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OCEAN BOUNDARIES IN THE SOUTH PACIFIC*

by Sherry Broder** and Jon Van Dyke,***
with the assistance of Faye Kimura† and Naomi Hirayasu††

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I. INTRODUCTION

A. *National Jurisdiction Over Ocean Space*

The island communities of the South Pacific have an unique relationship to the sea because the land area of their islands is small compared to that of the surrounding ocean. They have developed economies and cultures highly dependent on the sea. Their ocean boundaries are essential to their self-definition and preservation.

This article will analyze maritime claims of South Pacific political communities that could produce conflicts. The claims are those of Tonga, Fiji, New Zealand (the Kermadec Islands), American Samoa, Western Samoa, New Caledonia and Vanuatu. Several special circumstances make the South Pacific an interesting focus for such an analysis. Tonga, Fiji and American Samoa claim reefs or islands that are far from their main island groups. Recognition of these geological formations as islands would permit these countries to claim adjacent 200-nautical-mile exclusive economic zones,[1] which would greatly expand their maritime jurisdiction. Another potential problem is Tonga's 1887 claim, which defined its boundaries in terms of geographic coordinates,[2] and which has been reasserted by Tonga in recent years.[3] It is difficult to predict how these claims will mesh with the concepts being developed at the Third United Nations Conference on the Law of the Sea (UNCLOS III).[4] These claims and the

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[1] The exclusive economic zone is a zone extending not more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Draft Convention on the Law of the Sea (Formal Text), U.N. Doc. A/ CONF.62/L.78 (1981), arts. 55, 57 [hereinafter cited as "Draft Convention"]. In the exclusive economic zone, a coastal state has sovereign rights over the natural resources, living or non-living, of the seabed, subsoil and superjacent waters. *Id.* art. 56.

A coastal state is also entitled to a territorial sea, which extends the sovereignty of the state beyond its land territory over an adjacent belt of sea of not more than twelve miles. This sovereignty extends to the air space as well as to the seabed and subsoil. *Id.* arts. 2-3. Although a nation does not possess as great a bundle of rights in its exclusive economic zone as in its territorial sea, the rights of a nation to control its natural resources in its exclusive economic zone are still extensive.

[2] *See* note 26 *infra* and accompanying text.

[3] *See* note 28 *infra* and accompanying text. *See also* text accompanying note 54 *infra*.

[4] The Third United Nations Conference on the Law of the Sea has been in progress since 1974. Virtually all nations of the world have been participating in the negotiations. The Conference completed its work in the spring of 1982, and has scheduled a signing in Caracas, Venezuela, for December, 1982. For descriptions of the progress of the negotiations, *see* Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 AM. J. INT'L L. 1 (1980); Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)*, 73 AM. J. INT'L L. 1 (1979); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57 (1978); Oxman, *The Third United Nations Conference on the Law of the Sea; The 1976 New York Sessions*, 71 AM. J. INT'L L. 247 (1977); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AM. J. INT'L L. 763 (1975); Oxman, *The Third United Nations Conference on the Law of the Sea:*

close geographic configuration of the nations making the claims create potentially overlapping maritime boundaries which may create conflicting areas of jurisdiction.

In other parts of the world, ocean boundary disputes have been major topics of international controversy. The International Court of Justice has considered a maritime boundary problem in the North Sea,[5] arbitration tribunals have been established in several locations,[6] treaties have been negotiated to resolve many disputes[7] and the delegates to the United Nations Law of the Sea conferences have labored long and hard to articulate the standards that should govern these disputes.

The standard adopted in 1958 in the Convention on the Continental Shelf[8] and the Convention on the Territorial Sea and Contiguous Zone[9] emphasized the equidistance principle, which requires the splitting of a disputed area between the countries involved.[10] This reference to the

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The 1974 Caracas Session, 69 AM. J. INT'L L. 1 (1975); Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974).

[5] N. Sea Continental Shelf Cases, [1969] I.C.J. 4.

[6] Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf (1977-78), *reprinted in* 18 INT'L LEGAL MATERIALS 397 (1979) (American Society of International Law, D.C.) [hereinafter cited as "Anglo-French Arbitration, 18 I.L.M. 397"].

[7] *See, e.g.*, U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, OFFICE OF THE GEOGRAPHER, LIMITS IN THE SEAS NO. 87, TERRITORIAL SEA AND CONTINENTAL SHELF BOUNDARIES: AUSTRALIA AND PAPUA NEW GUINEA-INDONESIA (1979); U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, OFFICE OF THE GEOGRAPHER, LIMITS IN THE SEAS NO. 75, CONTINENTAL SHELF BOUNDARY AND JOINT DEVELOPMENT ZONE: JAPAN-REPUBLIC OF KOREA (1977) [hereinafter cited as "JAPAN-REPUBLIC OF KOREA JOINT DEVELOPMENT ZONE"].

[8] Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

[9] Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

[10] Article 6 (1)-(2) of the Convention on the Continental Shelf, *supra* note 8, reads as follows:

> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Article 12(1) of the Convention on the Territorial Sea and Contiguous Zone, *supra* note 9, reads as follows:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its

equidistance approach continued in the early versions of the current Draft Convention,[11] but in 1981 the text was amended to eliminate any mention of equidistance. The version adopted in the summer of 1981 reads as follows: "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."[12]

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territorial sea beyond the median line every point of which is equidistant from the nearest points on the baseline from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

Adjacent states are those states having a common land boundary. Opposite states do not share a land boundary, but lie across an area of water from each other.

Current analysis of delimitation rules can be traced to the reports prepared in 1951 and 1953 by the International Law Commission to the General Assembly. Report of the International Law Commission to the General Assembly, 6 U.N. GAOR Supp. (No. 9), U.N. Doc. A/1858 (1951), *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123 at 143, U.N. Doc. A.CN.4/Ser. A/1951/Add.1; Report of the International Law Commission to the General Assembly, 8 U.N. GAOR Supp. (No. 9), U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200 at 213, U.N. Doc. A/CN.4/Ser.A/1953/Add.1. These reports indicate that the Commission's proposals for continental shelf and territorial sea delimitation were negotiation and the principle of equidistance. The commentary noted that "departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels" are justifiable deviations from the general rule. The Commission emphasized that the situations suggested as special circumstances were illustrative, not exhaustive, and acknowledged that the rule was "elastic." The Commission stated: "This case may arise fairly often." Report of the International Law Commission to the General Assembly, 11 U.N. GAOR Supp. (No. 9), U.N. Doc. A/ 3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 300, U.N. Doc. A/CN.4/Ser. A/ 1956/V.2.

Tonga and Fiji both ratified the Convention on the Territorial Sea and Contiguous Zone as well as the Convention on the Continental Shelf. New Zealand ratified the Convention on the Continental Shelf, but did not ratify the Convention on the Territorial Sea and Contiguous Zone. U.S. DEP'T OF STATE, TREATIES IN FORCE 317-18 (1980).

[11] *See* Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/CONF. 62/W.P. 10/Rev. 3 (Aug. 27, 1980), art. 74(1):

> 1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement by conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.

Article 83 on the delimitation of the continental shelf boundaries had virtually identical language.

For an in-depth discussion of the debate in the lengthy negotiations to formulate a compromise treaty text on delimitation, see Adede, *Toward the Formulation of the Rule of Delimitation of Sea Boundaries Between States With Adjacent or Opposite Coasts*, 19 VA. J. INT'L L. 207 (1979); U.N. Press Release SEA/376 at 15-16 (Feb. 27, 1980); U.N. Press Release SEA/396 at 4, 30-32 (Apr. 4, 1980).

[12] Draft Convention, *supra* note 1, art. 74(1) (as amended). Paragraphs 2, 3 and 4 of article 74 highlight the significance of agreement in providing for arrangements prior to a

This new language was designed in part to refer to the decision in the *North Sea Continental Shelf Cases*,[13] where the International Court of Justice stated that "delimitation is to be effected by agreement in accordance with equitable principles."[14] In addition, the delegates to the 1981

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final agreed delimitation, in making provision for resolution of differences in reaching agreement and in stating that an agreement in force between nations shall determine any future questions of delimitation:

> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
>
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final determination.
>
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

Article 83 was also amended in 1981 to conform to the new language of article 74.

[13] [1969] I.C.J. 4.

[14] *Id.* at 54. Despite strong language in the 1958 Convention regarding the use of the equidistance method (*see* note 10 *supra*), the International Court of Justice in the *North Sea Cases* determined that equidistance is a cartographical method, not an obligatory legal basis for delimitation. *Id.* at 36, 46-47, 53-54.

In the context of the Germany-Netherlands-Denmark geography, the court ruled that equidistance would have produced a clearly inequitable result. *Id.* at 49, 53-54. Denmark, the Federal Republic of Germany and the Netherlands are adjacent to each other on the eastern and southeastern shores of the North Sea. The Danish coastline and the adjacent portion of the German coastline are due north-south. Near the mouth of the Elbe River and close to the two land boundaries, the German coastline changes to an east-west direction, in the same direction as the Dutch Friisian shoreline. Because of this radical change in the shoreline, application of equidistance in these circumstances would result in Germany receiving a disproportionately smaller area of the North Sea. Denmark and the Netherlands argued that the equidistance principle governed delimitation in the absence of special circumstances. *Id.* at 20-21. Germany argued that equidistance was not mandatory, and that each nation should be entitled to a "just and equitable share." *Id.* at 21-22.

The court concluded that the concept of a just and equitable share was not the basis for delimitation. Delimitation, not apportionment, noted the court, was in issue. Apportionment would involve the allocation of a previously unallocated area. Delimitation assumes preexisting rights to the areas of ocean to be delimited. Although the concept of a just and equitable share might be applicable when apportionment is in issue, that concept is not a guiding principle when delimitation is involved. *Id.* at 21-23.

The court determined that the first applicable rule was the obligation to negotiate. It found that this rule arose out of the Truman Proclamation and was simply a special application of a general principle underlying all international relations. *Id.* at 32-33, 47-48.

In rejecting equidistance and apportionment, the majority in the *North Sea Cases* relied heavily on the physical facts and geographic features ("natural prolongation") of the continental shelf existing in the area. *Id.* at 51, 54-55. Continental shelves do not exist in the South Pacific in the same sense that they are found in Europe and the North Atlantic, but the underlying rationale for the majority was, simply, equity. *Id.* at 48-49. The court suggested various factors to be considered to produce an equitable result: appurtenance of the continental shelf to the countries in front of whose coastlines it lies, the configuration of the coast, the natural resources of the area and a reasonable degree of proportionality between

session of UNCLOS III were aware of the many negotiated and arbitrated agreements that had reached unique solutions which departed from notions of equidistance.[15] Many other agreements have, of course, been based completely on equidistance,[16] because that is the most "equitable" approach in many situations. But no nation can now insist on equidistance as the only appropriate solution. Each boundary problem must be examined in light of its own factual situation to provide a balanced solution that considers the interests of all the competing parties.

This article will therefore examine potential boundary problems of the South Pacific to provide background analysis that should be relevant to the solution of these disputes. The actual solution can only be reached by the parties themselves through good-faith negotiation and agreement.

B. What Is at Stake?

It is important for the island communities of the South Pacific to establish their maritime claims and to be able to control the development of their marine environments for several reasons. First, recent advances in the technology for exploitation of natural resources has put technologically underdeveloped countries such as these at a disadvantage. Degradation or pollution from the new methods involved in exploiting mineral resources from the sea may endanger the environment or deplete marine resources and thus cut off the access the people traditionally have had to the ocean environment.

Second, some of the resources within the Pacific Ocean may become

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the extent of the shelf and the lengths of the coastlines of the respective nations. *Id.* at 51-52. The court suggested that areas of overlap can be divided between the parties in agreed proportions and in some cases a regime of joint jurisdiction or use may be warranted. *Id.* at 53-54.

The 1958 Conventions did not specifically include natural resources of the area as a factor or a special circumstance significant to resolution of delimitation by agreement. This factor shows the fluidity of the content of the equitable principles/special circumstances rule. The court's recognition of the natural resources factor could be significant in any South Pacific delimitation. More data on the resources of the region may be necessary to determine the most equitable result. In spite of the court's suggestion that delimitation could consider the location of resource fields, however, the boundaries in both cases are drawn so that known Danish and Dutch hydrocarbon fields were excluded from the German Continental Shelf. Hodgson, *The Delimitation of Maritime Boundaries between Opposite and Adjacent States Through the Economic Zone and the Continental Shelf* 16 (paper delivered at the Law of the Sea Institute Annual Meeting, Mexico City, Oct. 1979, to be published in STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION (T. Clingan ed. 1982)).

[15] *See* sections IV-B-1 to B-3 *infra*.

[16] *See, e.g.*, U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, OFFICE OF THE GEOGRAPHER, LIMITS IN THE SEAS NO. 72, CONTINENTAL SHELF BOUNDARY: CANADA-GREENLAND (1976) [hereinafter cited as "CANADA-GREENLAND CONTINENTAL SHELF BOUNDARY"], where almost all of the boundary was established by application of the equidistance method, the exact line being drawn with the aid of a computer.

foundations of economic expansion for these island communities. At present, fish is the most significant of these resources and all the communities are in the process of expanding their fishing industries, both for local consumption and for export.[17] In particular, skipjack and yellowfin tuna are in relative abundance in this region and can produce significant income if exploited properly.[18]

Although oil has not yet been discovered in the South Pacific, its potential as an economic resource should also counsel the importance of maritime space.[19] When Indonesia issued its declaration claiming archipelagic status in 1957,[20] it had no knowledge that its archipelagic waters contained rich deposits of oil. However, provisions for minerals and oils were wisely included in the declaration.[21]

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[17] For a general discussion of these efforts and a detailed analysis of the legal issues raised by tuna fishing in the Pacific, *see* Van Dyke & Heftel, *Tuna Management in the Pacific: The South Pacific Forum Fisheries Agency*, 3 U. HAWAII L. REV. 1 (1981). *See also* G. KENT, THE POLITICS OF PACIFIC ISLANDS FISHERIES (1980).

[18] Van Dyke & Heftel, *supra* note 17, at 6.

[19] Thus far, geological surveys by the Tonga Oil Consortium have failed to locate any mineral deposits in commercial quantities in the waters of the Kingdom. A consortium of companies, Shell, British Petroleum, Aquitane, Ampol and Republic, was formed in the middle of 1970. Under the Petroleum Agreement of June 4, 1970, a concession of 6,000 square miles was granted in southern Tongan territory. Comprehensive geological surveys were undertaken. Two wells were drilled to depths of approximately 5,500 feet, but no oil was discovered. Tonga is now trying to reappraise the petroleum potential within the Kingdom. An expert from the New Zealand Department of Scientific and Industrial Research, and an U.N. Development Program marine geologist have reported that good petroleum potential may exist in the south Tongan Ridge. Drilling tests are recommended at depths of 8,000 to 12,000 feet. The Tongan government is negotiating with applicants for a petroleum exploration agreement covering the southern portion of the previous concession area. KINGDOM OF TONGA, THIRD DEVELOPMENT PLAN 1975-1980 213 (1976) [hereinafter cited as "1975-1980 TONGA DEVELOPMENT PLAN"]. In the spring of 1982, a ship from United States Geological Survey returned to this area for further seismic testing. Interview with Gary Greene, Pacific-Arctic Marine Geology Branch, U.S. Geological Survey, in Honolulu (Mar. 21, 1982).

[20] *See generally* Draper, *The Indonesian Archipelagic State Doctrine and Law of the Sea: "Territorial Grab" or Justifiable Necessity?*, 11 INT'L LAW. 143 (1977).

[21] Indonesia was probably inspired to do so by the Truman Proclamation. Pres. Proc. No. 2667, 3 C.F.R. 67 (1943-1948 Compilation). Even in the North Sea seabed, as late as 1957, most professionals viewed the possibility of exploitable gas and oil deposits as poor. Swan, *Gulf of Maine Dispute: Canada and the United States Delimit the Atlantic Continental Shelf*, 10 NAT. RESOURCES LAW. 405, 421 (1977). Once initial signs were detected, controversy over maritime delimitation of the North Sea continental shelf began between Denmark, Netherlands and the Federal Republic of Germany. Eventually, the differences were submitted to the International Court of Justice. N. Sea Continental Shelf Cases, *supra* note 14.

The United States and Canada faced a similar problem in the late 1960's concerning the delimitation of Georges Bank in the Gulf of Maine. In 1973, the issue was described as "one of the thorniest boundary questions at the moment because of the high oil and gas potential." Beauchamp, Crommelin & Thompson, *Jurisdictional Problems in Canada's Offshore*, 11 ALBERTA L. REV. 431, 443 (1973). This Atlantic delimitation controversy will be submitted to a panel of the International Court of Justice as well. Treaty Between the United States and Canada to Submit to Binding Dispute Settlement the Delimitation of the Mari-

Another resource that may be of value in the South Pacific are the polymetallic nodules that form naturally on the ocean floor.[22] Their prevalence and quality in this region have not yet been determined. Although general surveys have not discovered any rich, commercially viable nodules in the southwestern Pacific Ocean, detailed surveys of the area have yet to be undertaken.

It is impossible to put a monetary value on the wealth within the waters of the South Pacific. Only time will tell what types and quantities of resources will be found. Control over these resources has, however, a psychological dimension in addition to any economic payoff. The Fijian delegate to the 1974 Caracas session of the Law of the Sea negotiations described the relationship of his people to the sea in these terms:

> The sea and the land of Fiji were interdependent. The sea was regarded as an essential link between the islands of the archipelago; it was not only a roadway but a source of sustenance for many Fijians. Archipelagic peoples were farmers of the seas and the sea-bed; the control of the sea was as important to them as control of the land was to continental States.[23]

These "farmers of the seas and the sea-bed" must soon see if they can reach agreement on how the boundaries of the seas should be drawn so that their resources can be divided in the most equitable fashion.

II. TONGA

A. *The Friendly Isles*

The independent Kingdom of Tonga, known to visitors as "the Friendly Isles," has a population of slightly more than 90,000 persons and encompasses 169 islands (of which about forty are inhabited) with a total land area of around 750 square kilometers.[24] This is less than the land area of the island of Oahu.[25]

In 1887, Tonga issued a territorial claim to all the islands, rocks, reefs, foreshores and waters lying between 15° and 23°30' south latitude, and between 177° and 173° west longitude.[26] This claim encompasses 259,000

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time Boundary in the Gulf of Maine Area, Mar. 29, 1979, MARITIME BOUNDARY SETTLEMENT TREATY WITH CANADA, S. EXEC. DOCS. U & V, 97th Cong., 1st Sess. [hereinafter cited as "U.S.-Canada Gulf of Maine Treaty"]. The treaty was ratified by the Senate on April 29, 1981. 127 CONG. REC. S4060 (daily ed. Apr. 29, 1981).

[22] *See generally* Van Dyke & Yuen, *"Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?*, 19 SAN DIEGO L. REV. 493 (1982).

[23] 1 UNCLOS III OR at 113, U.N. Sales No. E.75 V.3 (1974).

[24] PAC. ISLANDS Y.B. 407, 411 (J. Carter ed. 1981).

[25] Oahu contains 607 square miles (1572 square kilometers) of land. ATLAS OF HAWAII 200 (W. Armstrong ed. 1973).

[26] Royal Proclamation of August 24, 1887:

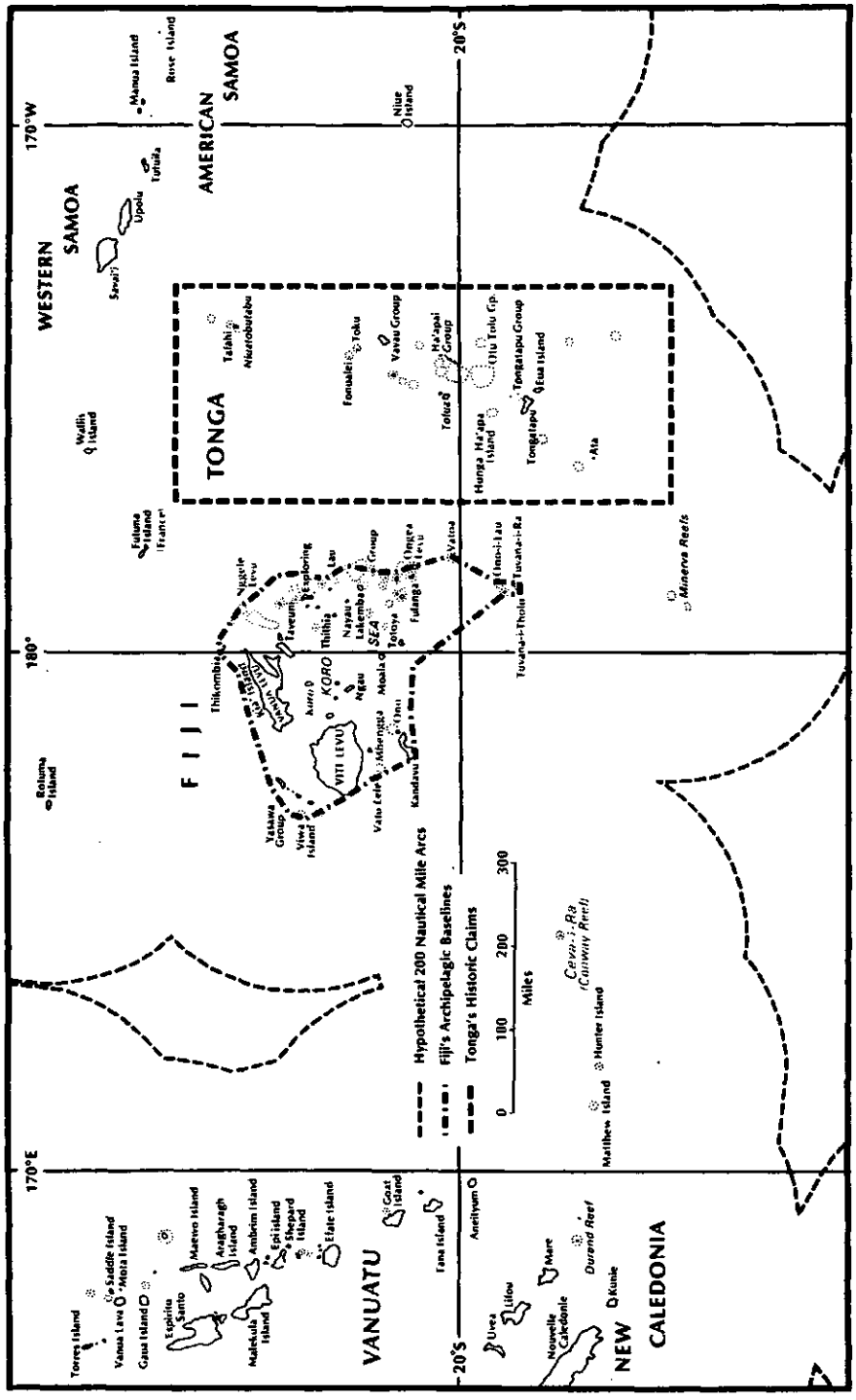

FIGURE 1: THE SOUTH PACIFIC

Rectangle around Tongan Islands illustrates 1887 historic title claim. Lines around Fijian Islands illustrate archipelagic claim around which a 200-mile exclusive economic zone has been claimed. New Zealand's Kermadec Islands are directly below the Minerva Reefs.

square kilometers of ocean[27] (see Figure 1). In 1968, when oil exploration commenced in the area, the Tongan legislature reaffirmed this territorial claim by enacting a definition of "land" that included the seabed within its historic claim: "Land includes all submerged lands lying within the extent and boundaries of the Kingdom as defined by the Royal Proclamation of 11 June 1887."[28] This claim was communicated by letter to the Secretary-General of the United Nations.[29] No government has yet challenged the Tongan claim.[30]

In 1972, Tonga proclaimed jurisdiction over the Minerva Reefs[31] (see Figures 1 and 4), formations of volcanic origin that emerge at low tide but are below water at high tide. These reefs[32] lie 170 miles southwest of the nearest Tongan island of Ata and are outside the boundaries of the 1887 claim.[33] Tonga also claimed a twelve-mile territorial sea around the

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Whereas it seems expedient to us that we should limit and define the extent and boundaries of Our Kingdom, we do hereby erect as Our Kingdom of Tonga all islands, rocks, reefs, foreshores and waters lying between the fifteenth and twenty-third and a half degree of south latitude and between the one hundred and seventy-third and the one hundred and seventy-seventh degree of west longitude from the Meridian of Greenwich.

2 TONGA GOVERNMENT GAZETTE No. 55 (1887).

[27] PAC. ISLANDS Y.B., *supra* note 24, at 411.

[28] Minerals Act of 1968, Act No. 11 of 1968 (Tonga). Tonga has reaffirmed its sovereignty over this area in the Petroleum Mining Act of 1969 (text transmitted to the Secretary-General of the United Nations by the Acting Prime Minister for Foreign Affairs of Tonga, in a letter dated June 25, 1974, *reprinted in* 29 U.N. GAOR, U.N. Doc. ST/LEG/SER. B/18 at 32-33; the Continental Shelf Act of 1970 (text transmitted to the Secretary-General of the United Nations in a letter dated June 25, 1974, *reprinted in* 29 U.N. GAOR, U.N. Doc. ST/LEG/SER. B/18/Add. 2 at 122-27; and the Fisheries Protection Act of 1973 (text transmitted to the Secretary-General of the United Nations in a letter dated June 25, 1974, *reprinted in* 29 U.N. GAOR, U.N. Doc. ST/LEG/SER. B/18/Add. 2 at 352-55). *See also* O'Connell, *Mid-Ocean Archipelagos in International Law*, BRIT. Y.B. INT'L L. 1, 47 (1971).

[29] Letter from Acting Prime Minister of Foreign Affairs of Tonga to Secretary-General of the United Nations (June 25, 1974), *reprinted in* 29 U.N. GAOR, U.N. Doc. ST/LEG/SER. B/18.

[30] O'Connell, *supra* note 28, at 47. States have objected to other unilateral proclamations that include all islands of an archipelago and the sea between them as an integral unit. For instance, the 1957 "Proclamation on the Territorial Waters of the Republic of Indonesia" was greeted with considerable international opposition. Draper, *supra* note 20, at 146.

[31] Proclamation of June 15, 1972:

WHEREAS the Reefs known as North Minerva Reef and South Minerva Reef have long served as fishing grounds for the Tongan people and have long been regarded as belonging to the Kingdom of Tonga; AND WHEREAS the Kingdom of Tonga has now created on these Reefs islands known as Teleki Tokelau and Teleki Tonga; AND WHEREAS it is expedient that we should now confirm the rights of the Kingdom of Tonga to these islands; THEREFORE we do hereby AFFIRM and PROCLAIM that the islands of Teleki Tokelau and Teleki Tonga and all islands, rocks, reefs, foreshores and waters lying within a radius of twelve miles thereof are part of our Kingdom of Tonga.

TONGA GOVERNMENT GAZETTE EXTRAORDINARY No. 7 (1972).

[32] *See* text accompanying notes 116-17 *infra*.

[33] *See* note 26 *supra* and accompanying text.

Reefs.[34]

The following discussion will focus on potential boundary delimitation issues faced by Tonga in light of its historic title claim established by the Proclamation of 1887,[35] and the controversy surrounding the Minerva Reefs, which Tonga refers to as the islands of Teleki Tonga and Teleki Tokelau.[36]

B. Tonga's Historic Title Claim

1. Background

In the 19th century, Tonga began to experience pressures from powerful nations such as England and Germany who sought to control it through annexation or conquest.[37] To counter these pressures, King George Tupou I sought to adopt many internationally recognized attributes of a sovereign nation. These included the 1887 Royal Proclamation defining the Territory of Tonga.[38] The Proclamation explains its purpose as follows: "Whereas it seems expedient to us that we should limit and define the extent and boundaries of Our kingdom."[39] As noted earlier, this claim included "all islands, rocks, reefs, foreshores and waters" within the coordinates.[40]

It is understandable that Tonga would include such a vast area within its historic claim, for the Tongans have historically been described as "the widest ranging navigators in western Polynesia."[41] Although written records of the extent of past Tongan fishing operations are practically non-existent, substantial traditional archaeological and anthropological evidence exists of their ability as mariners and navigators to travel for commerce, conquest, birds and fish over sizable stretches of the Pacific.[42]

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[34] *See* section II-C *infra*.

[35] *See* section II-B *infra*.

[36] *See* section II-C *infra*.

[37] FRIENDLY ISLANDS, A HISTORY OF TONGA 162-63 (N. Rutherford ed. 1977).

[38] *See* note 26 *supra*.

[39] *Id.* During this period, King George Tupou I of Tonga took numerous other steps to define his kingdom as a nation in order to prevent falling under direct European rule. In 1875, a constitution was adopted. In 1882, an act was passed to regulate land, whereby all land belonged to the King and was inalienable. Tonga gained a code of laws, Privy Council, Cabinet, Legislature, Judiciary, flag and emblem during his reign. Tonga was successful in remaining independent for some time. Germany and England both signed treaties recognizing Tonga as a nation. But in 1900, Tonga was forced to become a protectorate of England, a status that lasted until 1970. N. Rutherford, Shirley Baker and the King of Tonga (1971) (unpublished Ph.D. thesis available in Australian National University Library); PAC. ISLANDS Y.B., *supra* note 24, at 419.

[40] *See* note 26 *supra* and accompanying text.

[41] P. BELLWOOD, MAN'S CONQUEST OF THE PACIFIC, THE PREHISTORY OF SOUTHEAST ASIA AND OCEANIA 312 (1979).

[42] *Id.*

The seat of Tongan power was on Tongatapu, but Tongan rule extended over a vast area.[43] Around 1200, the Tongans dominated some parts of Samoa in addition to the Tongan group of islands.[44] Traditions also suggest that in earlier times, the Tongans dominated Uvea (Wallis Island), Futuna (Hoorn Island) and Rotuma (now a part of Fiji).[45] Reports during the mid-18th century indicate that Tongans were still visiting Samoa and Fiji.[46] Based on this history, Tonga may be able to develop persuasive arguments for its 1887 jurisdictional claim.[47]

For an additional argument in support of its claim, Tonga could assert that the islands in the Kingdom have an intrinsic association with each other and, as such, have been and must continue to be regarded as a single political unit. In support of this position, Tonga can point out that it has been classified as an archipelago by at least one of its neighbors, although it has not formally made such a claim itself.[48]

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 301.

[47] Tongans still fish extensively in the waters surrounding their islands. These waters are rich in fish and other marine resources. Recently, Tonga has been working with the United Nations Development Program to determine more specifically the extent and abundance of fish and other marine resources available in its waters. 1975-1980 TONGA DEVELOPMENT PLAN, *supra* note 19, at 208. Fish have historically been the major protein and complements carbohydrates as the major food of the islanders.

Modernization has had an impact on Tonga's ocean resources. Growing migration to the main island of Tongatapu and overfishing by its residents have depleted the fish resources of the reefs and lagoons around this island. Fish are still abundant in the rest of the Tongan Kingdom, including the Minerva Reefs.

The Tongan government estimates that the market in Tongatapu could absorb an additional 100 to 1,000 tons of fish annually. *Id.* at 207. Development of Tonga's fishing industry could assist in satisfying the traditional Tongan demand for fish. A healthy fishing industry could also help diminish an increasing trade deficit.

The Tongan government, in recognition of these needs, has embarked on a program to increase the catch of fish. The private sector has been encouraged to modernize its equipment. In 1966, the government first ventured into long-line fishing. KINGDOM OF TONGA, DEVELOPMENT PLAN 1970-1975, at 9. More recently, the Ekiaki, a new long-line fishing vessel, has substantially increased the nation's catch. 1975-1980 TONGA DEVELOPMENT PLAN, *supra* note 19, at 207. These vessels provide recent evidence of Tonga's geographically-extended fishing operations. In the mid-1970's the Tongan government stated its intention to expand deep sea fishing operations by purchasing a second deep sea fishing vessel to increase the export of fish. *Id.* at 385.

The largest segment of the Tongan fishing industry remains the private sector. Tongan fishing methods are basic, geared to subsistence. A 1975 Tongan government survey revealed that of 715 privately owned vessels, 458 were canoes, 50 were sail powered, 193 were small skiffs powered by outboard motors and only 14 were larger private vessels powered by inboard motors. *Id.* at 206. These boats tend to confine their operations to the lagoons and reefs near their islands, but the Tongans also fish far from the lagoons and reefs of the major island groups in unsophisticated canoes and boats just as they did in prehistoric times.

[48] For example, S. Nandan, Fiji's delegate to the U.N. Seabed Committee argued that:

Tonga can also assert several equitable arguments in defense of its historic claim. These are quite similar to those raised by states claiming archipelagic status.[49] First, as an island state, Tongans have a greater degree of economic interdependency between their land and surrounding waters than exists with continental states. Second, the unhampered use of the interisland waters is essential to the nation's travel and communication needs. Finally, fishing within these waters is of enormous importance and the impact of pollution could be devastating.[50]

Recognizing the relevance these arguments have to his country's historic title claim, Tonga's delegate to UNCLOS III has publicly supported the concept of archipelagic states and archipelagic waters.[51] At the 1974 session, Ambassador Tupou stated that Tonga's 1887 Royal Proclamation[52] was based on the need to protect territorial integrity and the unity

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> Either an island group is such an entity or it is not, and no arbitrary distance test can affect that factual entity. For instance a test of ten or even twenty-four miles between islands such as has at times been mooted would exclude from the definition of an archipelago both the Fiji and *Tonga archipelagos*, both of which have been generally accepted as archipelagos and have been cited as such by eminent authorities. . . . Each is contained on its own submarine platform with the islands and islets comprising mere surface manifestations of a single submerged land mass. Each is a tightly knit political and economic entity and historically has been accepted as such for many years. . . .
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> . . . .
>
> It is the contention of my delegation that just as coastal archipelagos were freed by the judgment in the Anglo-Norwegian Fisheries Case of 1951 from such arbitrary tests, oceanic archipelagos should be treated in the same way, so that the tests to be applied to them are those of a real unity and not an arbitrary one. It is in our view the physical relationship that is important . . . and that . . . mere distance between the islands comprising the archipelago is irrelevant. . . .

PARLIAMENT OF FIJI, REPORT ON FOREIGN AFFAIRS FOR THE PERIOD 10TH OCTOBER, 1970—31ST DECEMBER, 1973 at 33, 34, PARLIAMENTARY PAPER No. 19 (1974) (emphasis added) [hereinafter cited as "FIJI PARLIAMENTARY REPORT ON FOREIGN AFFAIRS"].

[49] The development of the concept of "archipelagic waters" and "archipelagic states," *see* Draft Convention, *supra* note 1, arts. 46-54, was based on a recognition of the close relationship between land and sea in these island states and the geographical and ecological unity of the land and water areas. M. Kasumaatmadja, *The Legal Regime of Archipelagoes: Problems and Issues*, in THE LAW OF THE SEA, NEEDS AND INTERESTS OF DEVELOPING COUNTRIES 166 (Proceedings of the 7th Annual Meeting of the Law of the Sea Institute, Rhode Island, 1972, published in 1973); Andrew, *Archipelagos and the Law of the Sea*, MARINE POLICY 46 (Jan. 1978); Anand, *Mid-Ocean Archipelagos in International Law: Theory and Practice*, 19 INDIAN J. INT'L L. 228 (1979); *see generally* O'Connell, *supra* note 28.

[50] Article 46(b) of the Draft Convention, *supra* note 1, looks not only to the political association of a group of islands claiming archipelagic status but also to their economic association and geographic configuration. *See also* Comment, *The Third United Nations Conference on the Law of the Sea and an Archipelagic Regime*, 13 SAN DIEGO L. REV. 742 (1976). The Philippines has advanced similar equitable arguments to support its historic claims. Anand, *supra* note 49, at 235.

[51] 2 UNCLOS III OR at 107, U.N. Sales No. E. 75 V. 4 (1974).

[52] *See* note 26 *supra*.

of its islands,[53] which is of course the same reason for the modern development of the archipelagic concept. He also reported that Tonga "was willing to review its claim [of 1887] so that the Conference might bring into being a convention accommodating not only the legitimate interests of Tonga but also the interests of the world community."[54] Tonga's claim to the status of an "archipelagic state" is discussed below,[55] but before examining this subject, we will examine the validity of the historic claim itself.

2. *The Juridical Regime of Historic Waters*

The concept of historic waters has on numerous occasions been considered an indispensable principle in the delimitation of maritime areas. For example, the International Court of Justice ruled in 1951 that Norway had historic title to the waters in its sharply indented north coast because of the geographic configuration of that coast, the long use by Norwegians of these waters, their economic dependence on its resources and the acquiescence of foreign states in this exclusive use.[56] In addition, the 1958 Convention on the Territorial Sea and Contiguous Zone explicitly allows for variance in delimiting the territorial sea between two opposite or adjacent states where necessary to accommodate historic title claims.[57] The Draft Convention also adopts this historic title exception.[58] However, neither the Geneva Convention nor the Draft Convention defines the criteria for determining the validity of a claim to historic title.

This question has been addressed by the United Nation's Office of Legal Affairs. In 1962, upon the request of the International Law Commission,[59] the Office prepared a study entitled *Juridical Regime of Historic*

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[53] 2 UNCLOS III OR at 107, U.N. Sales No. E. 75 V. 4 (1974).

[54] *Id.*

[55] *See* section II-B-4 *infra.*

[56] The Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116. *See also* the discussion of Hawaii's historic claim to the waters around its northwest islands in Comment, *State-Federal Jurisdictional Conflict Over the International Waters and Submerged Lands of the Northwestern Hawaiian Islands*, 4 U. HAWAII L. REV. 139, 168 n.132 (1982).

[57] Convention on the Territorial Sea and Contiguous Zone, *supra* note 9, art. 12(1) (quoted in note 10 *supra*).

[58] Draft Convention, *supra* note 1, art. 15 (emphasis added):

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of *historic title* or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

[59] The International Law Commission is:

> an arm of the General Assembly charged, per Article 13 of the U.N. Charter, to 'initiate studies and make recommendations for the purpose of encouraging the progres-

Waters, Including Historic Bays.[60] According to the authors, this study was undertaken because codification of the international law governing delimitation of territorial waters and bays in the 1958 Convention on the Territorial Sea and Contiguous Zone[61] could remove considerable maritime areas over which states had historically exercised jurisdiction. In order to deal with this problem and to induce as many states as possible to accept codification, a clause to exclude historic waters from its regulations was included in the Convention,[62] and this 1962 study was prepared to convince nations with claims to historic waters to accede to the Convention.[63]

Applying the analysis of this study to Tonga's situation, the rectangular shape of Tonga's claim would not of itself bar its claim to historic waters.[64] Although the term "historic waters" has often been thought to refer only to bays, the study states unequivocally that "all those authorities who have directed their attention to the problem seem to agree that historic title can apply also to waters other than bays, i.e., to straits, *archipelagoes*[65] and generally to all those waters which can be included in the maritime domain of a State."[66] After examining the customary law on historic waters, the study contends that the regime of historic waters is *not* an exception to the general rules of international law regarding delimitation of maritime space.[67] In other words, the regime of historic title is to be considered on its own merits and general delimitation rules do not

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sive development of international law and its codification.' The Commission holds one session per year, lasting from eight to eleven weeks, in Geneva, Switzerland. Its twenty-five members do not serve as representatives of their governments but, rather, in their individual capacities as 'recognized' experts on international law. Since it began its work in 1948, the Commission has explored a wide variety of topics deemed suitable for codification, including, *inter alia*, the law of consular intercourse and immunities, of nationality, of the sea, of State responsibility, and of treaties.

B. WESTON, R. FALK & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 103 (1980). For additional discussion of the work of the International Law Commission *see* text accompanying notes 144-55, 169-73 *infra*.

[60] 14 U.N. GAOR, U.N. Doc. A/CN.4/143 (1962) at 19 [hereinafter cited as *"Historic Waters Study"*].

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

[62] *See* Convention on the Territorial Sea and Contiguous Zone, *supra* note 9, art. 12(1) (quoted in note 10 *supra*).

[63] The *Historic Waters Study*, *supra* note 60, at 19, quotes from Gidel on this point: "The theory of 'historic water,' whatever name it is given, is a necessary theory; in the delimitation of maritime areas, it acts as a sort of safety valve; its rejection would mean the end of all possibility of devising general rules concerning this branch of public international law . . . ." 3 G. GIDEL, DROIT INTERNATIONAL PUBLIC DE LA MER 651 (1934).

[64] The study does not comment specifically on Tonga's claims or on other rectangular claims.

[65] Although Tonga has not yet claimed archipelagic status, at least one of its neighbors has. *See* note 48 *supra* and accompanying text. For a discussion of whether archipelagic principles may be applicable to Tonga, see section II-B-4 *infra*.

[66] *Historic Waters Study*, *supra* note 60, at 17 (emphasis added).

[67] *Id.* at 21-31.

necessarily have a superior validity in relation to a historic title claim.[68] This study concludes that the following three factors should be considered in determining whether a nation has acquired historic title to a maritime area: "(1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States."[69] These three factors will therefore be analyzed and applied to Tonga's historic title claim.

a. Exercise of Authority Over the Area Claimed

According to the study, because a claim over historic waters denotes a claim to a maritime area as part of the domain of the nation, a state must exercise sovereignty over the waters.[70] Not all the rights and duties of sovereignty are required to have been exercised.[71] Rather, the state must have carried on activities which would normally be performed by the sovereign of the area.[72] For instance, the state may have excluded foreign fishing vessels or regulated their activities, measured the seas, placed beacons or otherwise assisted navigation or maintained ownership through legislation.[73]

Although a state need not necessarily have taken concrete action, sovereignty must have been effectively expressed.[74] Where action is required to enforce the nation's authority, however, such action must be taken.[75] The simple assertion of a "right for its citizens to fish in the area" would not be sufficient to establish a historic claim.[76] The assertion must be for "an exclusive right" and the state asserting this right must have "kept

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[68] *Id.* For further discussion *see id.* at 37. The study points out that:

> [C]laims to maritime areas have been made by States on grounds which have varied greatly both within the same period of time and from one time to another. International doctrine and practice therefore present a rather confusing picture in this respect. It is to be expected that the Geneva Conventions will, when coming into force, bring more stability to this field, but as far as the customary law is concerned the situation is far from clear.

Id. at 29. Obviously, the study did not expect the Convention on the Territorial Sea and Contiguous Zone to preempt the field of customary law and, in particular, the regime of historic waters. Rather, article 12 was intended to maintain historic titles *status quo ante* the entry into force of the Convention. For further discussion see *id.* at 35.

[69] *Id.* at 37.

[70] *Id.* at 39.

[71] *Id.* at 40.

[72] *Id.*

[73] *Id.* at 38-44.

[74] *Id.* at 43.

[75] *Id.* at 38-44. On this point, Bourquin expressed the general opinion that, "Sovereignty must be effectively exercised; the intent of the State must be expressed by deeds and not merely by proclamations." *Id.* at 43, quoting Bourquin, *Les Baies Historiques*, in MELANGES GEORGES SAUSER-HALL 43 (1952).

[76] *Historic Waters Study, supra* note 60, at 39.

foreign fishermen away from the area or taken action against them."[77]

Historical accounts of Tongan action to enforce sovereignty over this area do not appear to exist. No doubt, Tonga's location has served as a natural protection against hostile incursions into its ocean boundaries by other nations, thereby eliminating the need for confrontations. In more recent times, Tonga probably has not attempted to confront the naval and fishing nations of the world who have sent ships into its historic waters. The fact that Tonga is a relatively small and poor country should be given due consideration in this regard. Permitting the extinction of Tonga's claim just because it did not directly confront these incursions would promote an intolerable policy, for mighty nations could then arbitrarily change ocean boundaries of South Pacific island communities simply by sailing into their waters.[78]

b. Continuity of the Exercise of Authority

The 1962 U.N. study reports that the dominant view of jurists and decision makers is that "usage" is required to establish a valid claim to historic waters.[79] "Usage" may mean a general pattern of behavior or a repetition by the same persons of the same or similar activity.[80] Although the former may provide the basis for a general rule of customary law, only usage in the latter sense can give rise to historic title.[81] A nation consequently must exhibit repeated or continued usage over a period of time determined to be sufficiently lengthy from an evaluation of all relevant circumstances.[82]

Tonga's navigation tradition provides relevant evidence to establish actual usage of the waters.[83] It can be argued that prior to the period of European discovery, Tonga was unaware of customary international law and the need to formalize its claim. Thus, Tonga's 1887 Proclamation[84] and its continued assertion of jurisdiction through various proclamations[85] of its legislature could be argued to be sufficient evidence of con-

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[77] *Id.* at 40.

[78] The fact that a nation has not met opposition to its authority does not invalidate a claim. If the nation's authority has been continuously exercised and respected, that may suffice. After the 1887 Proclamation, Tonga signed a treaty with the United States (1888) which recognized Tonga's independence and did not dispute its claim. N. Rutherford, *supra* note 39, at 411. Tonga has, at various times, asserted and affirmed its sovereignty over the area described in the Royal Proclamation of 1887. *See* note 28 *supra*. Apparently, no nation has yet disputed this claim. *See* note 30 *supra*.

[79] *Historic Waters Study*, *supra* note 60, at 44.

[80] *Id.* at 45.

[81] *Id.*

[82] *Id.*

[83] *See* notes 41-50 *supra* and accompanying text.

[84] *See* note 26 *supra*.

[85] *See* note 28 *supra*.

tinued usage.

c. *Attitude of Foreign Nations*

The third factor necessary to establish a claim to historic waters is toleration by other nations to a state's exercise of sovereignty.[86] Inaction, particularly by neighbors, is sufficient;[87] formal consent is not required.[88] Tonga's neighbors are well aware of Tonga's historic title claim. In 1977, Joji Kotobalavu, then the Foreign Minister of Fiji, noted the existence of the "historical claim of Tonga, which we shall have to take into account in negotiations."[89] Fiji's position appears to constitute evidence of validation and, in conjunction with the longstanding absence of challenge to Tonga's boundaries, may be a persuasive indication of tolerance. Fiji's tolerance is especially significant for Tonga, because Fiji and Tonga are neighbors who most certainly will be involved in delimitation negotiations, and Fiji is one of the potential users of the seas claimed by Tonga. In addition, the fact that no other nation has yet disputed Tonga's claim further strengthens Tonga's position.[90]

d. *Other Considerations*

The U.N. study also states that "geographical configuration, requirements of self-defence or other vital interests of the coastal State" can serve to strengthen a claim to historic waters.[91] Perhaps Tonga could emphasize its economic dependence on these waters to provide additional persuasive evidence for its claim.[92]

A final issue raised by this study is whether the historic waters "are internal waters of the coastal State or are to be considered a part of its territorial sea."[93] The answer given is that it depends on how the state itself has treated the waters:

> If the claimant State has exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was

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[86] *Historic Waters Study, supra* note 60, at 46-56. The study concludes that the attitude of neighboring states should be given most weight, particularly those that are directly affected because of geographical proximity or commercial or other interest in the subject matter. *Id.* at 51-55.

[87] *Id.*

[88] *Id.* at 47.

[89] Kotobalavu, *The South Pacific and the Law of the Sea*, in REGIONALIZATION OF THE LAW OF THE SEA 317 (D. Johnston ed. 1977).

[90] *See* note 30 *supra.*

[91] *Historic Waters Study, supra* note 60, at 56.

[92] *See* note 47 *supra.*

[93] *Historic Waters Study, supra* note 60, at 65.

> sovereignty as over the territorial sea, the area would be territorial sea. For instance, if the claimant State allowed the innocent passage through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial seas.[94]

Because Tonga has permitted innocent passage by foreign ships through waters within its historic claim, the claim could probably not be considered one for internal water status. However, as shown above, Tonga's historic title claim arguably does meet the three criteria laid down by the 1962 U.N. study. Tonga can argue therefore that it has some level of sovereignty over the resources of those waters.

3. *Other Unique Ocean Boundary Situations: Historic Claims by the Philippines and the Republic of Maldives*

Tonga can cite the historic claims of other island nations for additional support. The archipelagic baseline delimitation established by the Philipines in the 1960's[95] is similar to Tonga's claim in that it also essentially followed a line identified by coordinates located along meridians and parallels. The enclosed archipelagic waters were defined as lying within straight baselines connected by the outermost islands of the archipelago. However, the limits of the overall territorial seas, which are claimed to have been established by three treaties,[96] extends from the nearest land by as much as 285 nautical miles in some spots while hugging the coastline in others[97] (see Figure 2).

In addition, the Republic of Maldives in the Indian Ocean has declared a rectangular exclusive economic zone.[98] The claimed area varies in

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[94] *Id.* at 66.

[95] Republic Act No. 3046, June 17, 1961, *as amended by* Republic Act No. 5446, Sept. 18, 1968.

[96] J. PRESCOTT, MARITIME JURISDICTION IN SOUTHEAST ASIA: A COMMENTARY AND MAP 14 (East-West Center Environmental and Policy Institute Research Report No. 2, 1981) (referring to treaties in 1898 and 1900 between the United States and Spain and the 1930 treaty between the United States and the United Kingdom), *citing* G. Martens, *Nouveau Recueil general de traites et autres actes relatifs aux rapports de droit international*, continuation de grant recueil de F. Fr. de Martens par Felix Stoerk, 2 series, vol. 32, Librarie Deiterich, Leipzig, 1905, at 74 (Dec. 10, 1898), 82 (Jan. 2, 1900); 137 L.N.T.S. 298.

[97] J. PRESCOTT, *supra* note 96, at 15. Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321, 349 (1979).

[98] Krueger & Nordquist, *supra* note 97, at 351-52. There appears to be no historical or legal precedent for the Maldivian limits which were first declared in the Maldives' 1964 Constitution. The Republic was defined as "the islands and the sea and air surrounding and in between latitudes 7-10 ¼' (North) and 0-45 ½' (South) and longitudes (East 72-29 ¼' and 73-49')." Constitution of the Republic of Maldives, art. 1, *reprinted in* U.N. Doc. ST/LEG/SER. B/16, at 16 (1974). The limits were affirmed on February 24, 1969, when the Republic created an exclusive fishing zone that paralleled the rectangle at a distance of

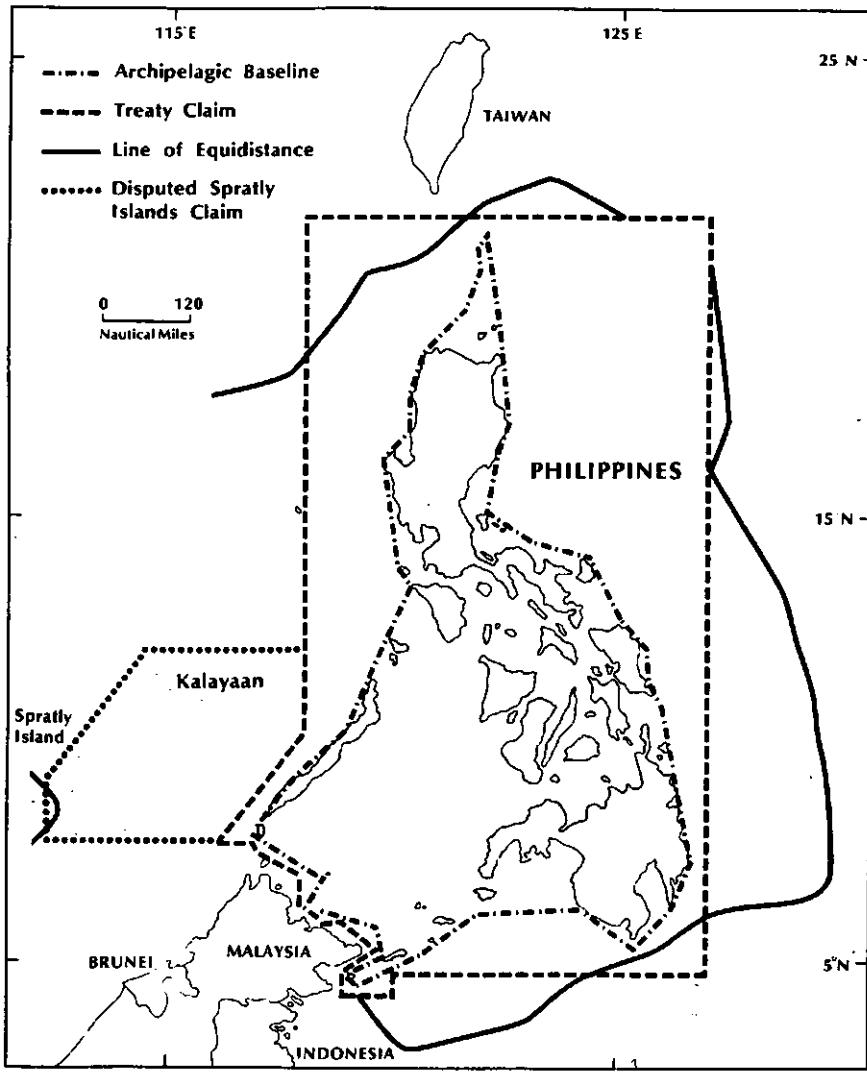

FIGURE 2: THE PHILIPPINES

Rectangular lines around main Philippines Islands illustrates its historic "treaty claim," which in certain areas is broader than the 200-mile equidistance claim (solid line).

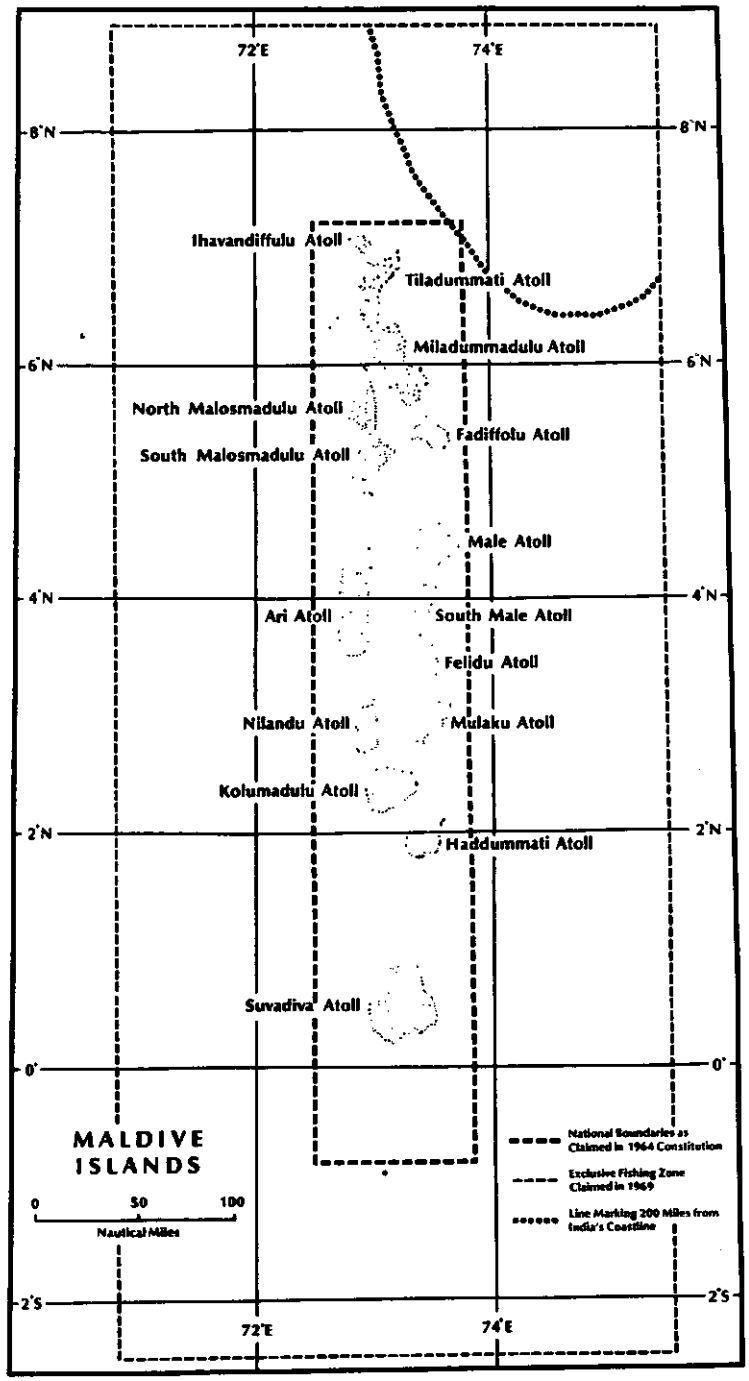

FIGURE 3: MALDIVE ISLANDS

India also has some islands north of these Islands that may affect the boundary delimitation between the two nations.

breadth from thirty-five to over 300 nautical miles.[99] This claim is interesting in that the freedoms permitted foreign nations in the newly declared zone suggest an attempt by that nation to enlarge the area of its territorial sea, rather than the establishment of a new economic zone. This result appears to have been intended because only innocent passage through the exclusive economic zone is permitted without the prior consent of the Maldivian government;[100] all other uses of the waters are subject to prosecution and conviction under Maldivian laws[101] (see Figure 3). By contrast, article 58 of the Draft Convention protects the freedoms of navigation, overflight and the right of all nations to lay submarine cables and pipelines in the exclusive economic zones of other nations.[102]

4. *Applying the Archipelagic Principles of UNCLOS III to Tonga*

It is also possible to analyze Tonga's historic claim in terms of the concept of the archipelagic state, which is gaining acceptance throughout the world. Despite Tonga's support for the development of the archipelagic concept at UNCLOS III, the specific principles that have emerged do not appear at first glance to apply very well to the geographic configuration of Tonga's islands. Article 47 of the Draft Convention defines the archipelagic baselines that an archipelagic state is permitted to draw in precise terms:

> 1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
> 2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.[103]

Because Tonga's islands are small and scattered, even straight archipelagic baselines enclosing only the major islands of Tonga would exceed the maximum proposed water-to-land ratio of 9:1. Baselines enclosing the islands south of Fonualei produce a water-to-land ratio of 45:1, and if all

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approximately 100 miles. Law No. 5/69 Javiyani of 1969. On May 29, 1972, the Maldives transmitted a note to the U.N. Secretariat, restating the fishing zone limits and redefining the Republic's coordinates, but retaining the rectangular shape of its territory.

[99] Krueger & Nordquist, *supra* note 97, at 352.

[100] *Id.*

[101] *Id.*

[102] Draft Convention, *supra* note 1, art. 58.

[103] *Id.* art. 47(1)-(2).

the islands are enclosed, the ratio increases to 65:1[104] (see Figures 1 and 4).

In order to come within the requisite 9:1 water-to-land ratio, Tonga could draw baselines connecting the islands in some of its island clusters—although not all its islands—and thereby qualify as an archipelagic state made up of several archipelagoes.[105] It could then claim territorial seas around its remaining islands. Fiji, which declared itself to be an archipelagic regime as of 1978, employs this method for its islands that do not fit within the 9:1 ratio.[106] In the alternative, Tonga could of course choose to claim territorial seas around each of its islands.[107]

Tonga would have about the same area of exclusive economic zone whether it chooses to claim archipelagic baselines around its several island clusters with exclusive economic zones drawn from these baselines or draw a territorial sea and an exclusive economic zone around each Tongan island. The results are similar because all the islands claimed by Tonga are within 400 miles of another Tongan island.

The only practical difference between these two types of claims involves the status of the waters within the archipelagic baselines. According to the Draft Convention, an archipelagic state can exercise "sovereignty" over its archipelagic waters.[108] These waters are therefore akin to waters in the territorial sea, and the archipelagic state has greater control over them than over waters in the exclusive economic zone.[109] Although it is possible for Tonga to assert some sort of archipelagic status under the principles established by UNCLOS III,[110] as of this writing, Tonga has not made any specific claim in these terms and instead appears to be

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[104] J. Prescott, Existing and Potential Maritime Claims in the Southwest Pacific Ocean 19 (unpublished paper delivered to Environment and Policy Institute, East-West Center, 1980). Fiji has been generally supportive of considering Tonga to be an archipelagic state although it appears that Tonga does not meet the current definition in the Draft Convention. In the earlier stages of negotiation, Fiji argued against the requirement of a water-to-land ratio for archipelagoes. *See* FIJI PARLIAMENTARY REPORT ON FOREIGN AFFAIRS, *supra* note 48, at 33.

[105] Article 46 of the Draft Convention, *supra* note 1, defines "archipelagic state" and "archipelago" as follows:

> (a) "Archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;
>
> (b) "Archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

[106] *See* figure 5 and section III-A *infra*. In 1977, Fiji established an archipelagic regime effective April 21, 1978, for the purpose of drawing its territorial sea and exclusive economic zone. *See* note 186 *infra* and accompanying text.

[107] Draft Convention, *supra* note 1, art. 121(2).

[108] *Id.* art. 49.

[109] *Id.* Compare arts. 2, 49-53 and 56-73.

[110] *See* text accompanying notes 105-07 *supra*.

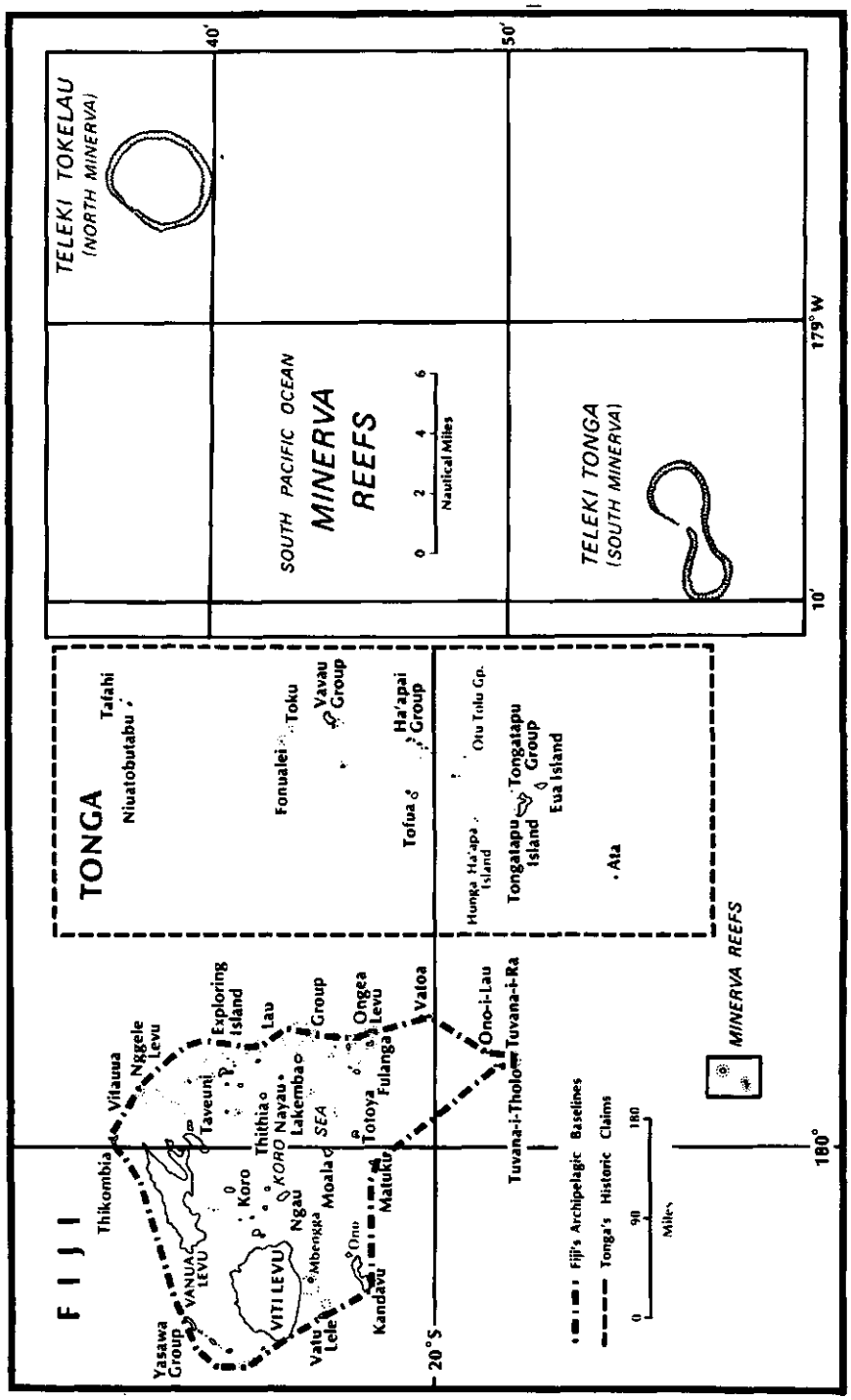

FIGURE 4: TONGA AND THE MINERVA REEFS

maintaining its historic title claim of 1887.[111]

It is difficult to translate this 19th century claim into the concepts that are emerging in the Draft Convention. As mentioned above,[112] the Tongan delegate to the 1974 Caracas session of UNCLOS III stated that Tonga was willing to "review" its claims to assist in the development of a global treaty. But what will the result of this review be?

If Tonga's historic claim is treated by other nations as an archipelagic claim, the resulting acquisition of control over ocean space might represent too great a loss of rights previously enjoyed by its neighbors and the international community. If the "foreshores and waters"[113] within the coordinates are viewed as a territorial sea or as archipelagic waters, Tonga could exert control to the exclusion of other states in the waters concerned, except for the right of innocent passage or archipelagic sea lanes passage.[114] Moreover, Tonga could then claim an expansive exclusive economic zone that would overlap with those zones and even the territorial seas of Fiji, Western Samoa and American Samoa.

A reasonable interpretation of the 1887 Proclamation might be to view the waters beyond the twelve-mile territorial seas surrounding each island as having the same status as that of waters within an exclusive economic zone. Or perhaps Tonga should claim an exclusive economic zone around all its islands, which would give them more maritime space than contained in their historic claim (see Figure 1). The historic claim would still be of importance in resolving the boundary delimitation problems that would arise because of overlapping exclusive economic zones with Tonga's neighbors.[115]

C. *Tonga's Claim to Teleki Tonga and Teleki Tokelau (the Minerva Reefs)*

1. *Background*

The Minerva Reefs are two formations of volcanic origin, eighteen miles apart and approximately 170 miles southwest of the nearest Tongan Island—Ata (see Figure 4). South Minerva, or Teleki Tonga, consists of two atolls, each forming a semi-circle approximately seven and a half miles in circumference. North Minerva, or Teleki Tokelau, is a single atoll

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[111] *See* note 26 *supra*.

[112] *See* text accompanying note 54 *supra*.

[113] *See* Proclamation, *supra* note 26.

[114] Draft Convention, *supra* note 1, arts. 52-53. Article 51 also requires archipelagic states to respect existing submarine cables and "traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States in certain areas falling within archipelagic waters," as "regulated by bilateral agreements." *See* text accompanying notes 93-94 *supra*.

[115] *See* section IV-A *infra*.

with a circumference of eleven miles.[116] Prior to 1972, South Minerva was covered by more than three feet of water at high tide and North Minerva was even more submerged. At low tide, however, portions of both were exposed.[117]

Previously, the Minerva Reefs had been primarily known as a navigational hazard. For centuries, vessels and sailors were shipwrecked there, never to be heard of again. In 1962, for example, Captain Tevita Fifita and his crew of seventeen sailors were marooned on the Reefs for 102 days.[118] In 1966, Captain Fifita returned to the Reefs, raised the Tongan flag, and proclaimed annexation of the Reefs to Tonga.[119]

In 1972, the Minerva Reefs were claimed by the Republic of Minerva, an organization operating through the corporate personality of the Ocean Life Research Foundation of Carson City, Nevada, whose members apparently adhere to a libertarian philosophy.[120] This group planned to create a new independent country, free of taxes and government control, and wanted to build a sea-city on the Reefs to house a population of up to 250,000.[121] On January 16, 1972, two members of the Ocean Life Research Foundation set sail with three crew members for the Minerva Reefs. They erected mounds of coral rock ten feet high on each reef and planted poles outfitted with reflectors and beacon lights. Laying claim to the Reefs in the name of the Republic of Minerva, they raised a flag they had designed[122] and then sent letters to more than 100 nations, including the United States, declaring and requesting recognition of Minervan sovereignty.[123]

The Minervan "President," Morris C. "Bud" Davis (who had never even seen the Minerva Reefs) explained that the Minervas were chosen by the Ocean Life Research Foundation after a search for "any place in the world that was unclaimed."[124] He argued that the Reefs were 100 miles from Tonga's boundaries as declared in the Tongan Royal Procla-

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[116] O. RUHEN, MINERVA REEF 2-6 (1963).

[117] *Id. passim*; N.Y. Times, Feb. 27, 1972, at 5, col. 1; Honolulu Advertiser, May 1, 1972, at D-2, col. 1; Sunday Star-Bulletin & Advertiser, Dec. 10, 1972, at G-5, col. 1.

[118] O. RUHEN, *supra* note 116, at 13-17. *See also* Comment, *To Be or Not to Be: The Republic of Minerva—Nation Founding by Individuals*, 12 COLUM. J. TRANSNAT'L L. 520, 545 (1973)[hereinafter cited as *"Minerva Comment"*].

[119] *Minerva Comment*, *supra* note 118, at 527, 545.

[120] The Ocean Life Research Foundation claimed a membership of 200,000 in the United States, Great Britain, Europe, Australia and New Zealand. Auburn & Chandler, *A New Island Country*, 25 SEA FRONTIERS 274 (Oct. 1979); *Minerva Play*, NEWSWEEK, Oct. 23, 1972, at 52; Honolulu Advertiser, July 28, 1972, at A-25, col. 2.

[121] Auburn & Chandler, *supra* note 120, at 281; 43 PAC. ISLANDS MONTHLY 93 (Mar. 1972); Sunday Star-Bulletin & Advertiser, *supra* note 117.

[122] *Minerva Comment*, *supra* note 118, at 521; Sunday Star-Bulletin & Advertiser, *supra* note 117.

[123] Sunday Star-Bulletin & Advertiser, *supra* note 117.

[124] Honolulu Star-Bulletin, Nov. 23, 1972, at F-6, col. 1.

mation of 1887 and succeeding declarations.[125]

Although the Republic never did materialize,[126] Tonga actively disputed the Foundation's claim to the Reefs and took several courses of action. In February 1972, Tongan officials built refuge stations on each of the reefs—boxes with beacons containing survival kits marked "Maintained by the Government of Tonga."[127] In May of the same year, a Tongan vessel towed a barge carrying several steel I-beams to support a permanent structure that Tonga intended to build on the Reefs.[128] King Taufa'ahau sailed on this voyage to observe the area,[129] and on June 15, 1972, issued a Royal Proclamation affirming Tonga's claim by declaring that the Reefs and the mounds created on them by the Foundation, which he called Teleki Tonga and Teleki Tokelau, plus all "islands, rocks, reefs, foreshores, and waters lying within a radius of twelve miles thereof are part of the Kingdom of Tonga."[130] The King asserted that the Reefs should have been part of Tongan territory years ago because they were part of the estate of an early Tongan chief whose other lands had all become a part of Tonga.[131]

That same month, the King arrived at the Reefs with a work force of ninety to 100 Tongans who added to the work of Ocean Life claimants, constructing two tiny islands on the Reefs with the steel I-beams transported earlier. These artificial islands are above water at high tide. The Tongans lowered the flag of the Ocean Life Research Foundation and proceeded to raise their own. Tonga's Prime Minister Mahe U. Topounia then read a Royal Proclamation declaring sovereignty over the Reefs.[132] Also in 1972, the Tongan government commenced operations with a patrol boat to insure that the Minervan waters would be protected from incursions by foreign fishing vessels.[133]

No nation ever recognized the Ocean Life Research Foundation's claim to the Minerva Reefs.[134] At a meeting of the South Pacific Forum in Can-

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[125] *Id.*; Sunday Star-Bulletin & Advertiser, *supra* note 117; *see* note 26 *supra*.

[126] Honolulu Star-Bulletin, *supra* note 124; *cf.* Auburn & Chandler, *supra* note 120, at 281.

[127] *Minerva Comment*, *supra* note 118, at 545; Honolulu Advertiser, *supra* note 117.

[128] *Minerva Comment*, *supra* note 118, at 528 n.31, 545-46.

[129] *Id.*

[130] *See* Proclamation, *supra* note 31; *Minerva Comment*, *supra* note 118, at 546.

[131] 44 PAC. ISLANDS MONTHLY 15 (Sept. 1973). S. Langi Kavaliku, Tongan Minister of Education, Works and Civil Aviation, has stated that the Tongan claim is based on oral traditions. Letter from S. Langi Kavaliku to Faye Kimura (Jan. 22, 1982).

[132] Auburn & Chandler, *supra* note 120, at 280; *Minerva Comment*, *supra* note 118, at 546; Sunday Star-Bulletin & Advertiser, *supra* note 117; Honolulu Star-Bulletin, *supra* note 124; Honolulu Advertiser, *supra* note 120.

[133] 44 PAC. ISLANDS MONTHLY 15 (Sept. 1973).

[134] The Sultanate of Ocussi Ambino on the island of Timor in the Malay archipelago invited the Foundation to enter into diplomatic relations in January 1972. Ocussi Ambino did not, however, have the status of a sovereign nation. Auburn & Chandler, *supra* note 120, at 281; *Minerva Comment*, *supra* note 118, at 526; Honolulu Advertiser, *supra* note 117.

berra in February 1972, Australia, New Zealand, Nauru, the Cook Islands, Western Samoa and Fiji all agreed to join Tonga in opposing the Foundation's claim. At its next meeting in September of the same year, the Forum recognized Tonga's historical association with the Minerva Reefs and agreed to exclude all other claims.[135]

The significance of Tonga's claim to the Reefs lies in the potential implications which would arise if a 200-mile exclusive economic zone were to be declared around each reef. Although a claim of this nature has not yet been made, such a declaration would result in an appropriation of a vast area of the high seas. Moreover, this claim would overlap with the exclusive economic zones of Fiji and New Zealand's Kermadec Islands and produce potential disputes with these countries of over 18,500 and 5,000 square nautical miles respectively.[136] It is true that Fiji and New Zealand have acquiesced to Tonga's claim to the Reefs and corresponding territorial seas during meetings of the South Pacific Forum and that, thus far, no other nation has opposed these claims. The question whether the Minerva Reefs and the islands built on them can or should generate territorial seas and exclusive economic zones is, however, one that needs to be examined in greater detail.

2. *Are Teleki Tonga and Teleki Tokelau "Islands" According to the Norms of International Law?*

According to the Draft Convention, artificial islands are not true islands and therefore cannot generate territorial seas or exclusive economic zones.[137] Tonga's position seems to be that Teleki Tonga and Teleki Tokelau are real islands, not artificial structures. For example, at the Second Session of UNCLOS III, on July 3, 1974, Prince Tupoutua of Tonga asserted that:

> [His] country did not question the rule that an artificial structure did not of itself generate a territorial sea, but that rule had by no means settled the question of islands. In fact, his Government had recently proclaimed its sovereignty over the islands of Teleki Tonga and Teleki Tokelau.[138]

This section will examine relevant authority to shed light on whether Teleki Tonga and Teleki Tokelau can be classified as true islands.

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[135] Auburn & Chandler, *supra* note 120, at 279-80; N.Y. Times, *supra* note 117; Honolulu Star-Bulletin, Feb. 2, 1972, at B-12, col. 1.

[136] J. Prescott, *supra* note 104, at 33. Fiji claimed an exclusive economic zone in An Act to Make Provision for the Demarcation of the Marine Spaces, Act No. 18 of 1977, Dec. 15, 1977 (Fiji) [hereinafter cited as "Fiji Marine Spaces Act of 1977"]. *See also* section III-A *infra*.

[137] *See* note 160 *infra*.

[138] 1 UNCLOS III OR at 109, U.N. Sales No. E 75 V. 3 (1974)(paraphrase).

a. The 1930 League of Nations Codification Conference at the Hague

The reports of the 1930 Codification Conference were considered at the time of their formulation to codify the customary international law concerning islands.[139] The Final Act of the Conference included a recommendation that an isolated island be allowed its own territorial waters only if it is above water at high tide.[140] The report defined an island as "an area of land, which is permanently above [the] high-water mark."[141] Significantly, however, the commentary explicitly refused to exclude artificial islands from the definition,[142] although low tide elevations of the sea bed were deemed not to be islands.[143]

b. The International Law Commission—1952, 1954, 1956

The 1930 definition of "island" was adopted by Professor J.P.A. Francois, the Special Rapporteur to the International Law Commission, in his first report on the regime of the territorial sea in 1952.[144] Two years later, at the 1954 meeting of the Commission, Francois explained his stance concerning artificial islands and their ability to generate territorial seas.[145] When a nation erects an artificial island beyond its territorial waters, he stated, other nations have the right to object and to refuse to recognize it and the territorial sea claimed to surround it.[146] Francois went on to state, however, that if no nation objected to the erection of an artificial island, it would be entitled to a territorial sea.[147]

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[139] Johnson, *Artificial Islands*, 4 INT'L L. Q. 203, 212-13 (1951); A. Soons, Artificial Islands and Installations in International Law 17 (Law of the Sea Institute Occasional Paper No. 22, 1974).

[140] Islands visible only at low tide could be used in determining the baseline for territorial waters only if they are within the territorial waters of the nation seeking to use them as baselines. League of Nations Conference for the Codification of International Law at 52-53, League of Nations Doc. C.74M.39.1929.V (1929).

[141] League of Nations Conference for the Codification of International Law at 219, League of Nations Doc. C.230.M.117.1930.V (1930).

[142] The comment to article 9 (Islands) states:

> The definition of the term "island" does not exclude artificial islands, provided these are true portions of the territory and not merely floating works, anchored buoys, etc. The case of an artificial island erected near to the line of demarcation between the territorial waters of two countries is reserved.
>
> An elevation of the sea bed, which is only exposed at low tide, is not deemed to be an island for the purpose of this Convention.

Id.

[143] *Id.*

[144] Francois, Report on the Regime of the Territorial Sea, 4 U.N. GAOR, U.N. Doc. A/CN.4/53 (1952).

[145] Summary of Records of the 260th Meeting, [1954] Y.B. INT'L L. COMM'N 91-94, U.N. Doc. A/CN.4/SER.A/1954 [hereinafter cited as "Summary Records"].

[146] *Id.*

[147] *Id.* at 91.

The British jurist Sir Hersh Lauterpacht, who later became a judge on the International Court of Justice, disagreed with Francois on this question. Lauterpacht proposed that the word "natural" be inserted before the words "area of land."[148] In this manner, he hoped to prevent an artificial island, a technical installation or a lighthouse from being the focus for extensions of maritime jurisdiction.[149] The Commission rejected this amendment by a five to four vote.[150] It declined, however, to decide whether artificial islands were in fact entitled to territorial seas.[151]

The Commission did note that elevations above water only at low tide are not "islands." Francois analogized lighthouses built on such low tide elevations to installations built upon the water to exploit resources of a continental shelf. He concluded that neither would qualify as islands[152] nor be entitled to territorial seas.[153] Francois also suggested, however, that an island formed artificially by the accumulation of sand or rubble would be entitled to a territorial sea. Significantly, the Commission did not explicitly rule out this possibility.

The Commission eventually adopted the following definition of an island. "Every island has its own territorial sea. An island is an area of land surrounded by water which is under normal circumstances permanently above highwater mark [sic]."[154] This language was also recommended by the International Law Commission in its 1956 proceedings.[155]

Under the standards with regard to islands laid down by the 1930 Conference and draft provisions prepared through 1956 by the International Law Commission, Tonga's claim to a territorial sea around Teleki Tonga and Teleki Tokelau would arguably be justifiable. If Francois' theory is applicable, the claim would especially be justified if the material elevating them above the high-tide line was "natural."

c. *The 1958 Geneva Convention and the Third U.N. Conference on the Law of the Sea*

Article 10 of the Convention on the Territorial Sea and Contiguous Zone,[156] as finally adopted by the 1958 Geneva Convention, codified Lau-

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[148] *See* text accompanying note 141 *supra*.

[149] Summary Records, *supra* note 145, at 92. Lauterpacht also proposed to add the words "and capable of effective occupation and control" after the words "above the high-water mark." He withdrew that amendment before a vote was taken. *Id.* at 92, 94.

[150] *Id.* at 94.

[151] *Id.* at 93. The Chair noted that "the question of artificial islands should be left open."

[152] Francois, *supra* note 144, at 28-29.

[153] Francois stated that lighthouses and technical installations built on low-tide elevations would not have a territorial sea. The members of the Commission appeared to agree. Summary Records, *supra* note 145, at 91-94.

[154] *Id.* at 94.

[155] [1956] 2 Y.B. INT'L L. COMM'N 270, U.N. Doc. A/CN.4/SER.A/1956/V.2.

[156] Convention on the Territorial Sea and Contiguous Zone, *supra* note 9.

terpacht's view that artificial islands are not entitled to a territorial sea. It provides that "[a]n island is a *naturally-formed* area of land, surrounded by water, which is above water at high tide."[157] Tonga has ratified this Convention.[158]

This definition of islands has been adopted without change as article 121 of all the negotiating texts and drafts prepared by UNCLOS III.[159] Under this definition, the Minerva Reefs, being totally submerged at high tide under "natural" conditions, would not seem to qualify as islands. Instead, the Reefs would probably be classified as low tide elevations which, according to the Draft Convention, are not entitled to territorial seas.[160] Such elevations can be used as basepoints for measuring a territorial sea if they are within twelve miles of other territory within a country's jurisdiction, but if not, they can have no impact on the delimitation of maritime space.[161] Because the Reefs are approximately 170 miles from the closest Tongan territory, the island of Ata, they therefore cannot be used as base points for measuring Tonga's territorial sea.

Fiji appears to be in support of this conclusion. In a session of the Law of the Sea Institute in November 1977, Fiji's then Foreign Minister, Joji Kotobalavu, responded to a question on the status of the Minerva Reefs as follows:

> [The status of the Minerva Reefs], of course, is a matter that will have to be resolved by Fiji and Tonga. New Zealand also has an interest in this. If it is accepted that Minerva Reefs can generate its own economic zone, that will

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[157] *Id.* art. 10(1) (emphasis added).

[158] U.S. DEP'T OF STATE, TREATIES IN FORCE 317-18 (1980).

[159] Although the late S. H. Amerasinghe, then President of the Conference, noted in his memorandum to the 1979 Revised Informal Composite Negotiating Text that the regime of islands (article 121) "had not yet received adequate consideration and should form the subject of further negotiation during the resumed session" (U.N. Doc. A/Conf.62/WP.10/Rev.1 (1979) at 19), further consideration of the article now seems unlikely. *See generally* Van Dyke & Brooks, *Uninhabited Islands and the Ocean's Resources: The Clipperton Island Case* to be published in STATE PRACTICES IN ZONES OF SPECIAL JURISDICTION (T. Clingan ed. 1982).

[160] The latest version of the Draft Convention, *supra* note 1, art. 60(8) states, "Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."

[161] *Id.* art. 13:

> 1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
>
> 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

Article 13 is identical to article 11 of the 1958 Convention on the Territorial Sea and Contiguous Zone, *supra* note 9.

> have some effect on the manner in which the economic zones of Fiji and New Zealand are drawn. This situation has not yet been resolved, but, again, we hope it will be settled in a Pacific way. Under the ICNT [Informal Composite Negotiating Text of the Law of the Sea Conference], as you know, a drying reef (that is a low-tide elevation) cannot generate a territorial sea or an EEZ [exclusive economic zone], if it is wholly situated more distant than the breadth of the territorial sea from the adjoining or adjacent territory.[162]

This statement not only indicates that Fiji may recognize some type of Tongan jurisdiction over waters around the Reefs, but also that Fiji is willing to resolve the matter only through direct negotiations with Tonga and New Zealand.

It should be noted here that Teleki Tonga and Teleki Tokelau would fall within an exclusive economic zone generated by the island of Ata if Tonga were to claim such zones around its islands. Ata's zone would extend thirty miles beyond the Reefs. Article 121 of the Draft Convention states that all islands have exclusive economic zones except "[r]ocks which cannot sustain human habitation or economic life of their own."[163] Under this definition, Ata would probably be deemed as having the capacity to generate an exclusive economic zone[164] since it is clearly above water at high tide and apparently has been inhabited in the past, even though it is presently uninhabited.[165] Although jurisdiction in such a zone is not as great as in a territorial sea, it would sanction the establishment and use of artificial islands[166] such as Teleki Tonga and Teleki Tokelau.

3. Are Teleki Tonga and Teleki Tokelau Entitled to Safety Zones?

If the structures built upon the Minerva Reefs do not qualify as islands, Tonga could assert a claim to a form of territorial jurisdiction to the waters surrounding the Reefs by claiming a safety zone. At the 1952 meetings of the International Law Commission, Francois examined prior statements of international scholars and draft provisions concerning continental shelves and concluded that the concept of safety zones could ap-

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[162] Kotobalavu, *supra* note 89, at 316-17. The Informal Composite Negotiating Text was an earlier version of the Draft Convention, *supra* note 1; no substantive changes have been made in the articles under discussion.

The reference to a solution "in a Pacific way" is central to Fiji's foreign relations. In 1974, the Foreign Minister stated, "In its foreign policy, Government has accorded the highest priority to the development of the closest possible relationships with its South Pacific neighbours and to the extension of practical co-operation to all matters of common interest . . . ." FIJI PARLIAMENTARY REPORT ON FOREIGN AFFAIRS, *supra* note 48, at 1.

[163] Draft Convention, *supra* note 1, art. 121.

[164] *See generally* Van Dyke & Brooks, *supra* note 159.

[165] PAC. ISLANDS Y.B., *supra* note 24, at 421.

[166] Draft Convention, *supra* note 1, art. 56(1)(b)(i).

ply to lighthouses placed on low tide elevations.[167] These safety zones would extend for "reasonable distances" so measures necessary for their protection could be taken.[168]

Besides the question of whether artificial islands should be entitled to territorial seas,[169] the International Law Commission also debated the question of whether it is permissible for a nation to construct artificial islands in areas beyond its territorial sea. The consensus among members in 1954 appeared to be that such a construction would be contrary to international law.[170]

Francois argued that lighthouses and other technical installations should be considered special cases. He noted that lighthouses on an area of land permanently above the high water mark would present no difficulties because the land would of itself be an island and have its own territorial sea.[171] He also explained the converse situation; lighthouses built on an area of land above water only at low tide would not be entitled to a territorial sea.[172] But he also argued that technical installations should be entitled to at least a safety zone because of their great vulnerability.[173] These proposals were debated but no resolution was reached.

Because Tonga has not yet declared exclusive economic zones around its islands, the waters around the Minerva Reefs could also be considered to be "high seas."[174] It may therefore be necessary to consider whether the construction of Teleki Tonga and Teleki Tokelau on the Reefs constitutes a permitted use of the high seas. Although the 1958 Convention on

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[167] Francois, *supra* note 144, at 3. Francois relied on draft articles on the continental shelf and related subjects. *See* Report of the International Law Commission to the General Assembly, 6 U.N. GAOR Supp. (No. 9) at 19, U.N. Doc. A/1858 (1951), *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123, U.N. Doc. A/CN.4/Ser.A/1951/Add.1. The draft articles referred to installations constructed for the exploration and exploitation of the continental shelf, and Francois argued the same regime should govern lighthouses.

Francois summarized the views of scholars of international law as follows:

> Sir Charles Russell, in his arguments during the Behring Sea Arbitration, claimed that a lighthouse built upon a rock or upon piles driven into a bed of a sea "becomes as far as that lighthouse is concerned, part of the territory of the nation which has erected it, and has incident to all the rights which belong to the protection of the territory." Westlake would limit this statement to a claim to immunity from violation and injury, together with exclusive authority and jurisdiction of the territorial State.
>
> It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighboring sea, could be made the source of a presumed occupation of it, converting a large tract into territorial waters.

Id.

[168] *Id.*

[169] *See* section II-C-2-b *supra*.

[170] Summary Records, *supra* note 145, at 91-93.

[171] *Id.* at 91.

[172] *Id.*

[173] *Id.*

[174] *See* Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, art. 2.

the High Seas did not specifically decide the issue, article 2 provides that "[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty."[175]

International law does permit some *uses* of the high seas even though they are permanent and exclusive in nature. For instance, fishing conducted by means of equipment embedded in the floor of the sea, lighthouses built on submerged rocks and lightships are generally permitted.[176] Lighthouses and lightships are considered permissible because they serve important international community interests such as safety of shipping, navigational aid and meteorological observation. These and any other uses must be exercised, however, "with reasonable regard to the interests of the other States in their exercise of the freedom of the high seas."[177]

Tonga may argue persuasively that the refuge stations constructed on Teleki Tonga and Teleki Tokelau[178] serve these important international community interests. Tonga's assertion of jurisdiction may also, however, be viewed as an exercise of *sovereignty*, which is quite different from a *use*.

Returning to the issue of whether a safety zone can be declared, under emerging law, the Draft Convention permits the construction of artificial islands, installations and other structures on the high seas[179] and in the exclusive economic zone.[180] Article 60, on the status of artificial islands in the exclusive economic zone, authorizes the establishment of a safety zone "to ensure the safety both of navigation and of artificial islands, installations and structures."[181] This article also specifically states, however, that artificial islands "have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea [or] the exclusive economic zones. . . ."[182]

Applying these principles to the Minerva Reef situation, Tonga may be able to claim a safety zone around these formations by arguing that the refuge stations aid navigational safety. If the claim is recognized, the Draft Convention grants the coastal state the right to determine the breadth of safety zones but sets a maximum distance of 500 meters.[183]

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[175] *Id.*

[176] Johnson, *supra* note 139, at 212-14; A. Soons, *supra* note 139, at 8.

[177] Convention on the High Seas, *supra* note 174, art. 2.

[178] *See* text accompanying note 127 *supra*.

[179] Draft Convention, *supra* note 1, art. 87(1)(d).

[180] *Id.* arts. 56(1)(b)(i), 60.

[181] *Id.* art. 60(4).

[182] *Id.* art. 60(8).

[183] *Id.* art. 60(5):

> The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized

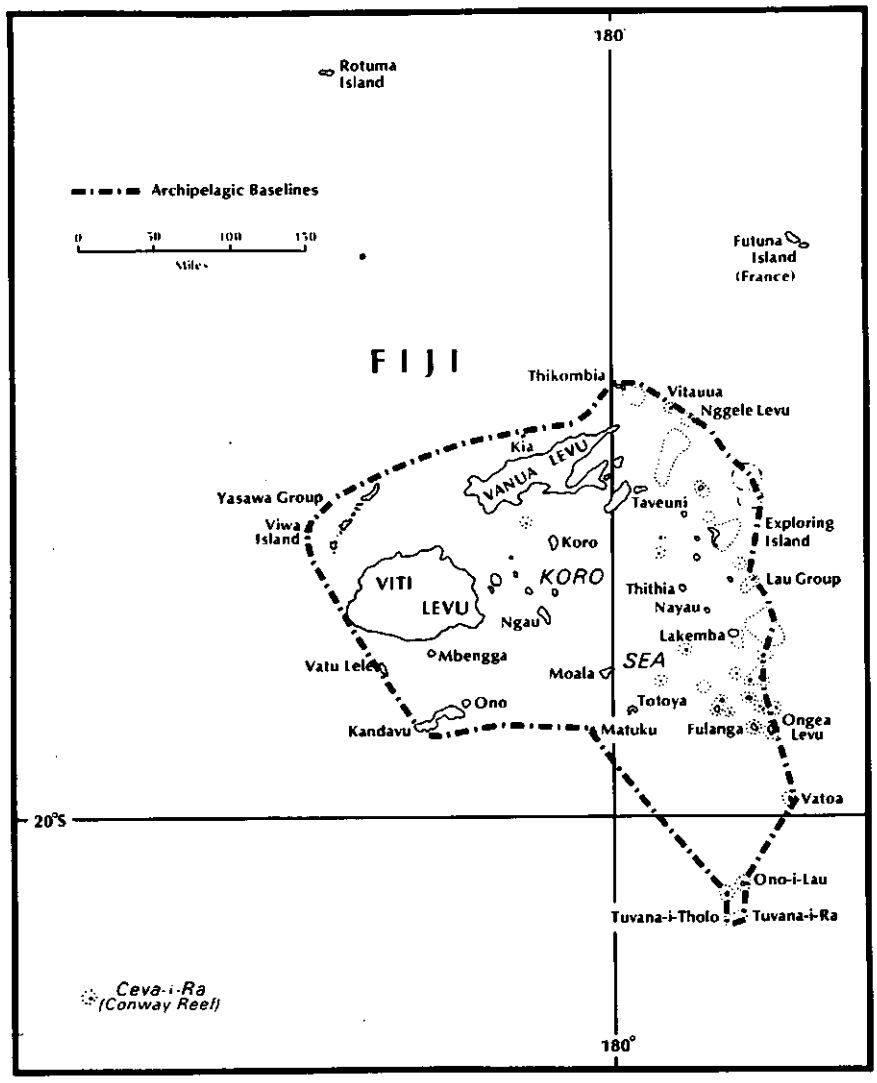

FIGURE 5: FIJI

Claims to broader jurisdiction over these waters must be based on arguments that Teleki Tonga and Teleki Tokelau are not artificial islands but are real islands, that artificial islands should have rights to territorial seas, that Tonga has historic title to these waters or that these waters are included in the exclusive economic zone of Ata, 170 miles away.

III. FIJI

A. *An Archipelagic State*

The independent nation of Fiji has about 320 islands, which together contain approximately 18,272 square kilometers of land[184] (see Figure 5). About 150 of these islands are inhabited.[185] On December 15, 1977, Fiji passed legislation declaring itself an archipelago and claiming a 200-mile exclusive economic zone.[186]

Fiji's main island group, including the islands of Vanua Levu and Viti Levu, lie between 15° and 22° south latitude, and 177° west and 175° east longitude.[187] In the 1977 Act, Fiji enclosed these main islands within archipelagic baselines[188] (see Figure 5). The longest straight baseline segment measures 120 nautical miles between Vuata Ono Reef and Matuku Islands and fewer than three percent of the segments measure as much as 100 nautical miles; the ratio of water to land within the archipelagic baseline is 4.2:1.[189]

The northern Fijian island group, including Rotuma Island, was omitted from the 1977 archipelagic baselines.[190] Rotuma Island lies about 240 miles north-northwest of the main Fijian group, on 12°27' south latitude and 177°7' east longitude.[191] Rotuma is thirteen kilometers long and four

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by generally accepted international standards or as recommended by the competent international organization.

[184] PAC. ISLANDS Y.B., *supra* note 24, at 89, 97. On October 10, 1874, Fiji was ceded by its chiefs to Great Britain, and Fiji became a crown colony. On October 10, 1970, Fiji became independent. HANDBOOK OF FIJI 6 (J. Tudor ed. 1972).

[185] PAC. ISLANDS Y.B., *supra* note 24, at 97. Many of the uninhabited islands are visited regularly by Fijians who go to fish or gather coconuts. *Id.*

[186] Fiji Marine Spaces Act of 1977, *supra* note 136, §§ 2.-(1), 6.-(1).

[187] HANDBOOK OF FIJI, *supra* note 184, at 7.

[188] *See* Fiji Marine Spaces Act of 1977, *supra* note 136.

[189] Fiji has therefore met the requirements of an archipelagic state under the Draft Convention. J. Prescott, International Maritime Boundaries in the Southwest Pacific Ocean 8 (paper presented to the 15th Annual Meeting of the Law of the Sea Institute, Honolulu, Hawaii, Oct. 1981; publication forthcoming in Proceedings of the Conference).

Fiji has also drawn baselines enclosing bays on a number of islands, thereby creating a rather large area of internal waters within archipelagic baselines. *Id.* at 9. Fiji's declaration claims an exclusive economic zone and a territorial sea from the archipelagic baselines. Fiji Marine Spaces Act of 1977, *supra* note 136, § 4.

[190] Fiji Marine Spaces Act of 1977, *supra* note 136, § 2.-(1).

[191] HANDBOOK OF FIJI, *supra* note 184, at 7.

kilometers wide and is surrounded by eight small islands.[192] The population in the Rotuma group in 1976 was approximately 7,000.[193] Its people are Polynesian, as distinct from the native Fijians, who are Melanesian.[194] Small interisland vessels from Suva arrive every few months to bring passengers and merchandise and to pick up copra.[195]

In 1874, the King and chiefs of Fiji transferred sovereignty over most of the current territory of Fiji to Queen Victoria.[196] Rotuma and its outlying islands were not ceded until 1879.[197] On October 6, 1978, Fiji enclosed the Rotuma group within its own separate archipelagic baselines and called it the Rotuma archipelago.[198] Fiji's archipelagic waters thus are interrupted by a great expanse of sea. This latter expanse will be governed by the regime of the exclusive economic zone.[199] The southern island of Ceva-i-Ra (also called Conway Reef) was excluded from the declared archipelagic baselines,[200] apparently in order to conform to the definition of an archipelago under the Draft Convention[201] (see Figure 5).

The nation of Fiji is unusual because it is comprised of this variety of different island groupings. Nevertheless, Fiji still meets the requirements of an "archipelagic State" under article 46(a) of the Draft Convention, which defines an "archipelagic State" as "a State constituted wholly by one or more archipelagoes and may include other islands."[202]

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[192] PAC. ISLANDS Y.B., *supra* note 24, at 123.

[193] *Id.*

[194] *Id.* at 124.

[195] HANDBOOK OF FIJI, *supra* note 184, at 7; PAC. ISLANDS Y.B., *supra* note 24, at 123-24.

[196] O'Connell, *supra* note 28, at 48. "[T]he Deed of Cession included the whole island of Rotuma, and over the inhabitants thereof, and of and over all ports, harbours, roadsteads, streams and waters, and all foreshores and all islets and reefs adjacent thereto." *Id.* quoting 66 BRITISH AND FOREIGN STATE PAPERS 953.

[197] The Letters Patent annexing Rotuma and its "dependencies" includes "all islands, rocks, reefs and fisheries lying between the 12° and 15° of south latitude and between the 175° and 180° of east longitude . . . ." *Id.* quoting 71 BRITISH AND FOREIGN STATE PAPERS 130. Although this declaration defines the territory in terms of geographic coordinates, it does not include the "foreshores and waters" as did the Tongan declaration.

[198] An Act to Amend the Marine Spaces Act of 1977, Act No. 15 of 1978, Oct. 5, 1978 (Fiji) 2-4.

[199] The two rectangular jurisdictions created by the British were contiguous and, if Fiji were to claim all the marine waters therein, it would have a more extended maritime territory and a unified country. The United Kingdom, however, has subsequently refuted any suggestion that the waters were to be included in those points. The British did the same for the Cook Islands, Australia and New Zealand which were also defined by reference to coordinates. The government asserted that the term "waters" was intended to cover "waters appurtenant to the several islands and no more." O'Connell, *supra* note 28, at 49, quoting Anglo-Norwegian Fisheries Case, [1951] 2 I.C.J. Pleadings 523-31.

[200] *See* text accompanying notes 186 & 198 *supra*.

[201] Draft Convention, *supra* note 1, art. 47.

[202] *Id.* art. 46(a).

B. *Fiji's Claim to Ceva-i-Ra (Conway Reef)*

As noted above, Fiji's leading chiefs ceded sovereignty over their islands in 1874 and 1879.[203] The 1874 Treaty of Cession, like the Tongan Royal Proclamation of 1887, described the colony in terms of geographic coordinates; that is, the area lying between 15° and 22° south latitude, and 175° west and 175° east longitude.[204] In January 1965, the boundary of the eastern meridian was extended by one degree to 174° east longitude in order to include Ceva-i-Ra.[205] The apparent justification for the annexation of Ceva-i-Ra was to provide the benefits of maritime law to any vessels shipwrecked or otherwise damaged in that isolated corner of the Pacific.[206] The annexation took place before the negotiations of UNCLOS III and before the concept of the 200-mile exclusive economic zone had gained substantial acceptance.

Because Ceva-i-Ra is located approximately 300 miles southwest of Kadavu, the nearest Fijian island,[207] it obviously could not be included in the archipelagic baselines.[208] Likewise, it does not fall within the exclusive economic zone of any of Fiji's islands.

Fiji's claim to Ceva-i-Ra has many similarities to Tonga's claim to Teleki Tonga and Teleki Tokelau.[209] Both are relatively recent claims to geological formations lying outside the claimed waters of the countries' main islands. Both purport to be related to the needs of ships that meet disaster at sea. Both potentially provide the claiming nation with an enormously enlarged exclusive economic zone.

Because Ceva-i-Ra (Conway Reef) is a sand cay of six and one-half acres,[210] is naturally formed and is above water at high tide, it apparently qualifies as an island under the 1958 Conventions and the Draft Convention.[211] It differs significantly from Teleki Tonga and Teleki Tokelau (the Minerva Reefs) in that it is *naturally* above water at high tide.[212] As an island, it would be entitled to a territorial sea, contiguous zone and exclusive economic zone.[213] If Fiji claims an exclusive economic zone for Ceva-i-Ra, however, it will overlap with the exclusive economic zone of either New Caledonia or Vanuatu, depending on which succeeds in establishing

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[203] *See* notes 196-97 *supra* and accompanying text.

[204] O'Connell, *supra* note 28, at 48, quoting Anglo-Norwegian Fisheries Case, [1951] 1 I.C.J. Pleadings 490-91.

[205] HANDBOOK OF FIJI, *supra* note 184, at 7.

[206] *Id.* at 37.

[207] *Id.*

[208] Draft Convention, *supra* note 1, art. 47(2).

[209] *See* section II-C *supra*.

[210] HANDBOOK OF FIJI, *supra* note 184, at 37.

[211] *See* Convention on the Territorial Sea and Contiguous Zone, *supra* note 9, art. 10; Draft Convention, *supra* note 1, art. 121.

[212] *See* section II-C-2 *supra*.

[213] *See* Draft Convention, *supra* note 1, art. 121; *see generally* Van Dyke & Brooks, *supra* note 159.

sovereignty over Matthew and Hunter Islands[214] (see Figure 1).

The exclusive economic zones generated by Matthew and Hunter Islands amount to 53,800 square nautical miles.[215] Matthew Island is about 450 kilometers due east of the southern tip of the New Caledonian mainland, 400 kilometers from Kunie, or the Isle of Pines (famous as a French penal colony in the 19th and 20th centuries), and 350 kilometers southeast of Anatom (Aneityum) in Vanuatu. It is an uninhabited island, 500 meters in diameter and up to 177 meters high.[216] Hunter Island is even further east from the tip of the New Caledonian mainland and Anatom (Aneityum). It is apparently also uninhabited[217] (see Figure 1). These islands could not be included in the archipelagic baseline system of either New Caledonia or Vanuatu because they are more than 125 nautical miles from the main island groups.[218]

C. Approaches to Delimitation

In any delimitation involving an overlap created by Ceva-i-Ra (Conway Reef), Fiji will find difficulty in making any equitable arguments. Although Ceva-i-Ra technically qualifies as an island, it appears to be uninhabited. Thus no arguments can be raised on the need for ocean space for economic or political purposes.[219] Because Ceva-i-Ra was only recently claimed,[220] Fiji cannot argue historic title to justify the disproportionate claim which would result. The island also does not seem to be linked to Fiji by any geographic formations and no other special circumstances seem to exist to justify Fiji's claim. Thus, Ceva-i-Ra cannot be said to be linked to any of the Fijian islands except by proclamation. In all directions, it creates a totally new exclusive economic zone for Fiji.

Conversely, although both Matthew and Hunter Islands are also uninhabited, they are at least linked to Vanuatu geographically—they are on the same submarine ridge as the other islands of Vanuatu.[221] Their geographic location also makes them more accessible to the people of New Caledonia and Vanuatu for fishing and gathering of other resources than

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[214] Prescott reports that 20th century maps have shown these islands as belonging to either Vanuatu (formerly New Hebrides) or New Caledonia. It is unclear as to whether or not France has made a formal claim to these islands. Prescott also reports that officials in Vanuatu may be considering a counter claim. J. Prescott, *supra* note 189, at 23.

[215] *Id.*

[216] PAC. ISLANDS Y.B., *supra* note 24, at 299. According to this publication, New Caledonia claims Matthew Island.

[217] It appears that New Caledonia is presumed to have sovereignty over Hunter Island also. *Id.* at 533.

[218] *See* J. Prescott, *supra* note 189, at 11.

[219] *See generally* Van Dyke & Brooks, *supra* note 159.

[220] *See* text accompanying note 205 *supra*.

[221] *See* J. Prescott, *supra* note 189, at 23. However, Hunter and Matthew Islands are separated from the islands of New Caledonia by the deep New Hebrides Trench. *Id.*

Ceva-i-Ra is to the Fijians. In addition, Hunter and Matthew Islands would grant a more restrictive claim than Ceva-i-Ra. The northerly and westerly expanses of the exclusive economic zones for Hunter and Matthew Islands fall to a great extent in the exclusive economic zones of either Anatom (Aneityum), the main island of New Caledonia, or Kunie.

Fiji has indicated a willingness to negotiate to resolve potential disputes with its neighbors over the delimitation of its exclusive economic zone.[222] According to Fijian law, the Minister of Foreign Affairs is empowered to establish the outer limits of the country's exclusive economic zone "for the purpose of implementing any international agreement or the award of any international body, or otherwise . . . ."[223] If no such line is drawn, a median line is assumed for delimitation "which is equidistant from the nearest points of the baselines from which the breadth of the territorial seas of Fiji and of any opposite or adjacent State or territory are measured."[224]

Because all these islands are remote and uninhabited, their claim to maritime space is weak. Assuming that they are all entitled to exclusive economic zones, application of the equidistant principle in a delimitation between Ceva-i-Ra and Matthew and Hunter Islands could arguably grant Ceva-i-Ra too much recognition. Ceva-i-Ra will already give Fiji extensive ocean space in other directions of its exclusive economic zone.

In order to curb inequities in delimitation negotiations, recent agreements and arbitral decisions have tended to reduce the impact of islands where their geographic location produces disproportionate results. For example, some islands have been given only half-effect,[225] while others have been excluded from baselines and have only been given effect in establishing territorial seas.[226]

In other instances, countries have proceeded with delimitation without considering an island's effect. Greenland and Canada discounted Hans Island in their boundary delimitation because the sovereignty of the island was in dispute; no boundary was therefore drawn in that vicinity.[227] Another example is Machias Seal Island in the Gulf of Maine. When the United States and Canada agreed to submit the delimitation of the maritime boundary in the Gulf of Maine area to the International Court of Justice, they requested the court to ignore that island because it is claimed by both countries.[228]

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[222] Fiji Marine Spaces Act of 1977, *supra* note 186, § 6.

[223] *Id.* § 6(2).

[224] *Id.* § 6(3)-(4).

[225] *See* text discussing the Scilly Isles accompanying notes 257-60 *infra*.

[226] *See* text discussing the Channel Islands accompanying notes 253-56 *infra*.

[227] CANADA-GREENLAND CONTINENTAL SHELF BOUNDARY, *supra* note 16, at 8.

[228] Special Agreement between the United States and Canada to Submit to the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine area, art. II(1), attachment to U.S.-Canada Gulf of Maine Treaty, *supra* note 21; *see* 127 CONG. REC. S4052-54 (daily ed. Apr. 29, 1981) (remarks of Sen. William Cohen of Maine).

One important point for Vanuatu and New Caledonia to consider in their negotiations is that a dispute between them concerning sovereignty over Hunter or Matthew Islands could result in a loss of maritime space for either country, depending on who is ultimately determined to be the sovereign. These countries might consider following the solution reached for Hans and Machias Seal Islands where the disputing countries agreed to disregard the islands altogether in boundary delimitation.[229] In the South Pacific arena, because the disputed islands create a potential conflict with a third country (Fiji), Vanuatu and New Caledonia could protect any future interests to an exclusive economic zone around these islands by creating a joint development zone.[230] Alternatively, New Caledonia and Vanuatu might consider protecting their mutual rights by agreeing to divide the exclusive economic zone gained by these islands according to some proportionate share.

Assuming Ceva-i-Ra is permitted the full sweep of its exclusive economic zone in the north, east and south, the resulting appropriation of ocean may be sufficiently great to convince Fiji to negotiate an agreement with New Caledonia and/or Vanuatu giving less than full effect to Ceva-i-Ra. In exchange, New Caledonia and/or Vanuatu could agree to recognize Fiji's claim to Ceva-i-Ra and a corresponding territorial sea and exclusive economic zone.

IV. DELIMITING THE BOUNDARIES

A. The Competing Claims

1. Tonga

The task of delimiting Tonga's boundaries is somewhat unique because that country's historic claim does not refer to specific base points on land from which baselines may be drawn. Instead, its claim is staked out according to longitudinal and latitudinal coordinates.[231] The territorial limits drawn from these coordinates are approximately forty-eight to 152 miles in breadth from the nearest point of land within the area. Tonga's claim over Teleki Tonga and Teleki Tokelau (the Minerva Reefs)[232] presents additional delimitation problems.

Machias Seal Island is 500 feet wide and about a third of a mile long. It has been declared a bird sanctuary and has a lighthouse. Gull or North Rock is 12 feet high. Grandall, *Remember Machias Seal Island?*, 64 ATLANTIC ADVOCATE 47-53 (1974).

[229] 127 CONG. REC. S4052-54 (daily ed. Apr. 29, 1981) (remarks of Sen. William Cohen of Maine).

[230] *Cf.* JAPAN-REPUBLIC OF KOREA JOINT DEVELOPMENT ZONE, *supra* note 7. *See also* note 270 *infra* and accompanying text.

[231] *See* note 26 *supra* and accompanying text.

[232] *See* section II-C *supra*.

2. Fiji

Fiji has declared itself an archipelagic regime and has claimed a 200-mile exclusive economic zone.[233] Although Fiji has yet to issue formal declarations for its 200-mile zone, the government declared in 1980 that it intends to issue such a formal statement in the near future.[234] When Fiji's formal declaration is issued, an interface of 4,860 square nautical miles with Tonga's declared territorial limits will result[235] (see Figure 1). An even greater overlap would occur if Tonga were to declare the limits of its historical claim as baselines from which further claims are measured.[236]

3. New Zealand (The Kermadec Islands)

The Kermadec Islands, a New Zealand dependency, are a volcanic group whose principal islands are Raoul (or Sunday), Macauley, the Herald Isles, Curtis and L'Esperance.[237] Their total land area is only thirteen square miles.[238] The islands are an important nature preserve and the sole inhabitants are a handful of New Zealand personnel who live on Raoul Island.[239]

On September 26, 1977, New Zealand declared a 200-mile exclusive economic zone around its islands, including the outlying ones.[240] Presumably, New Zealand intends this claim to include the Kermadecs for they fit the definition of "island" under the act, and also are clearly not "low-tide elevation[s]."[241]

The Kermadecs are located approximately 360 miles south of the Mi-

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[233] *See* note 136 *supra*.

[234] 51 PAC. ISLANDS MONTHLY 9 (July 1980).

[235] *See* J. Prescott, *supra* note 189, at 20.

[236] This situation would be possible if all the waters within the historic claim were considered to be territorial waters. *But see* text accompanying notes 93-94 *supra*; Draft Convention, *supra* note 1, arts. 3, 57.

[237] PAC. ISLANDS Y.B., *supra* note 24, at 233. The Kermadec Islands are annexed islands and all New Zealand laws extend to them. They have no separate administrative structure but rather are administered by the New Zealand Survey Department. N.Z. OFFICIAL Y.B. 1134 (1958).

The Kermadec Islands are north of New Zealand's two main islands, North Island and South Island, and are located between 29° and 32° south latitude, and 177° and 180° west longitude. *Id.* at 1. By proclamation of July 21, 1887, the Kermadecs were declared to be part of the territory of New Zealand, which was then a British colony. British sovereignty over New Zealand was proclaimed on January 30, 1840. *Id.* at 3.

[238] N.Z. DEP'T OF INTERNAL AFFAIRS, INTRODUCTION TO NEW ZEALAND 166 (1945).

[239] Meteorological and radio stations have been constructed on Raoul Island. PAC. ISLANDS Y.B., *supra* note 24, at 233. *Cf.* N.Z. DEP'T OF INTERNAL AFFAIRS, *supra* note 238, at 166; G. LINGE & R. FRAZIER, ATLAS OF NEW ZEALAND GEOGRAPHY 6 (1977).

[240] Territorial Sea and Exclusive Economic Zone Act, 1977, Act No. 28, 1 Stat. N.Z. 192, 196, 198 [hereinafter cited as "New Zealand Territorial Sea and EEZ Act"]; *see also* Reserves Act, 1977, Act No. 66 § 100(1), 1 Stat. N.Z. 836.

[241] New Zealand Territorial Sea and EEZ Act, *supra* note 240, at 194 § 2(1).

nerva Reefs and 480 miles south of Ata, the closest inhabitable Tongan island (see comment to Figure 1). Even if Tonga were to declare a 200-mile exclusive economic zone with baselines at Ata, this zone would not overlap with New Zealand's zone around the Kermadecs. If, however, Tonga declares a 200-mile exclusive economic zone around Teleki Tonga and Teleki Tokelau, the islands built on the Minerva Reefs, this zone would overlap with New Zealand's claim by approximately 5,000 square nautical miles.[242]

New Zealand has suggested a solution to this problem within its Territorial Sea and Exclusive Economic Zone Act.[243] The Act defines a "median line" between New Zealand and any other country as "a line every point of which is equidistant from the nearest points of the baseline of the territorial sea of New Zealand and the corresponding baseline of that other country."[244] If New Zealand agrees to accept Teleki Tonga and Teleki Tokelau as a baseline point, then the difference might be allocated between the two countries by drawing such a median line. New Zealand might, however, be reluctant to consider the islands built on the Minervas to be an appropriate Tongan baseline point[245] since it would lose a significant part of its claimed exclusive economic zone if it did.

B. Equitable Principles

The triumph of the doctrine of "equitable principles" over the cartographic approach of drawing equidistant lines has been described in the opening section.[246] Under the adopted approach, boundary conflicts should be resolved through negotiations between (or among) affected states, taking all factors into consideration.

As a preliminary matter, because of the *North Sea Continental Shelf Cases*,[247] Tonga may be able to negotiate from a strong position for the establishment of ocean boundaries based on its historic claim. The International Court of Justice in the *North Sea Cases*, although dealing there with disputes concerning the continental shelf, pointed out that delimitation involves the expression of preexisting rights.[248] According to the court, rights to the areas to be delimited are already in existence, vested in the states-parties to the delimitation[249] and the process of delimitation

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[242] See Section II-C *supra* for a discussion of Tonga's claim to Teleki Tonga and Teleki Tokelau.

[243] New Zealand Territorial Sea and EEZ Act, *supra* note 240, at 192.

[244] *Id.* at 195.

[245] Prescott concludes that Tonga is not entitled to any maritime zones around the Minerva Reefs except a 500 meter safety zone. J. Prescott, *supra* note 189, at 21-22. *See* discussion in section II-C *supra*.

[246] *See* notes 5-16 *supra* and accompanying text.

[247] [1969] I.C.J. 4; *see* note 14 *supra*.

[248] [1969] I.C.J. 4, 31.

[249] *Id.* at 33: "[T]he coastal state has an original, natural, and exclusive (in short a vested)

is simply the expression of these prior rights.[250] Because the equidistance/median line method of delimitation is merely a cartographical device, a generally convenient mode of expressing these preexisting rights,[251] that method cannot be as persuasive a mode of expression as a longstanding historic title claim.[252]

Keeping these pronouncements of the International Court in mind, some recent solutions to international boundary disputes will now be examined. These examples illustrate the types of approaches taken and solutions reached in cases that parallel the complexity of the situation in the South Pacific.

1. The Anglo-French Continental Shelf Arbitration

After several years of unsuccessful negotiations, the governments of France and the United Kingdom agreed to submit the issue of continental shelf delimitation between the two countries to a Court of Arbitration.[253] France argued that the Channel Islands, under the jurisdiction of the United Kingdom but located close to the French coast, were a special circumstance which would have to be taken into account in order to achieve an equitable result.[254] The court agreed and decided that the islands were a "special circumstance" and "a circumstance creative of inequity" within the meaning of article 6 of the 1958 Convention on the Continental Shelf.[255] It then formulated a two-part solution. First, a median line was drawn in the English Channel without considering the Channel Islands as a point on the baseline. Second, the court created an "enclave" within the continental shelf for the Channel Islands to allow them a fisheries zone measured twelve miles seaward from the natural baseline.[256]

The other major area of disagreement in the Great Britain-France delimitation arbitration was in the Atlantic region. France argued that the westward British Scilly Isles, and the greater projection of the Cornish mainland beyond the French coastline constituted a special circumstance justifying departure from equidistance.[257] The United Kingdom perceived no "special circumstances" and argued for the true equidistant line.[258]

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right to the continental shelf off its shores. . . ."

[250] *Id.* at 22: "Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal state and not the determination *de novo* of such an area."

[251] *Id.* at 23, 35.

[252] *Id.* at 35-36.

[253] Anglo-French Arbitration, 18 I.L.M. 397, *supra* note 6.

[254] *Id.* ¶¶ 6-8, 18 I.L.M. at 402-403.

[255] Convention on the Continental Shelf, *supra* note 8; Anglo-French Arbitration, *supra* note 6, ¶¶ 196-97, 18 I.L.M. at 444.

[256] Anglo-French Arbitration, *supra* note 6, ¶¶ 201-02, 18 I.L.M. at 444-45.

[257] *Id.* ¶¶ 216-28, 18 I.L.M. at 448-49.

[258] *Id.* ¶¶ 227-31, 18 I.L.M. at 450-51.

The court rejected both arguments and concentrated instead on the geography of the Celtic Sea shoreline. It found that the projection westward of the Scilly Isles, when "superadded" to the Cornish mainland, distorted the equidistant line and, as such, constituted a special circumstance.[359] The court employed an unusual technique in delimitation, but one it thought produced an equitable result. The court modified the Scilly Isles to "half-effect" basepoints; no justification was given for their choice of that particular fraction. In any event, the court constructed one set of baselines and equidistance lines using the Ushant and the Scilly Isles and another set that ignored them. The triangle thereby created was divided in half to create the "half-effect" line.[360]

This decision opens the door to several possible technical solutions to any boundary disputes between Fiji and Tonga (and for the two Samoas as discussed below[361]). If an exclusive economic zone around Fiji's archipelagic baselines protrudes into Tonga's historic waters, the latter could formulate archipelagic baselines around the opposite group of islands solely for the purpose of delimitation. Alternatively, baselines around the separate islands of both Fiji and Tonga might result in an equitable delimitation. If an island or low-tide elevation were to give one country a "superadded" geographic claim, this effect could be reduced by some fractional proportion equitable to both sides.

The decision in the Anglo-French case is also important in that it underscores the significance of the choice of baselines. The principle of equidistance was not applicable until all the baselines were drawn. Most importantly, the court's methodology would allow Tonga to argue the relevance of its historic claim because before drawing any baselines, the court analyzed whether or not any special circumstances existed.

2. *Treaty Between Australia and Papua New Guinea*

Should the drawing of a median line between Tonga and Fiji or between Tonga and New Zealand be unacceptable to any of the parties, the nations might consider the creation of a joint resource zone within the area beyond their respective territorial waters. Recent agreements be-

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[359] *Id.* ¶ 244, 18 I.L.M. at 454.

[360] *Id.* ¶¶ 251-53, 18 I.L.M. at 455-56. In other geographic locations where application of equidistance would lead to a disproportionate result, similar solutions have been negotiated. Italy and Yugoslavia had a number of very small islands lying between them in the Adriatic Sea which were given partial effect in delimitation. Ely, *Seabed Boundaries Between Coastal States: The Effect to be Given Islets as "Special Circumstances,"* 6 INT'L LAW. 219, 227-28 (1972).

In the delimitation between Iran and Saudi Arabia, the island of Kharg was given half-effect by constructing the equidistance line halfway between the area formed by a line equidistant from the Saudi Arabian mainland and Kharg and a line equidistant from both the mainland of Iran and Saudi Arabia giving no effect to Kharg. *Id.* at 229.

[361] *See* text accompanying notes 325-27 *infra*.

tween Japan and Korea,[262] Abu Dhabi and Qatar,[263] and Papua New Guinea and Australia[264] provide illustrations for delimitation of such a zone. Of these, the treaty between Papua New Guinea and Australia will be examined in detail.

On December 18, 1978, the two countries signed a treaty which, among other things, set up maritime boundaries between them.[265] This treaty highlights the importance of mutual agreement as the primary mode of resolving boundary issues between neighboring nations.

Part 4, article 10 of the Treaty establishes a protected or joint resource zone.[266] In conjunction with Annexes 6, 7 and 9 to the treaty, article 10 establishes the boundaries of the area, including the land, sea, airspace, seabed and subsoil of the Torres Straits area. Article 10(3) sets out the principal purpose of the parties in establishing the protected zone, which is "to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement."[267]

"Traditional activities" are defined in Part 1, article (k) as "traditional activities performed by the traditional inhabitants in accordance with local tradition," including "(ii) activities on water, including traditional fishing."[268] "Traditional fishing" is defined in article 1(1) as "the taking, by traditional inhabitants for their own use or their dependents' consumption or for use in the course of other traditional activities, of the living resources of the sea, seabed, estuaries and coastal tidal areas."[269] In this manner, Australia and Papua New Guinea used the unique approach of a joint resource zone to protect the traditional lifestyles of the inhabitants of the Torres Straits.

This model may be a useful one for any of the potential South Pacific boundary disputes raised in this paper. A joint jurisdiction or use zone could be established with the Australia-Papua New Guinea protected zone as a model.[270] Traditional fishing activities of the peoples of Tonga

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[262] *See* note 7 *supra*.

[263] Ely, *supra* note 260, at 229; Karl, *Islands in the Delimitation of the Continental Shelf*, 71 AM. J. INT'L L. 642, 665 (1977). The area is to be developed by Abu Dhabi concessionaries, but all royalties, profits and government fees are to be divided equally.

[264] *See* note 265 *infra*.

[265] Treaty Concerning Sovereignty and Maritime Boundaries, Dec. 18, 1974, Australia-Papua New Guinea (publication of the Dep't of Foreign Affairs, Canberra) [hereinafter cited as "Treaty between Australia and Papua New Guinea"].

[266] *Id.* at 15.

[267] *Id.* at 16.

[268] *Id.* at 3.

[269] *Id.* at 4.

[270] A joint use zone has recently been established in the Gulf of Maine. Although a fisheries treaty had been negotiated between the United States and Canada covering the conservation, management and utilization of fish stocks in the area, the detailed provisions setting entitlement shares for various fish was unacceptable to the New England fishing industry. Agreement Between the United States of America and Canada on East Coast Fish-

and Fiji could thus be protected and maintained.

The Australia-Papua New Guinea Treaty also addresses issues concerning exploitation of seabed resources. First, it deals with the problem of upholding the rights of a permittee who had been granted a petroleum prospecting license by Australia over an area that subsequently became a part of the protected zone. The agreement requires Papua New Guinea to grant the permittee a license under its own laws.[271] Second, the signatories have provided for the equitable sharing of any mineral resources extending across any line defining the seabed jurisdiction of the parties.[272]

Tonga has already granted one petroleum exploration license in south Tonga territory.[273] The Australia-Papua New Guinea Treaty may thus provide a model for negotiation in the event any of the territory to which the license extends is in issue in delimitation. The treaty also presents one approach to the problem of how to exploit seabed deposits which extend beyond Tonga's boundaries. The Australia-Papua New Guinea model, however, is not the only possible mode of resolving the latter problem. Tonga and her neighbors could also consider forming a joint exploration and exploitation agreement in the event any deposits situated across common boundaries are discovered.[274]

3. *Dependency on Fish Resources*

Any delimitation in the South Pacific region will need to consider the dependency of the negotiating countries on fish resources within the disputed areas. Fiji, for example, in partnership with the Japanese, is the largest exporter of fish products in the South Pacific.[275] Although it ap-

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ery Resources (Mar. 29, 1979). This agreement was subsequently withdrawn from the Senate. Letter from Senator William Cohen of Maine to Sherry Broder (Sept. 22, 1981). However, the treaty to submit the boundary dispute over the Gulf of Mexico to the International Court of Justice has been ratified. *See* U.S.-Canada Gulf of Maine Treaty, *supra* note 21. In the interim, President Reagan agreed to permit Canadian fishermen to fish the entire disputed zone until the final court decision is issued, *see* CONG. REC. S4053 (daily ed. Apr. 29, 1981) (remarks of Sen. William Cohen of Maine), and to follow article IX of the 1977 agreement between the U.S. and Canada which states: (1) Neither the United States nor Canada will enforce the fishing laws against the nationals of the other country, (2) neither the U.S. nor Canada will permit a third country to take what either country might consider "excess" fish in the disputed area, and (3) both countries have the authority to enforce their laws against any third country in the disputed area. *Id.*; letter from Senator William Cohen of Maine to Sherry Broder (Sept. 22, 1981).

[271] Treaty between Australia and Papua New Guinea, *supra* note 265, art. 5.

[272] *Id.* art. 6. The problem with such a "unity of deposits" is that one country would be able to exploit all of the available amount of that resource from its side of a boundary line. *See* discussion of this problem in N. Sea Continental Shelf Cases, [1969] I.C.J. 4, 51-52.

[273] 1975-1980 TONGA DEVELOPMENT PLAN, *supra* note 19.

[274] *See, e.g.*, JAPAN-REPUBLIC OF KOREA JOINT DEVELOPMENT ZONE, *supra* note 7.

[275] PAC. ISLANDS Y.B., *supra* note 24, at 101. "In 1977, Fiji exported 2,113 tons of fish products worth $4.68 million . . . ." *Id.* For a survey of the fishing industry in the South

pears that Tonga's fishing activity is more subsistence oriented, new fisheries are being developed[276] and it is quite possible that Tonga may grow more economically dependent on fish resources in the future.

The importance to be attached to a nation's dependency on fish resources has been given explicit recognition in several negotiated solutions of past disputes. The Australia-Papua New Guinea Treaty, for example, makes provision for commercial fisheries in article 21 which states that "the parties shall cooperate in the conservation, management and optimum utilization of Protected Zone commercial fisheries."[277]

The significance of fisheries to livelihood and economic development were considered by the International Court of Justice in the *Fisheries Jurisdiction Case*.[278] In negotiations regarding fishing off Iceland's shores, the first factor that both parties were instructed to take into account was Iceland's entitlement to a preferential share of the fish resources in the area "to the extent of the special dependence of its people upon the fisheries in the seas and around its coasts for their livelihood and economic development."[279]

In addition, it may be interesting for the South Pacific nations to note the decision of the International Court of Justice in the maritime boundary dispute pending between the United States and Canada regarding the Georges Bank.[280] This area is a fertile fishing bank with potential for oil production, which falls into an overlap of the exclusive economic zones claimed by the two countries.[281] Canada seeks an equidistance delimitation. The United States, pointing to the heavy reliance of the Maine fishing industry on the fish resources of the Georges Bank, is arguing for a more equitable approach to delimitation.[282] Whatever solution is reached in that case, the nations of the South Pacific should be well aware that

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Pacific, see G. KENT, *supra* note 17, at 12-53.

[276] Tonga exported 9.5 tons of albacore tuna in 1976. A new Fisheries Extension Centre is being established at Vava'u and fisheries survey work under the FAO-UNDP marine resources development project has been conducted. PAC. ISLANDS Y.B., *supra* note 24, at 413. *See also* note 47 *supra*.

[277] Treaty between Australia and Papua New Guinea, *supra* note 265, at 26.

[278] United Kingdom v. Iceland, [1974] I.C.J. 3.

[279] *Id.* at 79. The main issue before the court in the *Fisheries Jurisdiction Case* was Iceland's assertion of a 50-mile fisheries zone. The court was understandably reluctant to render judgment or anticipate the law in light of ongoing Law of the Sea Conference discussion of those issues. *Id.* at 53. This reluctance was well justified in light of subsequent developments—the provisions of the Draft Convention on the Law of the Sea and the practices of nations in asserting their rights to 200-mile economic zones encompassing fisheries jurisdiction. The court's consideration of the special dependence of Iceland's people upon fisheries for their livelihood and economic development is, however, an aspect of the decision of continuing validity.

[280] U.S.-Canada Gulf of Maine Treaty, *supra* note 21. *See generally* Note, *Boundary Delimitation in the Economic Zone: The Gulf of Maine Dispute*, 30 MAINE L. REV. 207 (1979).

[281] Note, *supra* note 280, at 243.

[282] *Id.* See text accompanying notes 253-60 *supra* for a discussion of the application of equitable principles in the Anglo-French Continental Shelf Arbitration.

reliance on fish resources within a disputed area is a factor that has been and will be given strong consideration in resolving problems surrounding maritime boundary disputes.

V. Western Samoa and American Samoa

A. *Introduction*

American Samoa and Western Samoa are separated by a narrow strait thirty-two nautical miles wide. Western Samoa has a land area of 1,100 square miles. Its population in 1976 numbered 155,000.[283] American Samoa encompasses a land area of approximately seventy-seven square miles[284] and had a population of about 30,500 in 1979.[285] Thus Western Samoa is approximately fourteen and a half times as large as American Samoa in land area and has approximately five times as many residents.

Through a circumstance of geography, American Samoa can potentially claim an exclusive economic zone of 114,000 square nautical miles; if the principle of equidistance were applied, Western Samoa would only be entitled to a zone of 38,100 square nautical miles.[286] With Wallis (France) 190 nautical miles to the west, Tafahi (Tonga) 142 nautical miles to the south,[287] Swains Island (American Samoa) 190 nautical miles to the north and Tutuila Island (American Samoa) thirty-two nautical miles to the east,[288] Western Samoa is blocked in all directions from claiming a full 200-mile exclusive economic zone (see Figure 6). Moreover, Tonga's historic claim creates a conflict at the south-eastern edge of Western Samoa's ocean boundary. The situation is ripe for application of those equitable principles that would give Western Samoa a more proportionate share of ocean territory.

B. *Western Samoa*

Western Samoa consists of two main islands, Savai'i and Upolu, and the seven small islands of Apolima, Manono, Fanuatopu, Namua,

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[283] Western Samoa, Dep't of Economic Development, Western Samoa, National Goals, Development Priorities and Public Expenditure Policies: 1975-1979, First Report of the 1975-1979 Economic Development Plan, at 1.1 ¶ 2 (1974) [hereinafter cited as "1975-1979 Western Samoa Economic Development Plan"]; Pac. Islands Y.B., *supra* note 24, at 501.

[284] American Samoa Development Planning Office, Economic Development Plan for American Samoa FY 1979-1984, at III-6 (1979).

[285] *Id.* at II-2.

[286] J. Prescott, *supra* note 189, table 1.

[287] *Id.* This distance is measured from Asuisui on Savai'i Island to the nearest point on Tafahi Island.

[288] *Id.*

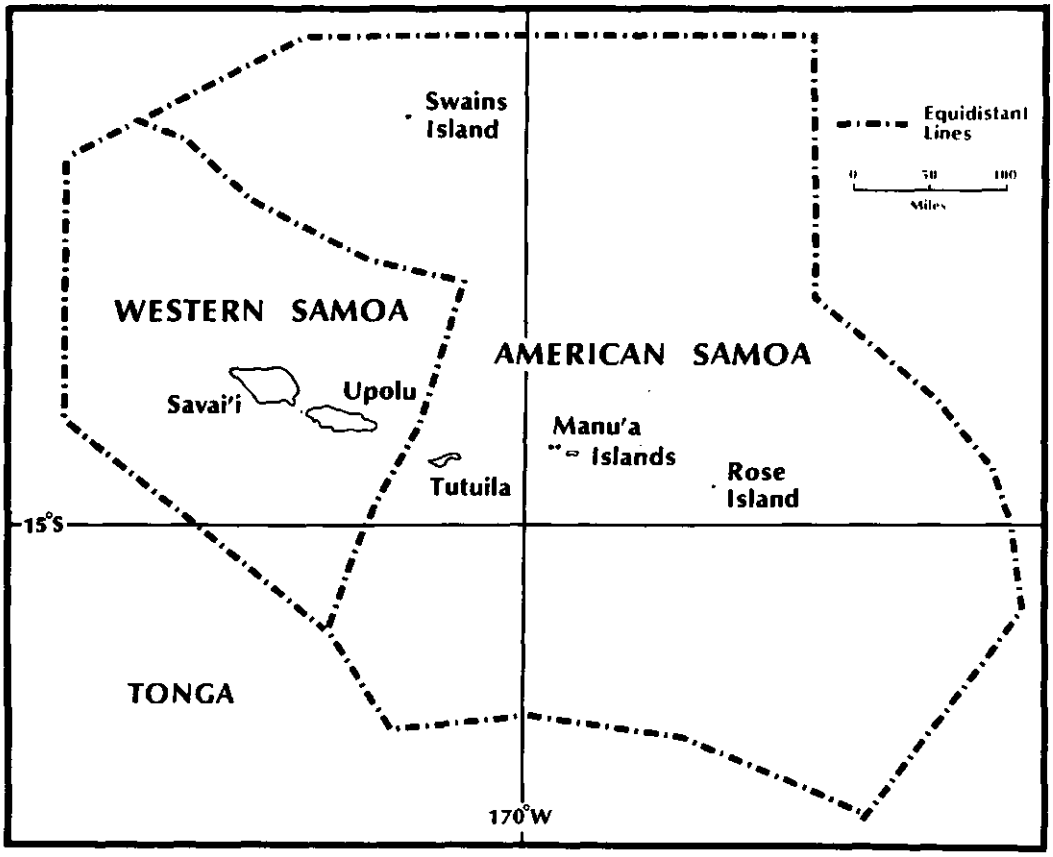

FIGURE 6: AMERICAN SAMOA AND WESTERN SAMOA

Lines illustrate ocean space which would be allotted to each if equidistance lines were used.

Nuutele, Nuulua and Nuusafee.[289] The group is an independent state[290] and a member of the United Nations, the South Pacific Forum and the (British) Commonwealth of Nations.[291]

In 1977, the Legislative Assembly of Western Samoa passed the Exclu-

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[289] W. SKINNER, HANDBOOK OF WESTERN SAMOA 17 (1925). Savai'i and Upolu comprise most of the land area. Savi'i accounts for 660 square miles; Upolu, 430 square miles. Only Apolina and Manono of the smaller islands are inhabited. The rest are near the fringe reef surrounding Upolu. J. Adren, The Political Development of Western Samoa from Mandate to Independence 4-6 (1964) (unpublished Ph.D. thesis at the University of Oklahoma).

[290] Western Samoa became an independent state on January 1, 1962. PAC. ISLANDS Y.B., *supra* note 24, at 501.

[291] *Id.* In 1889, Samoa was divided into Western Samoa and American Samoa along 171°

sive Economic Zone Act of 1977,[292] which establishes an exclusive economic zone of 200 miles measured from the baselines described in the Territorial Seas Act of 1971.[293] Despite the potential jurisdictional overlaps resulting from this claim, no reservations have yet been raised by Tonga or American Samoa. Western Samoa has not signed any of the 1958 Geneva Conventions.

C. *American Samoa*

American Samoa is an unorganized and unincorporated territory of the United States.[294] The main group contains six islands: Tutuila, Aunuu, Tau, Ofu, Olosega and Rose Island.

The United States has claimed a three-mile territorial sea around the territory[295] and a 200-mile fisheries management zone under the 1976 Fisheries Conservation and Management Act.[296] As a territory of the United States, American Samoa is subject to the treaties and conventions which the United States has ratified, including all the 1958 Geneva Conventions.

D. *Specific Problem Areas*

1. *Rose Island*

Rose Island is an atoll approximately eighty miles southeast of Tau Is-

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west longitude, with Germany acquiring Western Samoa in return for renouncing its claims in Tonga and West Africa to Great Britain. J. HART, HISTORY OF SAMOA 87 (1971).

[292] *Reprinted in* 29 U.N. GAOR, U.N. Doc. ST/LEG/SER. B/18 (1976) at 33 (as noted in Krueger & Nordquist, *supra* note 97, at 348).

[293] Act No. 3 of July 15, 1971 (Western Samoa), *reprinted in* 29 U.N. GAOR, U.N. Doc. ST/LEG/SER. B/18/Add. 2 at 37 (text transmitted through the Charge' d'Affaires a.i. of New Zealand to the United Nations in a note verbale of July 9, 1974). *Id.*

[294] *See generally* Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAWAII L. REV. 337, 361-62 (1981). Tate, *What's Going On in American Samoa?* 79 CASE AND COMMENT 26 (1974). Residents of American Samoa are "nationals" of the United States with rights to travel to and from other parts of the American political community. The right to trial by jury was recently declared to be a right of defendants in American Samoa. King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977).

After the 1889 division of the two Samoas (*see* note 291 *supra*), the American islands were placed under the jurisdiction of the United States Department of the Navy and designated as Tutuila Naval Station. In 1911, "American Samoa" was adopted as the name of the territory. In 1951, the territory's administration was transferred to the United States Department of the Interior. PAC. ISLANDS Y.B., *supra* note 24, at 45.

[295] J. Prescott, *supra* note 189, at 12.

[296] 16 U.S.C. §§ 1801-1882 (1976).

land in the Manua Group of American Samoa[297] (see Figure 6). It is a naturally formed area of land above water at high tide.[298] Plant life apparently exists on the atoll because German promoters of a fishing station planted coconuts on the island around 1870.[299] Although presently uninhabited, it is apparently capable of supporting life. Setchell reported in 1924 that one of the Samoans employed in conjunction with the fishing station remained on the island with his family after the project had been discontinued.[300] Rose Island thus qualifies as an island under article 121(1) of the Draft Convention[301] and article 10 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.[302] It would therefore be entitled to a territorial sea under article 10(2) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone[303] and a territorial sea, contiguous zone, exclusive economic zone and continental shelf under article 121(2) of the Draft Convention.[304]

2. *Swains Island*

Swains Island is an atoll with a land area of a little over one square mile[305] (see Figure 6). The greatest elevation of land is about six meters.[306] The island is historically and geographically a part of the Tokelau Islands.[307] It has a small population of people of Samoan and Tokelauan extraction.[308]

Shortly after 1841, Tokelau Islanders formed a colony on the atoll. Swains Island was originally included within the Tokelau islands as part

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[297] J. COULTER, LAND UTILIZATION IN AMERICAN SAMOA 43 (1941).

[298] W. SETCHELL, AMERICAN SAMOA 227 (1924).

[299] *Id.* at 247; J. COULTER, *supra* note 297, at 43.

[300] W. SETCHELL, *supra* note 298, at 247.

[301] Draft Convention, *supra* note 1.

[302] Convention on the Territorial Sea and Contiguous Zone, *supra* note 9.

Rose Island would merit consideration as an island under a test even more rigorous than the one adopted in the Draft Convention. Although not presently inhabited, Rose Island, "dont les conditions naturelles permettent la residence stable de groupes humains organizes" and is "capable of effective occupation and control," thus satisfying the more rigorous tests proposed by Lauterpacht. *See* text accompanying notes 144-55 *supra*; *see generally* Van Dyke & Brooks, *supra* note 159.

[303] Convention on the Territorial Sea and Contiguous Zone, *supra* note 9.

[304] Draft Convention, *supra* note 1.

[305] PAC. ISLANDS Y.B., *supra* note 24, at 55.

[306] *Id.*

[307] Tokelau is a territory directly north of the Samoas under New Zealand administration. *Id.* at 401.

[308] HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, SPECIAL SUBCOMM. ON TERRITORIAL AND INSULAR AFFAIRS, 84TH CONG., 1ST SESS., REPORT ON AMERICAN SAMOA (Comm. Print No. 4). According to the 1970 census, the population of Swains Island was 74. PAC. ISLANDS Y.B., *supra* note 24, at 55-56.

of the Union Group and was then known as Olosenga.[309] The Union Group was subsequently incorporated into the British colonies of Gilbert and Ellice Islands in 1916.[310] In 1925, Swains Island was annexed by the United States and made an administrative part of American Samoa.[311] Today the island is owned by a single family, which exploits the atoll for copra, producing up to 200 tons per year.[312]

Although American Samoa, as an island community, can advance many of the equitable arguments in favor of establishing an archipelagic regime for itself, it cannot qualify as an archipelagic regime drawing archipelagic baselines around all its islands under the provisions of the Draft Convention.[313] One problem is that if Swains Island is used as one of the base points for drawing archipelagic baselines, the resulting group would not satisfy the water-to-land ratio test.[314] In addition, the recent United States policy has been to refrain from recognizing archipelagic regimes and no attempt has thus been made to declare archipelagic status for American Samoa. Finally, because the Draft Convention permits only "States" to declare themselves archipelagoes, American Samoa may be foreclosed from making such a claim.[315]

If independence were declared, however, or if the "States" requirement in the Draft Convention were interpreted to include dependent territories, American Samoa could follow the precedent of Fiji and declare an archipelago using its main islands as base points, excluding Rose and Swains Islands.[316] The ocean between Swains Island and the main islands would then be included in an exclusive economic zone but would not be subject to those sovereign rights adhering to archipelagic waters.

If the United States declares a 200-mile exclusive economic zone around American Samoa, Swains Island could permit American Samoa to declare ocean boundaries disproportionate in relation to its neighbors (see Figure 6). Swains Island could account for approximately one-third of the total claim for American Samoa and at the same time severely restrict the claims of Western Samoa and Tokelau.[317] Application of the principle of

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[309] PAC. ISLANDS Y.B., *supra* note 24, at 56.

[310] Swains Island is historically closer to the Tokelaus as evidenced by the large number of Tokelau Islanders that originally lived on the island and the number of Tokelau-style homes still in existence there. J. GRAY, AMERIKA SAMOA 211 (1960); PAC. ISLANDS Y.B., *supra* note 24, at 56.

[311] H.R.J. Res. 294, 64th Cong., 1st Sess., 43 Stat. 1357 (1925).

[312] The island is owned by the Jennings family. PAC. ISLANDS Y.B., *supra* note 24, at 56.

[313] Draft Convention, *supra* note 1, arts. 46-54; Krueger & Nordquist, *supra* note 97, at 13.

[314] See Draft Convention, *supra* note 1, art. 47, *quoted at* text accompanying note 103 *supra*.

[315] Draft Convention, *supra* note 1, arts. 46-47.

[316] *See* section III-A *supra*.

[317] *See* J. Prescott, *supra* note 189, at 15.

equidistance would not appear to produce equitable results in this case. Instead, this situation presents another occasion in which it may be more equitable to apply the approaches used in the Anglo-French arbitration.[318]

Swains Island is only 175 kilometers from the Tokelaus but is 450 kilometers from American Samoa's main island of Tutuila.[319] The geographic location of Swains Island is therefore comparable to that of the British Channel Islands, which are closer to France than to the United Kingdom, but are under the latter's jurisdiction.[320] As discussed earlier,[321] in the Anglo-French Arbitration, the court found that the Channel Islands were a special circumstance because of geographic facts[322] and devised a creative solution to delimit the boundaries. The court ruled that the Channel Islands were on France's continental shelf and thus surrounded by French ocean space.[323] It then created an "enclave" to be measured twelve miles seaward from the natural baselines of the Channel Islands, which then became British ocean space.[324]

Tokelau would be able to present additional equitable arguments to justify creation of such an "enclave." Swains Island has traditional ties to Tokelau and has very limited economic importance to American Samoa.

Alternatively, the effect of Swains Island on the boundaries could be minimized in the manner proposed by the Anglo-French court for the Cornish Scilly Islands.[325] Once again, the court recognized a "special circumstance" based on the tendency of these islands to distort the equidistant line. The equidistant line was modified by giving only "half effect" to the Scilly Isles as base points.[326] The court developed one equidistant line using the Scilly Isles and another ignoring its existence; the resulting triangle was then divided in half.[327]

This approach could be followed in the Swains Island situation. One equidistant line using Swains Island and Tutuila as base points could be drawn. A second equidistant line, ignoring Swains Island could then be drawn, and some fraction, possibly one-half, of the resulting extension could be awarded to Tutuila.

The location of Swains Island presents another potential delimitation problem in that declaration of a 200-mile exclusive economic zone around

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[318] Anglo-French Arbitration, *supra* note 6. *See* text accompanying notes 253-56 *supra*.

[319] PAC. ISLANDS Y.B., *supra* note 24, at 55-56.

[320] *See* text accompanying notes 253-56 *supra*.

[321] *Id.*

[322] Anglo-French Arbitration, *supra* note 6, ¶ 196, 18 I.L.M. at 443-44.

[323] *Id.* ¶ 201, 18 I.L.M. at 444.

[324] *Id.* ¶ 202, 18 I.L.M. at 444-45.

[325] *Id.* ¶¶ 248-55, 18 I.L.M. at 455-56; *see* text accompanying notes 257-60 *supra*.

[326] *Id.* ¶ 253, 18 I.L.M. at 456.

[327] *Id.* ¶¶ 250-55, 18 I.L.M. at 455-56.

Swains Island would create an overlap with the zone claimed by Western Samoa, further boxing in that country's maritime space[328] (see Figure 6). Application of the proportionality principle, recognized by the International Court of Justice in the *North Sea Cases*, may be appropriate to a delimitation between American Samoa and Western Samoa.[329] The court held that a reasonable degree of proportionality should exist between the extent of the continental shelf and the lengths of the coastlines of the respective nations.[330]

Because no continental shelf exists in this area of the Pacific, a modified proportionality principle might be more appropriate to the Samoan delimitation. Since the countries are island states, a more significant consideration than the length of the coastlines would be the land area of the two Samoas. If the equidistance principle is utilized, Western Samoa, with a land area more than fourteen times that of American Samoa, would be entitled to only a third of the expanse of exclusive economic zone that American Samoa could claim. Proportionality, as applied in this context, would require giving Western Samoa a larger exclusive economic zone.

Once again, the solutions applied to ameliorate the disproportionate effect of the Channel Islands and Scilly Isles in the Anglo-French case could be useful in achieving a fair resolution.[331]

3. *Tafahi and Niuatoputapu Islands (Tonga)*

Tafahi and Niuatoputapu are located 127 nautical miles from the island of Vavau in the main Tongan group (see Figure 1). Tafahi is 142 nautical miles from Western Samoa.[332]

The Channel Islands' solution[333] may provide one possible model for resolving this potential overlap between Tonga's and Western Samoa's exclusive economic zones. Tafahi and Niuatoputapu could be treated as enclaves and accorded twelve-mile fisheries zones.[334] Tafahi and Niuatoputapu might then be discounted as base points in drawing an equidistant line.[335] In the alternative, both Tongan islands might be given

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[328] *See* note 317 *supra* and accompanying text.

[329] [1969] I.C.J. 4, 52, 54.

[330] *Id.*

[331] *See* notes 253-61 *supra* and accompanying text.

[332] J. Prescott, *supra* note 104, at 21. The importance of Niuatoputapu to Tonga was recently underscored. In June 1981, Tonga's Deputy Prime Minister, Baron Tuita, told the legislative assembly that the two most northerly islands, Niuatoputapu and Niua-foou, would gain the right to elect a people's representative to Parliament. 52 PAC. ISLANDS MONTHLY 44-45 (1981).

[333] *See* text accompanying notes 253-56 *supra.*

[334] *See* text accompanying note 256 *supra.*

[335] *Id.*

half-effect, as were the Scilly Isles.[336]

Given the overriding importance to Tonga of its historic claim,[337] Tonga may prefer to rely solely on that claim. Since Tafahi and Niuatoputapu lie near the northeastern boundary of the historic claim, Western Samoa would experience a minor reduction in its exclusive economic zone, but one that would be substantially less than under the above principles. Western Samoa would thus have an incentive to recognize Tonga's historic claim if it is considered to be the boundary of an exclusive economic zone. This recognition would also benefit Tonga in establishing its claim and negotiating with its other neighbors.

VI. Summary and Conclusion

Official attention to boundary delimitation in the South Pacific has thus far been limited. Perhaps the problems of overlapping ocean boundary lines have not become a matter for serious concern because the inhabitants are not yet able to exploit the far reaches of their exclusive economic zones sufficiently to encounter conflict with their neighbors. One could also speculate that the "Pacific way" might even allow for unlimited joint use. An overall regional regime may well make sense in many instances. The South Pacific nations have recognized such a peaceful approach through their continuing efforts in the South Pacific Forum, the Forum Fisheries Agency[338] and the South Pacific Commission regarding fisheries utilization.

Pressure from other nations, however, may change this situation dramatically. The land resources of Western Samoa and Tonga are of little sustaining economic value, and both nations are looking to the sea to broaden their economic bases and improve the diet of their peoples.[339] Both have expressed concern for the possibility of overfishing of their waters by foreign fishing vessels and interest in the establishment of rational fisheries management and conservation techniques.[340]

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[336] *See* text accompanying note 260 *supra*.

[337] *See* note 26 *supra* and accompanying text.

[338] *See generally* Van Dyke & Heftel, *supra* note 17.

[339] 1975-1979 Western Samoa Economic Development Plan, *supra* note 283, at 64-65; 1975-1980 Tonga Development Plan, *supra* note 19, at 206-08.

[340] According to Mr. Slade, Western Samoa's delegate to the 1974 Conference on the Law of the Sea:

> Western Samoa was therefore greatly concerned to see other countries with the most sophisticated of fishing technology indiscriminately taking fish, often well within its territorial waters, and rapidly depleting its resources. It had not the means to monitor or to counter those activities and was thus quite helpless in the face of large-scale foreign fishing which was likely to result in over-fishing of stocks.

I UNCLOS III OR at 84, U.N. Sales No. E.75 V.3 (1974).

All these island communities face a problem in policing their waters. Their naval power is limited compared to the developed nations of the world, and, in some cases, it is nonexistent. Their lack of sophisticated vessels places them in a competitively disadvantageous position for pursuing fish, petrochemicals or polymetallic nodules.

Clarification of ocean boundaries may be necessary in order to exclude foreign fishing vessels, to negotiate joint fishing agreements and to impose fees, royalties or other forms of reimbursement for fish taken from national waters. If other resources are discovered, such as petroleum or polymetallic nodules, the financial impetus for drawing boundaries will be even greater. If proposals are made to use the seabed for dumping or emplacement of nuclear wastes, environmental concerns will certainly lead to the desire for clear boundaries. These are all matters over which every state has the right to exercise control.

Both Tonga and Fiji claim uninhabited reef areas far from their main island groups. No dispute yet exists regarding these claims, but whether these reefs can or should generate 200-mile resource zones remains in doubt. The Tongan situation is particularly complex, because the Tongans have built artificial land structures on top of a reef that is below water at high tide. At the very least, one can conclude that these reefs should not be able to generate zones that would infringe upon the established zones of other nations. They arguably should not generate any zones whatsoever because these zones would reduce the resources available to the common heritage of humankind.

Tonga's historic title claim of 1887 may also create difficulties. Was the Proclamation originally issued to claim the waters themselves or only to give clear guidance to the locations of the islands claimed? Should the historic claim be considered one for a territorial sea, a modified archipelago or a type of resource zone? A historic claim should certainly be given due consideration in any ultimate resolution, but the actual weight to be given must be determined through good-faith negotiations.

The problem involving the two Samoas appears to require maximum flexibility in order to ameliorate the harshness of geographic realities because a solution based on the drawing of median lines between the two island groups leads to a result clearly inequitable to Western Samoa. Swains Island, separate from the main islands of American Samoa and only sparsely inhabited, appears to be a "special circumstance" demanding careful analysis in negotiations.

The Pacific Island communities have a strong record of resolving their differences in a "Pacific way," through agreements reached by respect and understanding. The boundary problems of this region have their own unique characteristics, but are not totally unlike problems that have been addressed and resolved in other regions. The Pacific communities may be

able to draw upon these recent solutions, and may in turn be able to negotiate agreements that can serve as models to be used elsewhere.

EQUITY AND FORFEITURES IN CONTRACTS FOR THE SALE OF LAND*

by Michael Cane**

It is well known that contracts for the sale of land have a special place in equity. Such agreements are particularly subject to the overview and protection of equity because of the unique qualities of land and the resulting inadequacy of legal remedies.[1]

One clear example of equitable protection occurs when one party to a contract for the sale of land declares a forfeiture because the other party fails to perform within the time agreed upon.[2] The bare bones of the problem can be stated as follows: S enters into a contract to sell land to B. The purchase price is payable over a certain period of time or on a certain date and B is required to make a down payment. It is agreed that upon default S may cancel the agreement and retain all monies paid as liquidated damages. In a standard provision it is further agreed that "time is of the essence" and any failure to perform within the time limit specified constitutes a default.[3] B fails to tender the balance or otherwise perform on time and S declares the agreement null and void.[4] S then sues to cancel the agreement and reacquire the property pursuant to the con-

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* This article is dedicated to the memory of Daniel Dexter.

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[1] Temple Enterprises v. Combs, 164 Or. 133, 100 P.2d 613 (1940); Keystone Sheep Co. v. Grear, 72 Wyo. 189, 263 P.2d 138 (1953); 71 AM. JUR. 2d *Specific Performance* 112 (1973) RESTATEMENT (SECOND) OF CONTRACTS § 360, Comment a (Tent. Draft No. 14, 1973). An example of equitable protection may be seen in a court-enforced remedy of specific performance.

[2] *E.g.*, Moran v. Holman, 501 P.2d 769 (Alaska 1972); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978). There are a number of reasons why one party to a contract would want to cancel the agreement upon the other party's delay. For example, during inflationary periods the value of property may increase during the term of the agreement.

[3] Provisions such as these are standard in such agreements. *See* Moran v. Holman, 501 P.2d 769 (Alaska 1972); Standard Form Deposit, Receipt, Offer and Acceptance, Hawaii Ass'n of Realtors.

[4] S, of course, might fail to perform his part in the bargain thus causing B to cancel the agreement. *See, e.g.*, Altadena Escrow Corp. v. Beebe, 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960). Such occurrences, however, are clearly in the minority; most likely because of the inflation factor mentioned in note 2, *supra*. Thus, this article will concentrate on the buyer breach, seller cancellation situation in analyzing equitable intervention.

tract. B counterclaims for specific performance after offering to fully perform.[5] The question confronting the court is whether to enforce the terms of the contract and declare a forfeiture or refuse to enforce the forfeiture provision on equitable grounds and order specific performance.[6]

The decision is definitely not a simple one. Such cases have confounded courts for years, resulting in conflicting decisions[7] and tortuous interpretations of contractual provisions.[8] In the resulting confusion and uncertainty the ultimate losers are the parties to the contract who are less able to predict outcomes and make plans pursuant to their contractual relations.[9]

This article reviews a number of cases involving the type of situation described above. It examines the legal rules used in deciding these cases in order to develop an analytical framework for deciding similar future

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[5] *See, e.g.*, Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978). On the other hand, the buyer may bring the action for specific performance followed by the seller's counterclaim for cancellation. *See, e.g.*, Moran v. Holman, 501 P.2d 769 (Alaska 1972); Weisberg v. Ashcraft, 223 Cal. App. 2d 793, 36 Cal. Rptr. 188 (1963). Or an escrow agent can bring an interpleader action to determine the proper disposition of the property. *See, e.g.*, Altadena Escrow Corp. v. Beebe, 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960). An escrow agent's typical reaction to any conflict between the parties is to hold all documents and money and await a court order or mutual agreement of the parties. *See, e.g.*, Wagner v. Keechi Oil & Gas Co., 79 Okla. 3, 190 P. 864 (1920). In any case, the resulting analysis is the same.

[6] *I.e.*, conveyance of property to the buyer.

[7] *Compare* Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978) *and* Bohnenberg v. Zimmerman, 13 Hawaii 4 (1900) *with* Lum v. Stevens, 42 Hawaii 286 (1958) *and* Tomikawa v. Gama, 14 Hawaii 175 (1902). *Also compare* Pothast v. Kind, 218 Cal. 192, 24 P.2d 771 (1933) *and* Moran v. Holman, 501 P.2d 769 (Alaska 1972) with these cases.

[8] *See, e.g.*, Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978); Tomikawa v. Gama, 14 Hawaii 175 (1902); Hubbell v. Ohler, 213 Mich. 664, 181 N.W. 981 (1921). Compare the Allan court's interpretation of the "thirteen day letter" clause with the interpretation of the court in Weisberg v. Ashcraft, 223 Cal. App. 2d 793, 36 Cal. Rptr. 188 (1963) of the "five day notice" requirement. *See* 1 J. POMEROY, EQUITY JURISPRUDENCE § 455 at 301 (5th ed. 1941). Pomeroy notes:

> [T]he question whether equity will relieve [the vendee] . . . ought to be a very plain and simple one; but in the face of the authorities, it is impossible to be answered in any general or certain manner. . . . This conclusion is in plain accordance with the general doctrine of equity in relation to relief against forfeitures; but it cannot be regarded as a universal rule. Under exactly these circumstances many American decisions have . . . refused to give any relief.

Id. at 305. *See also* Wagner v. Keechi Oil & Gas Co., 79 Okla. 3, 190 P. 864 (1920) (where the court used strictly interpreted contract terms in order to declare default and forfeiture); Quinlan v. St. John, 28 Wyo. 91, 201 P. 149 (1921) (where the court took a very restrictive view in interpreting the allegations of the complaint to refuse plaintiff relief).

[9] The confusion is compounded by the courts inconsistent use of language in these cases. Some courts will talk in equitable terms and discuss relief from a forfeiture, *see, e.g.*, Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978); Bohnenberg v. Zimmerman, 13 Hawaii 4 (1900), while others do not mention equitable considerations. *See, e.g.*, Altadena Escrow Corp. v. Beebe, 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960); Pothast v. Kind, 218 Cal. 192, 24 P.2d 771 (1933). Still others blatantly ignore the equities of the case completely. *See, e.g.*, Shoup v. First Nat. Bank of Hays, 145 Kan. 971, 67 P.2d 569 (1937).

cases.

I. EQUITABLE INTERVENTION IN GENERAL

A court's authority to prevent cancellation of a contract for the sale of land and to order specific performance on equitable grounds is derived from the general maxim that "equity abhors a forfeiture."[10] Invoking this maxim, a court acting in equity under proper circumstances will relieve a purchaser of land from forfeiting his interest therein, even though he may have been in default under the agreement.[11] This, however, does not mean that a purchaser will be relieved from a forfeiture regardless of the harm caused to the vendor by the default,[12] the nature of the interest being forfeited,[13] or the relative conduct of the parties with regard to the default.[14] Equitable relief is discretionary,[15] not automatic.[16] To be enti-

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[10] Moran v. Holman, 501 P.2d 769 (Alaska 1972); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978); Curry v. Curry, 213 Mich. 309, 182 N.W. 98 (1921); McCartney v. Campbell, 114 W. Va. 332, 171 S.E. 821 (1933). *See* Morris v. George C. Banning, Inc., 49 Ohio App. 530, 77 N.E.2d 372 (1947); 3A A. CORBIN, CONTRACTS §§ 713-15 (1960); 30 C.J.S. *Equity* § 56 (1965). The Hawaii Supreme Court has also recognized the use of equity to prevent forfeitures in leasehold arrangements. *See, e.g.*, Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Hawaii 606, 575 P.2d 869 (1978); Kanakanui v. De Fries, 21 Hawaii 123 (1912); Lau Dan v. Ah Leong, 19 Hawaii 417 (1909). Relief is granted upon the principle that a party with a legal right shall not be permitted to use it for purposes of injustice or oppression. Kahn v. Janowski, 191 Md. 279, 60 A.2d 519 (1948); Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 316 (1891). *See generally* 27 AM. JUR. 2d *Equity* § 77 at 600 (1973); 30 C.J.S. *Equity* § 56 at 889 (1965).

[11] *See, e.g.*, Moran v. Holman, 501 P.2d 769 (Alaska 1972); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978); Curry v. Curry, 213 Mich. 208, 182 N.W. 98 (1921); Blenheim Homes, Inc. v. Mathews, 119 Ohio App. 2d 44, 196 N.E.2d 612 (1963) (contract provisions are only one factor to be considered); Morris v. George C. Banning, Inc., 49 Ohio App. 530, 77 N.E.2d 372 (1947). *See also* Selby v. Battley, 149 Cal. App. 2d 659, 309 P.2d 120 (1957) (where contractor in default was granted specific performance in order to avoid an unconscionable forfeiture).

[12] *See* notes 106-07 *infra*. A fundamental limitation on the exercise of such equitable jurisdiction is that the loss caused by the default must be susceptible to exact calculation so that damages may be awarded in lieu of a forfeiture. Pierce v. New York Dock Co., 265 F. 148 (2d Cir. 1920). If it is impossible for a defaulting party to show that compensation can be made, equity will generally deny relief. *See* Tong v. Chan, 27 Hawaii 812 (1924) (court refused to relieve tenant from a forfeiture of his lease for a breach of his covenant to repair). Similarly, equity will not allow the defaulting party to put the nondefaulting party in peril of losing his interest. Schwartz Amusement Co. v. Independent Order of Odd Fellows, Howard Lodge, No. 15, 278 Ky. 563, 128 S.W.2d 965 (1939) (the court, while noting that forfeitures are not favored, stated that it would not allow the tenant to place the landlord in a position of peril and thus prevent the landlord from declaring a forfeiture for noncompliance).

[13] *See* text accompanying notes 101-05 *infra*.

[14] *See* text accompanying notes 110-15 *infra*.

[15] Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Hawaii 606, 575 P.2d 869 (1978); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978); First Hawaiian Bank v. Smith, 52 Hawaii 591, 483 P.2d 185 (1971). *See generally* 27 AM. JUR. 2d *Equity* § 77 (1973); 30 C.J.S.

tled to equitable relief, a party must be willing and able to completely perform his part of the bargain.[17] A default in these cases will be based upon a failure to perform within a stated period of time as opposed to a total refusal to perform.[18] Consequently, time is a key element in review.

The general rule is that where time is of the essence in an agreement, a party will be denied specific performance unless he has performed within the specified time.[19] Time is of the essence when it is specifically stated in

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Equity § 56 at 890 (1965). Discretion lies with the trial court acting within established principles of equity, and the decision made thereby will not be disturbed unless manifestly against the clear weight of the evidence. Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978). In exercising equitable power, the trial court may fashion a decree to meet the requirements of the situation and conserve the equities of the parties. Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Hawaii 606, 575 P.2d 869 (1978), *citing* Fleming v. Napili Kai, Ltd., 50 Hawaii 66, 430 P.2d 316 (1967), *reh'g denied*, 50 Hawaii 83, 431 P.2d 299 (1967).

[16] *See* Quinlan v. St. John, 28 Wyo. 91, 201 P. 149 (1921). Equitable jurisdiction to relieve a party from a forfeiture is regarded as dangerous and thus should not be extended but granted only in limited circumstances. Murray v. Trustees of the Lane Seminary, 1 Ohio Op. 2d 236, 140 N.E.2d 577 (1956).

[17] *E.g.*, Moran v. Holman, 501 P.2d 769 (Alaska 1972) (distinguishing the case of Alaska Pacer Co. v. Lee, 455 P.2d 218 (Alaska 1969) on the ground that there was no indication in *Alaska Pacer Co.* that the defaulting party would be able to perform). Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978); Kanakanui v. De Fries, 21 Hawaii 123 (1912); Lau Dan v. Leong, 19 Hawaii 417 (1909).

See Hubbell v. Ohler, 213 Mich. 664, 181 N.W. 981 (1921), where the court granted relief conditional upon the vendees' immediate payment of the entire purchase price, all arrearages of interest, all taxes paid by the vendors, vendors' attorneys' fees and costs. *Accord*, Morris v. George C. Banning, Inc., 49 Ohio App. 530, 77 N.E.2d 372 (1947).

[18] If the vendee refuses to perform, the vendor can recover possession. *See* Carter v. Brownell Auto Co., 217 Ala. 690, 117 So. 304 (1928); Fisher v. Chaffe, 49 Cal. App. 2d 97, 121 P.2d 51 (1942); Oaks v. Kendall, 23 Cal. App. 2d 715, 73 P.2d 1255 (1937); Hall v. Dallas Joint-Stock Land Bank of Dallas, 95 S.W.2d 200 (Tex. Civ. App. 1936).

[19] Weisberg v. Ashcraft, 223 Cal. App. 2d 793, 36 Cal. 188 (1963); Lum v. Stevens, 42 Hawaii 286 (1958); Tomikawa v. Gama, 14 Hawaii 175 (1902); Bohnenberg v. Zimmerman, 13 Hawaii 4 (1900); Stern v. Shapiro, 138 Md. 615, 114 A. 587 (1921); Wimer v. Wagner, 323 Mo. 1156, 20 S.W.2d 650 (1929); Dodge v. Galusha, 151 Neb. 753, 39 N.W.2d 539 (1949); Dwelly v. Rochlin, 47 R.I. 327, 133 A. 85 (1926). Whether equity will grant relief from a forfeiture depends on whether the parties stipulated that time is of the essence. The only difficulty is in determining when time has been made of the essence. 1 J. POMEROY, *supra* note 8, § 455 at 301-02.

In certain cases involving escrow arrangements, courts ignore whether time is of the essence and deny specific performance on the ground that escrow arrangements require strict performance. *See, e.g.*, Pothast v. Kind, 218 Cal. 192, 24 P. 771 (1933); Altadena Escrow Corp. v. Beebe, 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960). *See also* text accompanying notes 29-53 *infra*.

When the escrow agreement (1) fails to specify that time is of the essence, (2) lacks a definite time provision, or (3) the court determines that time was not essential to the agreement, then the time of performance is within a reasonable time. No default in such a case can occur until after a demand and a refusal to perform within a reasonable time. What constitutes a reasonable time is a question of fact to be determined by all the circumstances. Bradshaw v. Superior Oil Co., 164 F.2d 165 (10th Cir. 1947); Rockefeller v. Smith, 104 Cal. App. 544, 286 P. 487 (1930); Jameson v. Shepardson, 83 Cal. App. 569, 257 P. 157 (1927);

the agreement[20] or it is clear from all the facts and circumstances that the parties intended to make performance at a certain time an important part of the agreement.[21] Such circumstances may be found in the nature and purpose of the contract,[22] the conduct of the parties[23] or, as indicated in a few cases, the mere facts that the contract specifies a certain date for performance.[24]

Burnap v. Sharpsteen, 141 Ill. 225, 36 N.E. 1008 (1894); Melfi v. Goodman, 73 N.M. 320, 388 P.2d 50 (1963).

Although it is sometimes stated that time is always of the essence at law while in equity it is not, Corbin notes that this has never really been the rule either at law or equity. 3A A. CORBIN, CONTRACTS § 713 at 353-56 (1960).

[20] Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978); L'Engle v. Overstreet, 61 Fla. 653, 55 So. 381 (1911); Garbis v. Weistock, 187 Md. 549, 51 A.2d 154 (1947); Dwelly v. Rochlin, 47 R.I. 327, 133 A. 85 (1926); Nadeau v. Beers, 73 Wash. 2d 608, 440 P.2d 164 (1968); RESTATEMENT (SECOND) OF CONTRACTS § 276(e) (1964).

Such "time of the essence" clauses are customary in contracts. Moran v. Holman, 501 P.2d 769 (Alaska 1972); Quinlan v. St. John, 28 Wyo. 91, 201 P. 149 (1921).

[21] *See* Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978); Lum v. Stevens, 42 Hawaii 286 (1958); Southern v. Chase State Bank, 144 Kan. 472, 61 P.2d 1340 (1936); Oesting v. City of New Bedford, 210 Mass. 396, 96 N.E. 1095 (1912); Granser v. Zimmerman, 80 N.W.2d 828 (N.D. 1956); Dwelly v. Rochlin, 47 R.I. 327, 133 A. 85 (1926); Johnson v. McMullin, 3 Wyo. 237, 21 P. 701 (1889). *See generally* 28 AM. JUR. 2d *Escrows* § 22 (1973); 30 C.J.S. *Equity* § 56 at 891 (1965); RESTATEMENT (SECOND) OF CONTRACTS § 276(e) (1964).

Special circumstances, however, must be made known to the other party. Haislmaier v. Ache, 25 Wis. 2d 376, 130 N.W.2d 801 (1964).

[22] *See* Garbis v. Weistock, 187 Md. 549, 51 A.2d 154 (1947); Oesting v. City of New Bedford, 210 Mass. 396, 96 N.E. 1095 (1912).

[23] *See* Garbis v. Weistock, 187 Md. 549, 51 A.2d 154 (1947).

[24] Jones v. First National Bank of Greensboro, 206 Ala. 167, 89 So. 437 (1921); Weisberg v. Ashcraft, 194 Cal. App. 2d 255, 14 Cal. Rptr. 817 (1961), *aff'd*, 223 Cal. App. 2d 793, 36 Cal. Rptr. 188 (1963). *See* Bank of Columbia v. Hagner, 26 U.S. (1 Pet.) 455 (1828) (time fixed for performance is, at law, deemed of the essence of the contract); Pothast v. Kind, 218 Cal. 192, 24 P.2d 771 (1933); Altadena Escrow Corp. v. Beebe, 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960). In these last two cases nothing was stated about time being of the essence in the agreement, yet the court enforced a cancellation of the contract on the ground that escrow agreements required strict compliance and, therefore, a delay past the stated date was fatal. *But see* Jameson v. Shepardson, 83 Cal. App. 596, 257 P. 157 (1927) (time is not of the essence unless clearly specified); Garbis v. Weistock, 187 Md. 549, 51 A.2d 154 (1947). In *Garbis* the court stated:

> In written contracts which specify a given date for consummation . . . but do not contain a provision that time is of the essence of the contract, the time limit is to be given consideration and means the approximate date within which settlement must be made. Yet if the matter is not consummated within an approximation of the time specified in the contract, in the absence of wilful conduct creating delay, and in the absence of any injury caused by the delay, a court of equity will decree specific performance.

Garbis v. Weistock, 187 Md. 549, __, 51 A.2d 154, 157 (1947). *See, e.g.*, Hunter-Benn & Co. v. Basset Lumber Co., 224 Ala. 215, 139 So. 348 (1932) (performance will be allowed within a reasonable time, unless it affirmatively appears that time is of the essence in the contract); Haislmaier v. Zache, 25 Wisc. 2d 376, 130 N.W.2d 801 (1964) (time not regarded as of the essence merely because a definite time is stated). *Accord*, 3A A. CORBIN, CONTRACTS § 716 at 365 (1960).

On the other hand, merely stating "time is of the essence" in a land sale contract does not guarantee that a court will so treat it when asked to enforce the forfeiture provision.[25] Such a term may be read out of the agreement,[26] determined to be inapplicable to the specific performance provisions involved[27] or be held to be a covenant giving rise to an action for damages only.[28]

Consequently, it is necessary to look further than the time and default clauses in the agreement when analyzing the extent of equitable intervention in contracts for the sale of land.

II. Escrow vs. Non-Escrow Situations as a Test for Equitable Intervention

One material factor in a court's determination as to whether equitable relief will be granted is the existence of an escrow agreement. An escrow arrangement is a conveyancing device designed to carry out the terms of a land sale contract.[29] The escrow agreement contains instructions by the

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Courts may determine that the naming of a certain date creates a constructive condition precedent to delivery. *See, e.g.*, Katemus v. Westerlind, 120 Cal. App. 2d 537, 261 P.2d 553 (1953); New York v. Butter, 276 Mass. 236, 176 N.E. 797 (1930) (ability of seller to give good title on the agreed date was a condition of his duty to convey); Grose v. Lucas, 245 S.W.2d 831 (Mo. 1952); Williams v. Shamrock Oil & Gas Co., 128 Tex. 146, 95 S.W.2d 1292 (1936) (buyer's promise to drill well condition precedent to seller's promise to convey). In *Grose* and *Williams* the purchasers were not entitled to specific performance because they did not tender performance within the time required by their agreement.

[25] *E.g.*, Barton v. W. O. Broyles Stove & Furniture Co., 212 Ala. 658, 103 So. 854 (1925). If the provision has the effect of enforcing an excessive penalty or unjust forfeiture, equity will prevent such enforcement. 3A A. Corbin, Contracts § 715 (1960). It is said that slight circumstances are sufficient for equity to prevent the use of a time stipulation. *See, e.g.*, Hunter-Benn and Co. v. Bassett Lumber Co., 224 Ala. 215, 139 So. 348 (1932); Moran v. Holman, 501 P.2d 769 (Alaska 1979); Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 316 (1891) (omission of mortgagor to pay a sewer assessment of which she was not aware excused). *See* Bilandzija v. Shilts, 334 Mich. 421, 54 N.W.2d 705 (1952) (time cannot be made of the essence merely by declaring it to be so). *See generally* 27 Am. Jur. 2d *Equity* § 80 (1973).

In Jenkins v. Wise, 58 Hawaii 592, 598 n.3, 574 P.2d 1337, 1341 n.3 (1978), the court stated that a "time is of the essence" clause is just one factor to be taken into consideration in determining whether a court in equity will intervene to set aside a forfeiture.

[26] *See, e.g.*, Moran v. Holman, 501 P.2d 769 (Alaska 1972) (buyer's irregular payments excused because seller did not enforce timely payments for 16 months); Weisberg v. Ashcraft, 223 Cal. App. 2d 793, 36 Cal. Rptr. 188 (1963) (strict performance excused when buyer acted within a reasonable time).

[27] 3A A. Corbin, Contracts § 715 (1960). Corbin notes that a "general" provision stating that "time is of the essence" should not be held to apply to all provisions in a contract alike, "especially in the case of installment payments for which interest is provided in case of nonpayment. Such an often-repeated provision as this may be inserted in a contract without any realization of its significance." *Id.* at 363. *See, e.g.*, Phillis v. Gross, 32 S.D. 438, 143 N.W. 373 (1913).

[28] *See generally* 3A A. Corbin, Contracts § 715 (1960).

[29] Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978). *See generally*, W. French & H.

parties to an escrow agent,[30] describing how and when the transfer of property is to occur.[31]

Typically these agreements require that the transaction be closed or completed by a specific date and make time of the essence by express stipulation.[32] Moreover, such agreements will usually make this closing and the exchange of possession conditional upon the completion by both parties of all obligations stated therein.[33] Indeed, by definition, an arrangement must be made conditional on the performance of some act or the happening of some event in order to constitute an escrow.[34]

While the general status of the escrow device in the law has been questioned,[35] the rules as to performance of the conditions set in the agreement appear to be clearly established. In such arrangements there is said to be no doctrine of substantial performance; performance must be strict, full and to the letter or else the conditions are not met and the condition precedent to valid delivery is not discharged.[36] No title or interest will,

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LUSK, LAW OF THE REAL ESTATE BUSINESS, ch. 16 (4th ed. 1979). The principal object of this arrangement is to minimize the risks and provide for the safe handling of transactions in real estate. 28 AM. JUR. 2d *Escrows* § 1 (1973).

Sales of real property are customarily consummated through such arrangements. Weisberg v. Ashcraft, 223 Cal. App. 2d 793, 36 Cal. Rptr. 188 (1963).

[30] An escrow agent is the person designated to handle the transaction; also known as a depository. *See generally*, Home Ins. Co. v. Wilson, 210 Ky. 237, 275 S.W. 691 (1925); 28 AM. JUR. 2d *Escrows* § 1 (1973).

[31] These instructions are distinct from the contract or deed placed in escrow. Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978); Home Ins. Co. v. Wilson, 210 Ky. 237, 275 S.W. 691 (1925); 28 AM. JUR. 2d *Escrows* § 1 (1973). They are, however, typically taken directly from or make up the contract for sale. *See* Weisberg v. Ashcraft, 223 Cal. App. 2d 793, 36 Cal. Rptr. 188 (1963).

[32] See, for example, paragraph K of the standard form D.R.O.A. printed by the Hawaii Association of Realtors. *See also* Moran v. Holman, 501 P.2d 769 (Alaska 1972).

[33] *See, e.g.*, Pothast v. Kind, 218 Cal. 192, 24 P.2d 771 (1933) (escrow agent without power to deliver the deed until all the terms of the escrow had been fully complied with); Altadena Escrow Corp. v. Beebe, 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960) (inability of the escrow holder to close the escrow proximately caused by vendor's failure to timely deposit escrow instructions).

An escrow agent, in these situations, is given instructions to hold all instruments placed with him until the condition is met and then, and only then, to deliver them to the grantee. W. FRENCH & H. LUSK, *supra* note 29, at 724.

[34] Wagner v. Keechi Oil & Gas Co., 79 Okla. 3, 190 P. 864 (1920); McPherson v. Barbour, 92 Or. 509, 183 P. 752 (1919); Lechner v. Halling, 35 Wash. 2d 903, 216 P.2d 179 (1950). *See generally* 28 AM. JUR. 2d *Escrows* § 5 (1973). It is the annexation of a condition to delivery which characterizes the escrow arrangement. *See* Home Ins. Co. v. Wilson, 210 Ky. 237, 275 S.W. 691 (1925) (court states the reasoning behind the requirement of a condition).

[35] *See* Note, *A Survey of Escrow—A Legal Adolescence*, 8 ARK. L. REV. 164 (1954) (author suggests that the escrow device should be given its own independent status).

[36] Jones v. Gregg, 226 Ark. 595, 293 S.W.2d 545 (1956); Weisberg v. Ashcraft, 194 Cal. App. 2d 225, 14 Cal. Rptr. 817 (1961); Altadena Escrow Corp. v. Beebe, 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960); Todd v. Vestermark, 145 Cal. App. 2d 374, 302 P.2d 347 (1956); Watts v. Mohr, 86 Cal. App. 2d 256, 194 P.2d 758 (1948); Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N.W.2d 150 (1953); Wagner v. Keechi Oil & Gas, 79 Okla. 3, 190 P. 864 (1920).

therefore, pass from grantor to grantee unless and until there has been complete performance of all stipulated conditions, including those as to time.[37] Without such compliance, the escrow agent has no authority to deliver the deed, receive payment or otherwise close the transaction,[38] and the grantor is entitled to cancel the escrow and to redelivery of the instrument deposited.[39]

These rules are in direct conflict with those concerning land sale contracts generally. The general rule with regard to such contracts is that *substantial performance* of the contract terms is sufficient[40] and, therefore, a breach of a time provision is insufficient to discharge the nonbreaching party from his obligations as long as a tender of performance is made.[41]

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[37] San Diego Wholesale Credit Mens' Assn. v. Garner, 325 F.2d 862 (9th Cir. 1963); Andreas v. Henderson, 160 F. Supp. 252 (S.D. Cal. 1958); Van Mosch v. Waldrop, 177 Ark. 903, 8 S.W.2d 500 (1928); Mansfield Lumber Co. v. Gravette, 177 Ark. 31, 5 S.W.2d 726 (1928); Ford v. Moody, 169 Ark. 649, 276 S.W. 595 (1925); Love v. White, 56 Cal. 2d 192, 363 P.2d 482, 14 Cal. Rptr. 442 (1961); Parr-Richmond Indus. Corp. v. Boyd, 262 P.2d 573, *aff'd.* 43 Cal. App. 2d 793, 36 Cal. Rptr. 188 (1963); Vierneisel v. R.I. Ins. Co., 77 Cal. App. 2d 229, 175 P.2d 63 (1946); Ferguson v. Caspar, 359 A.2d 17 (D.C. 1976); Frankiewicz v. Konwinski, 245 Mich. 473, 224 N.W. 368 (1929); Muirhead v. McCullough, 234 Mich. 52, 207 N.W. 886 (1926); Seibel v. Higham, 216 Mo. 121, 115 S.W. 987 (1908); Dixon v. O'Conner, 180 Neb. 427, 143 N.W.2d 364 (1966); Dayle L. Smith Oil Co. v. Griffin, 104 S.W.2d 167 (Tex. Civ. App. 1937); Wilkins v. Sommerville, 80 Vt. 48, 66 A. 893 (1907). *See,* State v. Thom, 58 Hawaii 8, 563 P.2d 982 (1977) (title does not pass until conditions of escrow met); Bell v. Rudd, 144 Tex. 491, 191 S.W.2d 841 (1946).

[38] Jones v. First Nat. Bank of Greensboro, 206 Ala. 167, 89 So. 437 (1921); Pothast v. Kind, 218 Cal. 192, 24 P.2d 771 (1933); Jameson v. Shepardson, 83 Cal. App. 596, 257 P. 157 (1927); Brinton v. Lewiston Nat. Bank, 11 Idaho 92, 81 P. 112 (1905); Burnap v. Sharpsteen, 149 Ill. 225, 36 N.E. 1008 (1894); Melfi v. Goodman, 73 N.M. 320, 388 P.2d 50 (1963); Wagner v. Keechi Oil & Gas Co., 79 Okla. 3, 190 P. 864 (1920). *See generally* Annot., 107 A.L.R. 948 (1937).

An escrow agent or depository who violates the terms of the agreement by delivery prior to performance is liable for damages caused thereby. Note, *A Survey of Escrow—A Legal Adolescence,* 8 ARK. L. REV. 164, 170 (1954). The powers of an escrow agent are limited to those specified in the escrow agreement; he must, therefore, strictly comply with its terms. In re Dolly Madison Industries, 351 F. Supp. 1038 (E.D. Pa. 1972), *aff'd,* 480 F.2d 917 (3d Cir. 1973); Stein v. Rand Constr. Co., 400 F. Supp. 944 (S.D.N.Y. 1975); Union Title Co. v. Burr, 102 Ariz. 421, 432 P.2d 433 (1967); Ariz. Title Ins. & Trust Co. v. Realty Inv. Co., 6 Ariz. App. 180, 430 P.2d 934 (1967); Woodworth v. Redwood Empire Sav. & Loan Ass'n, 22 Cal. App. 3d 347, 99 Cal. Rptr. 373 (1971).

[39] Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978); Pothast v. Kind, 218 Cal. 192, 24 P.2d 771 (1933); Altadena Escrow Corp. v. Beebe, 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960). *See* Philipps and Colby Constr. Co. v. Seymour, 91 U.S. 646 (1875); Morris v. Prefabrication Eng'ring Co., 160 F.2d 779 (5th Cir. 1947); Weisberg v. Ashcraft, 223 Cal. App. 2d 793, 36 Cal. Rptr. 188 (1963).

[40] *See* 3A A. CORBIN, CONTRACTS §§ 713-716 (1960). Regarding time constraints in a contract, Corbin states: "time of performance is merely one element in determining whether a defective or incomplete or belated performance is 'substantial.'" *Id.* § 713 at 355.

[41] *See, e.g.,* Moran v. Holman, 501 P.2d 769 (Alaska 1972); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978).

A. Case Examples Utilizing Escrow Rules to Enforce Forfeiture of the Contract

A review of cases applying these rules may be instructive. In *Altadena Escrow Corp. v. Beebe*,[42] a vendor and vendee had entered into a sales contract and an escrow agreement calling for the sale of certain real property owned by the vendor. The instructions, in part, required the filing of a grant deed for recording and the issuance of a title insurance policy "prior to December 31, 1957."[43] The buyer signed and deposited his instructions, with the required notes and trust deeds, into escrow; but the seller, for some unexplained reason, did not file his signed copy of the instructions until December 23, 1957. This made closing by December 31 impossible. Buyer directed the escrow holder in writing on December 27 to cancel the transaction and return the documents to him. The escrow company brought an action in interpleader to determine the proper disposition of the property which it held in escrow.[44] Despite the seller's protests and offers to complete the sale as planned, the court stated that the terms and conditions of the escrow agreement must be strictly performed and, therefore, the buyer was entitled to terminate the agreement without being subject to the seller's claim of damages.[45]

While *Altadena* involved a seller's default, the cases have not made an artificial distinction between buyers' and sellers' defaults in applying the rules of escrow. For example, in *Pothast v. Kind*,[46] the California Supreme Court was faced with an escrow agreement whereby the vendor was to deliver the deeds to two lots to the vendees in return for a number of secured notes and $2,000 cash. The deeds were made and deposited, and one deed was actually delivered to the vendee, who promptly placed a mortgage on the property.[47]

The agreement in question allowed ninety days from the date escrow was opened for the deposit of the $2,000.[48] About sixty days after opening escrow, the vendees and certain third parties entered into a "supplementary" escrow with the same escrow agent, whereby $2,500 was deposited

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[42] 181 Cal. App. 2d 743, 5 Cal. Rptr. 530 (1960).

[43] The instructions provided further:

> If the conditions of this escrow have not been complied with prior to December 27, 1957, or any extension thereof, you are nevertheless to complete the escrow as soon as the conditions, except as to time, have been complied with, unless written demand shall have been made upon you not to complete it.

Id. at _, 5 Cal. Rptr. at 531.

[44] *Id.* at _, 5 Cal. Rptr. at 531-32.

[45] *Id.* at _, 5 Cal. Rptr. at 532. The court did not raise any issue of equitable relief, stating that the only issue was whether Beebe gave proper notice of cancellation under the agreement.

[46] 218 Cal. 192, 24 P.2d 771 (1933).

[47] *Id.*

[48] *Id.* at _, 24 P.2d at 772. The escrow agreement, however, contained no provision making time "of the essence" or "important."

on the purchase of one of the lots.[49] The vendors, however, were not parties to this supplemental arrangement.

Approximately ten days before the expiration of the ninety-day limit, the vendor attempted to cancel the entire sales agreement by demanding the return of his deeds. A few days later, the money held in the supplemental escrow was returned to the third parties.[50]

Nine days after the expiration of the ninety-day limit, the vendees deposited the cash required by the agreement into the original escrow and demanded performance by the vendor. The vendor instead brought suit to cancel the deed and mortgage, to quiet title on the lot and for a return from escrow of the other deed. The vendees countered by asking for specific performance and claiming that they were relieved of the duty to deposit the $2,000 on time by the anticipatory breach of the vendor.

The court, rejecting the vendee's claim, noted that the vendor's attempted repudiation was wholly ineffective since a delivery of a deed into escrow is irrevocable.[51] The duties of the parties thus set, the vendee's obligation to deposit the $2,000 within the time limit was continuing[52] and the escrow agent was without power to deliver the deed after the expiration of the ninety days unless all terms had been met at that time.[53] The court, seemingly unconcerned with the lack of any provision as to time being "of the essence," held that failure of the vendee to comply within the time limit entitles the vendor to cancellation.[54]

B. Non-escrow Situations Contrasted

In marked contrast to these decisions is the recent Hawaii Supreme Court decision of *Jenkins v. Wise*.[55] In *Jenkins*, the vendors of two parcels of land on Kauai entered into two separate agreements of sale for

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[49] *Id.* Certain restrictions were placed on the use of the deposit. From the sum, $2,000 was to be used in satisfaction of the initial escrow agreement.

[50] *Id.* The reasons for this action do not appear.

[51] *Id.*

[52] *Id.*:

> [T]he duty of [vendees] to provide the $2,000 within ninety days was a continuing one, which could not be waived by the unauthorized action of [vendor] . . . .
>
> This was not a case where the parties were dealing directly with each other and where an anticipatory breach by one might have excused performance by the other.

[53] *Id.*: "It is well settled that performance must be made within the time limit of the escrow arrangement."

[54] *Id.*:

> The provision of [the] agreement to the effect that the purchaser would carry out the escrow on his part after the expiration of the ninety-day period unless a written demand for return of the money and instruments deposited by him was made, does not alter the situation. [Vendor] had the right to rely upon the terms of the escrow that required deposit of the $2,000 within said prescribed period.

[55] 58 Hawaii 592, 574 P.2d 1337 (1978).

those parcels with the vendee.[56] The vendee put $6,000 down on each parcel and, after taking possession, made the first semi-annual payment of $4,000 on the first parcel when due. However, she failed to make the first payment on the second parcel as well as the second payment on the first parcel.[57] After waiting approximately six months, the vendors, pursuant to provisions of the agreements of sale, gave notices of cancellation for both agreements[58] and registered the notices with the Bureau of Conveyances.

A few weeks later, however, the vendors wrote the vendee a letter which indicated that the matter was still open.[59] Vendee did not respond to this letter. In fact, she and her partner had begun negotiating for the sale of the properties. A week or so after this letter was sent, they entered into an agreement to sell. They then wrote the vendors, informing them that the properties had been sold and that the purchase price would be paid by a specific date. No tender, however, was made on that date.[60]

Approximately one month later,[61] the vendors brought suit for a judicial determination that the vendee was in default and to cancel the two agreements of sale. The vendee counterclaimed for specific performance, alleging that the vendors had wrongfully and maliciously interfered with her attempts to sell the property.[62] The circuit court decreed a cancellation of the agreements of sale and the vendee appealed.[63]

Upon review, the Hawaii Supreme Court cited the general maxim that equity abhors a forfeiture; where no injustice would thereby result, equity will generally favor compensation rather than a forfeiture.[64] Whether or not to apply this equitable relief, the court stated, is within the sound discretion of the trial court.[65] The court, however, concluded that under

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[56] These agreements were executed on April 29, 1971, and September 15, 1971, respectively. *Id.* at 594, 574 P.2d at 1339.

[57] These payments were due on March 15, 1972, and April 15, 1972, respectively. *Id.* at 594, 574 P.2d at 1339-40.

[58] The notices of cancellation were hand-delivered on September 12, 1972. *Id.* at 594, 574 P.2d at 1340.

[59] The letter stated: "Having received no reply to my last letter [the notice of cancellation] regarding the . . . property if I do not hear from you by October 6th, 1972, this will be placed in the hand of my attorney." *Id.* at 594-95, 574 P.2d at 1340.

The court concluded that this was intended to afford the purchasers a further opportunity to cure their default. *Id.* at 599, 574 P.2d at 1342.

[60] The date set was November 15, 1972. *Id.* at 595, 574 P.2d at 1340.

[61] Suit was filed on December 29, 1972. *Id.*

[62] Wise complained that the Jenkinses never responded to communications requesting balances owed under the agreements of sale. *Id.* at 600, 574 P.2d at 1343.

[63] *Id.* at 595, 574 P.2d at 1341.

[64] *Id.*

[65] The question of whether relief against forfeiture should have been granted . . . and specific performance in favor of the purchasers decreed, were matters addressed to the sound discretion of the trial court, and its decision will not be set aside unless manifestly against the clear weight of the evidence.

Id. at 598, 574 P.2d at 1342.

the facts of the case, the trial court had abused its discretion by failing to grant equitable relief and by denying specific performance.[66]

The question which arises from these cases is obvious: Why the difference in treatment? Under the terms of each agreement the vendees agreed to pay the purchase price and the vendor agreed to execute and deliver to the buyer a deed to the property upon such payment. In *Altadena* and *Pothast*, the courts held the parties strictly to the terms of their agreements and refused to intervene to stop one party from cancelling the agreement. The *Jenkins* court prohibited cancellation according to the specific terms of the agreement and ordered specific performance by conveyance of the property.

One reason for this different treatment may be that, by definition, obligations under an escrow agreement are considered conditions precedent to completion of the contract,[67] while such obligations outside an escrow arrangement may be labeled as promises, covenants or even conditions subsequent.[68] It has been said that a promise gives the promisee only the legal right to require performance or to receive compensation for damages for nonperformance, while, a condition gives him the added legal privilege of not performing his own promise.[69] In addition, courts have distinguished between conditions subsequent and precedent, denying relief in the latter and granting relief in the former.[70] While this distinction has at

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[66] *Id.*

[67] *See* text accompanying note 34 *supra.*

[68] *See* 3A A. CORBIN, CONTRACTS § 713 at 357 (1960):

> A bilateral contract whereby V promises to convey land on May 1 and P promises to pay a price on March 1, is nothing more than two promises to convey and to pay. Neither one is in terms conditional on performance of the other, either on time or otherwise. The parties have not thought about making their promises conditional; indeed, when they do think about it, they use additional words of condition.

See State v. Thom, 58 Hawaii 8, 18 n.4, 563 P.2d 982, 989 n.4 (1977) (quoting Zapata v. Torres, 464 S.W.2d 926, 929 (Tex. Civ. App. 1971)):

> Since forfeiture of an estate for breach of a condition subsequent is not favored by the courts, a promise of the grantee will be construed as a covenant rather than as a condition unless a conditioned estate is clearly and unequivocally revealed by the language of the instrument. . . .

[69] *See* State v. Thom, 58 Hawaii 8, 18, 563 P.2d 982, 989 (1977), where the court distinguished between a covenant and a condition, stating that since the obligation was a covenant the vendee's breach did not provide grounds for rescission.

> This, of course, does not mean that someone who makes a promise to perform by a specified time and fails to do so is not guilty of a breach of a legal duty and thus not liable for the delay. It means only that he will not be required to forfeit his interest if other circumstances justify relief.

See id. (quoting Rhiddlehoover v. Boren, 260 S.W.2d 431, 434 (Tex. Civ. App. 1953)):

> When the stipulated purchase price has not been paid, a vendor who has given an absolute conveyance, without retaining an express lien, may sue for the debt and enforce an implied lien upon the property as against the original purchaser . . . . But he is not entitled to rescind the sale and recover the property.

[70] Levin v. Grant, 238 Wis. 537, 298 N.W.2d 63 (1941).

> When the contract is made to depend upon a condition precedent . . . , when no

times been disfavored,[71] it would seem to have some implicit support.[72] Often, however, an interest will be found, even under a condition precedent, upon which a court acting in equity will seize the opportunity to grant relief.[73]

C. *Limitation of the Escrow/Non-escrow Distinction*

While the distinction between a promise and a condition, or even a condition subsequent and a condition precedent, may appear to justify a difference in treatment of contracts held in and out of escrow, it provides a highly restrictive rule and thus fails to take into account the elements which a court acting in equity would and should consider. In short, it simply fails to be an adequate predictor of when a court in equity will grant relief from a forfeiture.

This conclusion is illustrated by comparing the cases of *Moran v. Holman*[74] and *Lum v. Stevens*.[75] In *Moran*, the parties had entered into a long-term written contract with an escrow arrangement for the sale of land under which the vendee was to pay the taxes and assessments on the property and to keep it insured during the term of the agreement. The contract also contained a "time is of the essence" clause, providing for strict foreclosure in the event of a breach of any covenant in the agreement.[76]

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right shall vest until certain acts have been done, as for example, until the vendee has paid certain sums at certain specified times,—then, also, a court of equity will not relieve a vendee against the forfeiture incurred by a breach of such condition precedent. But when . . . the stipulation concerning payment is only a condition subsequent, a court of equity has power to relieve the defaulting vendee from the forfeiture caused by a breach of this condition.

Id. at _, 298 N.W.2d at 66 (quoting 1 J. POMEROY, EQUITY JURISPRUDENCE § 455 at 886 (4th ed. 1918)). *Accord,* Catanzano v. Hydinger, 228 Ala. 547, 154 So. 588 (1934).

[71] *See* Valley Smokeless Coal Co. v. Mfr's. Water Co., 302 Pa. 232, _, 153 A. 327, 329 (1930). "It is true that rights acquired by contract will not ordinarily be enforced by declaration of a forfeiture in equity, but this rule is subject to exception where the agreement itself provides for such relief in case of default."

[72] *See* 27 AM. JUR. *Equity* § 81 at 604 (1966). "[I]f the condition is precedent and has not been complied with, the covenantor cannot have become vested with any right or estate which is the subject of forfeiture."

[73] *See, e.g.,* Jameson v. Wertz, 396 P.2d 68, 74 (Alaska 1964) (where contract involves land, buyer will be relieved from strict forfeiture if enforcement of forfeiture would cause a loss to him out of proportion to any injury that might be sustained by seller); McCormick v. Grove, 495 P.2d 1268, 1269 (Alaska 1972) (trial court may, at its discretion, refuse to enforce forfeiture provisions of escrow agreement if the equities of a particular situation so dictate).

[74] 501 P.2d 769 (Alaska 1972).

[75] 42 Hawaii 286 (1958).

[76] Moran v. Holman, 501 P.2d 769, 770 (Alaska 1972). This clause provided:

Time is of the essence in this agreement and the due performance of all covenants and agreements on the part of said buyer is a condition precedent whereupon depends the performance of the agreements on the part of said sell [sic], and in the

The vendee started to perform his obligations, but after a short time, he failed to meet his monthly installments and payments of taxes and insurance.[77] After waiting a significant period, the vendor sent the vendee two notices of default and a notice to vacate, and cancelled the escrow arrangements. Only then did the vendee tender the full contract price to the vendor.[78] After this tender was refused, the vendee brought an action against the vendor for specific performance.

Utilizing the escrow/non-escrow distinction and the rule that there is no doctrine of substantial performance in escrow agreements, one might expect the court to have denied the vendee's request. The trial court, however, refused to enforce the relevant forfeiture provisions of the contract and ordered specific performance. The Alaska Supreme Court affirmed.[79]

On the other hand, in *Lum*, the Hawaii Supreme Court was faced with a non-escrow situation but declined to order specific performance even though the default was relatively minor. In this case, the vendor and vendee entered into a contract for the sale of land calling for the payment of the purchase price "in cash within thirty days or sooner."[80] It further provided that in the event the purchaser failed to pay the purchase price on time, the seller could cancel the contract and retain the deposit as liquidated damages.

While the facts were disputed, the court accepted the following as true.[81] The vendee had arranged a mortgage with the Bank of Hawaii in

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> event of the failure of said buyer to comply with the covenants and agreements on his part entered into for a period of thirty (30) days, seller shall be released from all liability or obligation in law or in equity to transfer and convey said property, or any part thereof, and the escrow holder herein is instructed to return said deed to seller. . . .

Id. at n.3.

[77] The trial court found that the vendee was in default for most of the period of the contract. *Id.* at 770.

[78] [S]ometime prior to June 19 [vendor] had cancelled the escrow arrangements. Thus, when [vendee] tendered two more installments on June 19, the bank refused them. He subsequently tendered the full contract price to [vendor] personally through his attorney . . . , and through his authorized agent . . . . [Vendor] rejected all tenders, insisting on his right to strict foreclosure under the contract.

Id.

[79] *Id.* The court noted the maxim that equity abhors a forfeiture, finding it applicable to the case at bar although the potential forfeiture was not that great. The court stated that the rule was not based purely on the amount of the forfeiture but upon whether adequate compensation could be made. "[T]he ultimate aim . . . in equity must be to save the respective parties harmless from loss or damage and, if just and equitable, place them in the status quo of their contract so as to permit them as vendor and vendee to each have the benefit of their respective bargains . . . ." *Id.* at 771.

Since the vendor's intended benefit was the receipt of the purchase price and adequate compensation was available, specific performance was proper. *Id.*

[80] Lum v. Stevens, 42 Hawaii 286, 287 (1958).

[81] The court chose to accept the testimony of the vendor. *Id.* at 289.

order to pay off the majority of the purchase price to the vendor. In addition, he had drawn up a check for the balance and placed it in the hands of the real estate broker who handled the transaction.[83] The vendor, however, was unable to collect these sums and complete the transaction prior to the time specified, and therefore he refused to convey.[84] The vendee then sued for specific performance.

Despite the vendee's claim that he was at all times ready, willing and able to perform,[84] the trial judge denied specific performance and the Hawaii Supreme Court affirmed. In reviewing the facts on appeal, the court, contrary to the attitude that it was later to take in *Jenkins*, appeared determined to ignore equity and find grounds for enforcing the forfeiture provision.[85]

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[83] From the facts of the case it appears that this broker had been working for the vendor in the sale.

[84] The vendor had made two attempts to collect with the bank. The first time he arrived too late and the department was not open, the second time the bank told him that they still needed the vendee's authorization. On both occasions, however, he was told by the bank that they would credit the amount to his account if he would leave the signed deed. He refused, demanding full payment in cash prior to conveyance as agreed. Moreover, the vendee went to the bank over a week before time of performance was due and signed the necessary authorization to transfer to the vendor. *Id.* at 292.

[84] The court refused to accept vendee's testimony on this matter stating that there was "no satisfactory showing of actual readiness and ability," and held that actual readiness and ability must be shown "[e]ven under the liberal rule that prevails in equity . . . ." *Id.* at 293.

[85] First, the court found that the evidence showed that while the purchase price was not paid within the time specified, the contract did not expressly make time of the essence. *Id.* at 291. Second, the court refused to accept the buyer's testimony that he was ready, willing and able to perform as "not worthy of belief," even though he had made arrangements to borrow 80 percent of the money from the bank and had deposited a check for the balance with the real estate broker. Apparently rejecting vendee's testimony (the only such testimony) that the check was good, the court stated, "The fact that Lum found it necessary to borrow $16,800 from the bank and the fact that he did not at any time make a cash tender of the purchase price belie his testimony that he always had enough cash to pay Soffra." *Id.* at 294. This is, to say the least, a questionable conclusion. Third, the court ignored testimony that the vendee had called the broker and asked him to close the transaction, stating that he did not show much diligence. *Id.* at 293. Fourth, the court noted that the forfeiture was small, only a $1,000 down payment, and was an expenditure for a survey. *Cf.* Moran v. Holman, 501 P.2d 769 (Alaska 1972) (where purchaser made irregular payments under a land sales contract which called for regular monthly payments). Finally, the court quoting American Jurisprudence stated:

> Time may be made of the essence of the contract by express stipulation, or even without an express stipulation to that effect where such intention is clearly manifested from the agreement as a whole, construed in the light of the surrounding facts. In either case the court may refuse to decree specific performance where it appears that the plaintiff failed to perform on his part within the stipulated time, unless there is something in the facts to take the case out of the usual rule.

Lum v. Stevens, 42 Hawaii 286, 288-89 (1958).

III. Long-Term vs. Short-Term Agreements as a Test for Equitable Intervention

With the above cases in mind, a refinement of the previous analysis can be made between long- and short-term agreements.

When the contract requires a relatively long period to complete it usually takes the form of an Agreement of Sale or an Installment Land Sale Contract;[86] whether or not it contemplates an escrow, it is basically a security device.[87] The vendor retains legal title and the vendee takes possession and assumes the risks of ownership.[88] Conversely, when the contract is for a relatively short period, it usually takes the form of a Deposit Receipt Offer and Acceptance ("D.R.O.A.") or an Agreement to Purchase Real Estate;[89] and whether or not it uses an escrow, it is entered into merely to facilitate the conveyance of the property.[90] The vendor retains the legal title as in the long-term situation, but the vendee does not usually take possession or accept the risks of ownership until the conveyance is complete.[91]

The courts have shown a tendency to use equity to protect long-term agreements, such as in *Jenkins* and *Moran*, where the vendee is in possession of the property. By contrast, the courts are less willing to grant equitable relief to the defaulting party in short-term agreements, such as in *Altadena*, *Lum* and *Pothast*, where the vendee obtains possession only upon completion of the conditions contained therein.

While the distinction between long- and short-term agreements may be more meaningful than a distinction between escrow and non-escrow situations, the search for a working model of equitable intervention in land contracts cannot stop here. A case example will make this clear.

In *Bohnenberg v. Zimmerman*,[92] the parties had entered into a short-term escrow agreement requiring the vendor to deliver a warranty deed on certain land upon the payment of $2,500. The agreement required a $200 deposit with the balance of $2,300 to be paid in gold or cash on or before a specified date.[93] The deed was executed, placed into escrow and the escrow agent was instructed to hold the deed until the balance of the

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[86] Such agreements will hereinafter be referred to as an "agreement of sale." These agreements have become common in Hawaii, with a number of advantages especially to low income purchasers. Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978).

[87] *See* Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978); W. French & H. Lusk, *supra* note 29, at 299.

[88] Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978).

[89] For purposes of this article such agreements will be referred to generally as D.R.O.A.'s.

[90] W. French & H. Lusk, *supra* note 29, at 291.

[91] The Uniform Vendor and Purchaser Risk Act, Hawaii Rev. Stat. ch. 508 (1976), provides that the risk of loss of the property does not change from the vendor to the vendee until the transference of legal title or possession.

[92] 13 Hawaii 4 (1900).

[93] *Id.* at 5. The date set for completion of the sale was May 15, 1899.

purchase money was paid.[94]

Three days before the due date, the vendee tendered to the escrow agent a check drawn upon a Honolulu bank for the amount of $2,300, payable in gold. The escrow agent, however, refused to accept the check citing the requirement that payment be made in cash or gold. The vendor, a few days later, similarly refused the tender. The vendee thereupon attempted to obtain gold, but was unable to do so until almost two weeks after performance was due. Consequently, when the vendee offered to tender the gold, with interest for the delay, the tender was refused. The vendor then brought an action for cancellation of the deed and forfeiture of the deposit and vendee counterclaimed for specific performance.[95]

Instead of holding the buyer to the strict terms of the short-term escrow agreement, as might have been expected under earlier analysis, the trial court dismissed the vendor's action for cancellation and the supreme court affirmed, stating: "Equity favors compensation, as by the payment of interest to the injured party, rather than forfeiture against the defaulting party, where no injustice would result."[96]

IV. A Working Model

A. *Interests of the Parties*

What then is the key to these decisions? One consideration which may account for the difference in treatment between long-term agreements of sale and short-term D.R.O.A.'s is the interests of the parties in the property. Once such interests are isolated, the effect of the court's actions on them can be analyzed to determine the most beneficial decision.

Under an agreement of sale the vendee obtains an equitable interest[97] (possession and risks of ownership), while the vendor retains bare legal title.[98] Under the doctrine of equitable conversion the vendor's interest is converted into personalty and the vendee's interest into realty.[99] The ven-

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[94] The instructions to the escrow agent stated: "The within powers are delivered to you and are to be held until May 15th, 1899, or until A. Zimmerman pays you $2,300.00, then you are to deliver to him the deed and note." *Id.* at 6.

[95] *Id.* Vendee offering to pay the full amount of the purchase price as agreed.

[96] *Id.* at 7. In this case, the court noted, the vendor could be fully compensated for the delay and it would serve justice to complete the arrangement as the vendee had shown good faith and diligence.

[97] Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978); *see* C.B. Hofgaard & Co. v. Smith, 30 Hawaii 882 (1929).

[98] Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978). *See* note 86 *supra* and accompanying text. In *Jenkins* the court noted that the legal title is retained merely as security for payment of the purchase price and the forfeiture provisions are designed to protect this security. *See also* C.B. Hofgaard & Co. v. Smith, 30 Hawaii 882 (1929) (where the court states that the seller under such agreements holds only the "naked" legal title).

[99] *See* Pollick v. Pollick, 52 Hawaii 357, 477 P.2d 620 (1970); *In re* Deans Trust, 47 Ha-

dor thus holds the legal title in trust for the vendee as security for amounts due.[100]

Under a D.R.O.A., however, the possession and risk are not transferred, and any such transfer is made conditional upon completion of certain designated obligations.[101] Where such conditions precedent to the completion of the transfer exist, no conversion will occur[102] and thus the vendee will not acquire an equitable interest.

Important elements to consider in distinguishing these two types of agreements are the interest of the vendee and the hardship he will incur if a forfeiture provision is upheld.[103] Under the typical agreement of sale the hardship will generally be greater than under the typical D.R.O.A., as the former will usually involve the loss of possession and equitable inter-

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waii 629, 394 P.2d 432 (1964); *In re* Nelson, 26 Hawaii 809 (1923); Morris v. George C. Banning, Inc., 49 Ohio App. 530, 77 N.E.2d 372 (1947). In short, equity regards the purchaser of realty as the real owner. Va. Shipbldg. Corp. v. United States, 22 F.2d 38 (4th Cir. 1927), *cert. denied*, 276 U.S. 625 (1927).

A conversion will usually occur when all that remains to be done is the payment of money, Sanderson v. Sanderson, 130 Tex. 264, 109 S.W.2d 744 (1937), and as noted by the court in *Jenkins*, the payment of money is usually all that is necessary to complete the sale under an agreement of sale. Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978).

Such a conversion is based on the equitable maxim that equity regards as done that which ought to be done. Palos Verdes Properties v. County Sanitation Dist., 177 Cal. App. 2d 679, 2 Cal. Rptr. 537 (1960). The maxim has in turn been used to enforce specific performance. *See, e.g.*, Benner v. Lunt, 126 Me. 167, 136 A. 814 (1927); Josephian v. Lion, 66 Cal. App. 650, 227 P. 204 (1924). The maxim has been said to be equity's favorite and the foundation of all distinctively equitable property rights, estates and interests. State v. Neb. State Bank, 120 Neb. 539, 234 N.W. 82 (1931).

[100] Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978). *See* Jameson v. Shepardson, 83 Cal. 596, 257 P. 157 (1927).

In Henrique v. Paris, 10 Hawaii 408, 411 (1896), the court stated:

> Courts of equity regard . . . performance . . . as the real object desired, and the right of entry as mere security for such performance, and so they do not always hold parties strictly to their legal rights, but often relieve against a forfeiture, especially if full and exact compensation can be made to the injured party.

In this regard it is said that the test for determining whether equity will grant relief from a forfeiture is whether adequate compensation can be made for the breach. Bedell v. Barber, 80 Cal. App. 2d 806, 182 P.2d 591 (1947). In McGinnis v. Knickerbocker Ice Co., 112 Wis. 385, 88 N.W. 300 (1901), the court distinguished between time provisions put in a contract to secure payment of money and those put in to secure prompt payment. Equity, the court said, will grant relief where money is the principal object, but will not when time is the object. *See also* Klein v. N.Y. Life Ins. Co., 104 U.S. 88 (1881) (where forfeiture is merely to secure payment, payment is primary and forfeiture is only accessory).

[101] *See* note 89 *supra* and accompanying text.

[102] Where something more than the mere payment of money remains to be done, no conversion will take place. Sanderson v. Sanderson, 130 Tex. 264, 109 S.W.2d 744 (1937). The doctrine applies only to those who have the right to demand performance. It will not be invoked to disregard the essential conditions in a contract. Head v. Sellers, 251 Ala. 453, 37 So.2d 644 (1948).

[103] In *Jenkins* the court noted that the "key factor" in its decision is "whether forfeiture would be harsh and unreasonable under the circumstances." 58 Hawaii 592, 597-98, 574 P.2d 1337, 1341 (1978).

est, while the latter will not.[104] The existence of such hardship has clearly been recognized as an important factor in a court's decision whether or not to order specific performance.[105]

Another important element in this analysis is the hardship to the vendor caused by the default. Unlike the hardship incurred by a vendee, this hardship need not be financial and may simply arise when the vendor is placed in a worse position by the delay.[106] Moreover, there is clearly a greater likelihood of the vendor being harmed[107] by a delay in a short-term D.R.O.A. where payment is expected quickly and in full vis-a-vis a long-term agreement of sale where it is not.[108] In any event, this hardship has also been recognized as an important element in deciding these cases.[109]

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[104] *See* text accompanying notes 95-100 *supra*.

[105] Such losses were recognized as important in Jameson v. Shepardson, 83 Cal. 596, 257 P. 157 (1927); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978). The inability to show such losses and the small amount of the forfeiture were cited as important in Lum v. Stevens, 42 Hawaii 286 (1958) (forfeiture is only a small deposit); and Hill v. Fisher, 34 Me. 143 (1842) (if the purchaser had taken possession and made valuable improvements he might have been able to induce the court in equity to ignore the express conditions of the contract). Additional losses which may be critical to a court's decision in a particular case include: amounts paid in relation to the total purchase price, the nature and extent of improvements and expenditures incurred by the purchaser in good faith reliance upon the agreement of sale. Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978) (the court, in ordering specific performance, noted that the vendees had spent a lot of time, energy and money in the development of the properties for sale). *See* Jameson v. Shepardson, 83 Cal. 596, 257 P. 157 (1927); Selby v. Battley, 149 Cal. App. 2d 659, 309 P.2d 120 (1957). *But see* L'Engle v. Overstreet, 61 Fla. 653, 55 So. 381 (1911) (improvements made afforded no independent ground for specific performance unless they are both valuable, permanent, and warranted by the contract). Shoup v. First Nat. Bank of Hays, 145 Kan. 971, 67 P.2d 569 (1937) (where dissent points out that the lessee had enhanced the value of the property by his improvements while the lessor stood by and watched; the majority did not order that the lessee be compensated).

[106] *See* Leiter v. Eltinge, 246 Cal. App. 2d 306, 54 Cal. Rptr. 702 (1966); Garbis v. Weistock, 187 Md. 549, 51 A.2d 154 (1947). *See also* Burnap v. Sharpsteen, 149 Ill. 225, 36 N.E. 1008 (1894) (buyer was allowed to cancel sales agreement for delay because she wanted to build a house on the lot before winter, but seller's delay made this impossible); 3A A. CORBIN, CONTRACTS § 716 (1960) (purchaser's failure to make payment on time will justify seller's refusal to convey where values are rapidly fluctuating and delay would profit the purchaser).

[107] The vendor may be harmed by a loss of profit, inability to buy another piece of property, or other consequential damages. *See, e.g.*, Nygaard v. Anderson, 229 Or. 323, 366 P.2d 899 (1961). As with other consequential damages, these losses must be foreseeable. Therefore any special circumstances should be made known to the other party. *See* Haislmaier v. Zache, 25 Wis. 2d 376, 130 N.W.2d 801 (1964).

[108] As Corbin notes, the reason that time is not of the essence in land sale contracts is that even though delay causes a breach, the injury caused by the delay is usually *de minimus*. Delays are frequent in these transactions, and they are traditionally overlooked notwithstanding the parties' prior statements. 3A A. CORBIN, CONTRACTS § 716 (1960).

[109] *See, e.g.*, Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978). In *Allan* the vendors and vendees entered into a short-term contract for the sale of land under which escrow was to close on or before a certain date. After a 15-day extension the buyers had still failed to

B. Balance of Hardships

The logical method of deciding these cases, therefore, is to balance the respective hardships of the parties; if upon forfeiture the vendee stands to lose his interest and possession, while the vendor can be recompensed without any recognized hardship, the court should decline to allow the forfeiture and order specific performance. Having to wait for payment, without more, would not be a hardship which equity would recognize for this purpose, as it is said that equity considers money and interest sufficient relief in such cases.[110]

If, however, a cancellation of the contract will not affect any recognized interest of the vendee, while the default has caused a hardship to the vendor, the court should order the cancellation of the contract and deny specific performance. The vendee, as discussed above, would not have a recognized interest if he merely had an agreement to purchase subject to conditions precedent to possession and ownership.[111]

C. When a Balance Is Indecisive

If the balance is indecisive, however, the answer is not as easy. One factor which should be given serious consideration in such cases is the conduct of the parties.[112] Has the vendee shown diligence and good faith

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perform and thus the seller declared a default.

In refusing to order specific performance, the Supreme Court of Arizona noted that the vendors had set up the sale in order to obtain cash to purchase another home which they wished to move into immediately. The delay, however short, prevented this causing vendor's injury.

Where injury to the vendor has been specifically cited as being absent, compensation is sufficient. *See* Jameson v. Shepardson, 83 Cal. 596, 257 P. 157 (1927) (agreement was not to take effect until $1,510 was paid); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978) (Jenkins could not be deprived of legal title by unilateral action of the purchasers because no transfer of the property would have been valid without their consent).

[110] *See* Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978). *See generally* Kanakanui v. De Fries, 21 Hawaii 123 (1912); Lau Dan v. Au Leong, 19 Hawaii 417 (1909); Henrique v. Paris, 10 Hawaii 408 (1896); Garrett v. McFarlane, 6 Hawaii 435 (1883). The question is whether adequate compensation can be made for the delay. Bedell v. Barber, 80 Cal. App. 2d 806, 182 P.2d 591 (1947). Where full and exact compensation can be made equity will generally grant relief against a forfeiture. Humphrey v. Humphrey, 254 Ala. 395, 48 So.2d 424 (1950).

[111] *See* text accompanying notes 99-103 *supra*.

[112] *See* Food Pantry v. Waikiki Business Plaza, Inc., 58 Hawaii 606, 575 P.2d 869 (1978) (where lessee covenanted not to assign or sublease without written consent from the lessor, but later sublet to a fastfood franchise); O'Malley v. Cummings, 86 Ill. App. 2d 446, 229 N.E.2d 878 (1967) (where seller's contacting buyer several times with regard to closing on time made time of the essence and allowed him to cancel the agreement for delay). *See generally* 3A A. CORBIN, CONTRACTS § 713 at 354-56 (1960) (Corbin notes that in almost all cases where the court said time is of the essence, there was a substantial failure to perform by the plaintiff).

in attempting to prevent the default;[113] has he shown lack of diligence or even willful neglect;[114] has the vendor contributed to the delay either by statements or actions?[115] While such actions have on occasion been considered irrelevant,[116] they may be extremely important in situations where the harm is equal.[117]

If a review of the parties' conduct is not helpful, the court should require the enforcement of the contractual provision. Even equity recognizes the value of enforcing contracts and fulfilling the expectations of the parties. Therefore, equitable powers are not used lightly to interfere with the contractual rights.[118] Such equitable jurisdiction should be exer-

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In Jenkins v. Wise, 58 Hawaii 592, 598 n.3, 574 P.2d 1337, 1341 n.3 (1978), the court noted as important the conduct and equities of the parties, including the amount and length of default and the reasons for delay. Indeed, the word "forfeiture" is generally used to mean "lost by omission or negligence or misconduct." Lehigh Valley R. Co. v. Chapman, 35 N.J. 117, 171 A.2d 653, *cert. denied*, 368 U.S. 928 (1961); Rankin v. Homestead Golf & Country Club, 135 N.J. Eq. 160, 37 A.2d 640 (1944).

The conduct of one party may be used to show a waiver, *see, e.g.*, Tomikawa v. Gama, 14 Hawaii 175 (1902), or even to create an estoppel, *see* Kanakanui v. De Fries, 21 Hawaii 123 (1912). The conduct of the party seeking relief, therefore, should be equitable. Blue Ridge Metal v. Proctor, 327 Pa. 424, 194 A. 559 (1937); Boyd v. Am. Nat. Ins. Co., 20 Tenn. App. 631, 103 S.W.2d 338 (1936).

[113] *See* Selby v. Battley, 149 Cal. App. 2d 659, 309 P.2d 120 (1957) (delay was caused without fault by vendee); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978) (no evidence of gross negligence or deliberate bad faith conduct).

[114] *See* Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Hawaii 606, 574 P.2d 869 (1978) (court recognized that relief would generally be granted "where the lessee's breach has not been due to gross negligence, or to persistent and wilful conduct . . . ."); Lum v. Stevens, 42 Hawaii 286 (1958) (lack of diligence indicated); Kanakanui v. De Fries, 21 Hawaii 123 (1912) (conduct not so wilful and persistent as to prevent equity). *See generally* Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 316 (1891) (equity will not grant relief where party was negligent in curing default or breach was wilful); 1 J. POMEROY, *supra* note 8, § 452.

[115] *See* Selby v. Battley, 149 Cal. App. 2d 659, 309 P.2d 120 (1957); L'Engle v. Overstreet, 61 Fla. 653, 55 So. 381 (1911); Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978) (vendor partly responsible for the delay in closing); Lum v. Stevens, 42 Hawaii 286 (1958) (lack of evidence of any "sharp" practices by Seller cited by court as important in denying relief); Kanakanui v. De Fries, 21 Hawaii 123 (1912) (court said lessee was "lulled into nonaction"); Hall v. Dallas Joint-Stock Land Bank, 95 S.W.2d 200 (Tex. Civ. App. 1936). *See generally* 1 J. POMEROY, *supra* note 8 § 451.

[116] *See, e.g.*, Lau Dan v. Au Leong, 19 Hawaii 417 (1909); *see also* Kanakanui v. De Fries, 21 Hawaii 123 (1912) (conduct not controlling).

[117] This would account for the *Bohnenberg* decision.

[118] McCall v. Carlson, 63 Nev. 390, 172 P.2d 171 (1946) (equity has respect for contractual obligations and will not force upon parties contractual obligations, terms or conditions which they have not voluntarily assumed); Johnson v. Feskens, 146 Or. 657, 31 P.2d 667 (1934) (a court of equity can afford no relief). *See also* Hunter-Benn & Co. v. Bassett Lumber Co., 224 Ala. 215, 139 So. 348 (1932) (jurisdiction to grant relief from a forfeiture does not authorize court to set aside valid stipulations of the parties). There is, of course, something to be said for the certainty, stability and integrity of contractual rights and obligations. McCall v. Carlson, 63 Nev. 390, 172 P.2d 171 (1946).

cised with caution.[119] Consequently, when the balance is equal and the conduct of the parties does not justify equitable intervention, the court should deny specific performance and enforce the cancellation provisions of the contract.

V. CONCLUSION

Subsequent to the signing of an agreement to sell real property, many problems can occur which could cause one of the parties, usually the purchaser, to default under the terms of the agreement. Such a default will usually entitle the other party to cancel the agreement. However, under certain circumstances, courts refuse to allow the nondefaulting party to exercise this remedy and may order specific performance.

It appears from cases faced with such a problem that the solution revolves around the hardships to the parties. If the forfeiture will cause a severe loss but no countervailing hardship will be felt if the agreement is completed, then the court will order specific performance. If, however, the loss from the forfeiture is minor but the nondefaulting party has been injured by the delay, then the court will deny specific performance.

If the hardships are equal or similar, the decision may be based on the conduct of the parties, considering the diligence of the parties and causal factors behind the default. Finally, if even conduct fails to direct a conclusion, the contract remedy agreed to by the parties should be preferred to equitable intervention.

Based on the above model, some generalizations may be used as a shorthand for handling these problems. Cancellation of a long-term agreement of sale, such as discussed in *Jenkins*, will usually involve a substantial forfeiture of possession, equitable ownership interests and perhaps even the loss of valuable improvements without much harm to the vendor. Consequently, defaulting parties in such agreements, barring extreme inequitable conduct, should usually be allowed specific performance where an offer is made to cure the default.

On the other hand, cancellation of a short-term D.R.O.A., such as was involved in *Altadena* and *Pothast*, will normally involve only a small forfeiture, with the delay causing hardship to the nondefaulting party. Consequently, such situations will normally justify strict adherence to the contract and a refusal to grant equitable relief.

As noted above, these generalizations will not always hold true, yet they do allow the parties a certain measure of accuracy in predicting the enforceability of a forfeiture provision in their contract. To be more suc-

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[119] Equitable Loan and Sec. Co. v. Waring, 117 Ga. 599, 44 S.E. 320 (1903) (forfeitures may not be favored, but they are not unlawful). If the parties choose to contract for a forfeiture the court in equity may refuse to enforce it. *See* Spangler v. Misner, 238 Iowa 600, 28 N.W.2d 5 (1947); Johnson v. Feskens, 146 Or. 657, 31 P.2d 667 (1934).

cessful in predicting the outcome of a case, however, one should carefully consider the surrounding circumstances, balancing the hardships to the parties of alternative orders and, when pertinent, their conduct in relation to the default.

THE "RIGHT OF INFORMATION TRIANGLE": A FIRST AMENDMENT BASIS FOR TELEVISING JUDICIAL PROCEEDINGS

Out of the sensational, bizarre "Roman circus" that was the infamous Lindbergh kidnapping trial of 1935[1] came two convictions: one of Bruno Hauptmann for the kidnapping-murder of Charles Lindbergh's 18-month-old son, and the other of the news media for its hyperactive conduct at and hyped coverage of the trial proceedings.[2] With regard to the latter "conviction," news reporters and photographers alike were at times guilty of flagrantly unprofessional behavior.[3] Nonetheless, it was the photographer alone, or more precisely, the tool of the photographer—the camera—that would be sentenced. That sentence was meted out by the American Bar Association,[4] the federal judiciary[5] and eventually nearly all states:[6] henceforth, no cameras of any sort would be allowed in the courtroom during judicial proceedings. Radio broadcasting was likewise proscribed, and when television appeared on the communications scene, it too was prohibited from entering the courts with its electronic equipment—the camera and microphone.[7]

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[1] State v. Hauptmann, 115 N.J.L. 412, 180 A. 809 (1935), *cert. denied*, 296 U.S. 649 (1935).

[2] *See* Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 17-20 (1979); Goldman & Larson, *News Camera in the Courtroom During State v. Solorzano: End to the Estes Mandate?*, 10 SW. U.L. REV. 2001, 2008 n.49 (1978). *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 548-49 (1976).

[3] *See* Kielbowicz, *supra* note 2, at 18-19.

[4] In 1937, two years after the Hauptmann trial, the ABA added Canon 35 to its then Canons of Judicial Ethics. Canon 35 stated in part:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

ABA CANONS OF JUDICIAL ETHICS No. 35 (1937).

[5] Enacted in 1946, Rule 53 of the Federal Rules of Criminal Procedure states: "The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court." FED. R. CRIM. P. 53.

[6] *See* Estes v. Texas, 381 U.S. 532, 580-81, 581 n.39 (1965) (Warren, C.J., concurring).

[7] The ABA amended Canon 35 in 1952 to proscribe the televising of court proceedings. 77 A.B.A. REP. 429, 610-11 (1952). Similarly, in 1962, the Judicial Conference of the United

Today, nearly half-a-century after the Hauptmann trial, the issue of whether cameras and other tools of the electronic media should be permitted to record and broadcast judicial proceedings is once again one of the more hotly contested battlegrounds in the simmering conflict between the news media and the courts. It is a divisive issue, with the ABA, the federal courts, and a slim majority of states still opposed to cameras in the courtroom, at least during trial proceedings, but with the clear state trend heading, if not streaking, in the opposite direction.[8] It is also a complicated issue, involving a variety of public policy considerations and a host of constitutional guarantees, including the first amendment's free speech and press clauses, the sixth amendment's "public trial" and "impartial jury" provisions, the fourteenth amendment's equal protection clause, the due process clauses of the fifth and fourteenth amendments, and the right of privacy.[9] It is, above all else, however, an issue of considerable importance whose time for discussion has undeniably ripened into one for disposition. This is especially true with respect to the medium of television, whose current position as the predominant form of mass communication[10] and whose unique audio-visual capabilities[11] pose the hard-

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States passed a resolution extending Rule 53 of the Federal Rules of Criminal Procedure to ban television from the federal courts. [1962] JUD. CONF. ANN. REP. 9-10.

Canon 35 of the ABA Canons of Judicial Ethics is now Canon 3A(7) of the ABA Code of Judicial Conduct, which has eliminated the rhetoric of Canon 35 but not its sting. Canon 3A(7) states in part: "A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions . . . ." ABA CODE OF JUDICIAL CONDUCT, CANON No. 3A(7) (1979).

Canon 3A(7) allows electronic equipment into the courtroom only in three limited situations: (1) For "purposes of judicial administration" (*e.g.*, videotapes of depositions; the perpetuation of a record); (2) for "investitive, ceremonial, or naturalization proceedings"; and (3) for "instructional purposes in educational institutions." *Id.*

[8] The latest count by the National Center for State Courts, a count which is probably already outdated, reveals that 22 states currently permit the electronic coverage of judicial proceedings (including trials); 10 of them on a permanent basis and the other 12 on an experimental basis. NATIONAL CENTER FOR STATE COURTS, TELEVISION IN THE COURTROOM: RECENT DEVELOPMENTS (1981). An additional seven states allow cameras and microphones at appellate proceedings only. *Id.* Thus, less than half (21) of the states have retained rules completely banning the electronic media from their courtrooms. A dozen of these states, moreover, have special committees currently investigating the merits of allowing television coverage of their court proceedings. *See* Chandler v. Florida, 449 U.S. 560, 565 n.6 (1981). This enormous turnaround from the period following the Hauptmann case is even more startling when one considers that of the 29 states which now allow some electronic coverage of their courts, all but one of them—Colorado, which never adopted an anti-camera rule—switched over within the last six years. NATIONAL CENTER FOR STATE COURTS, *supra.*

[9] Although the right of privacy is not explicitly provided for in the U.S. Constitution, it has been given constitutional status by the U.S. Supreme Court in certain contexts. *See* notes 156-68 *infra* and accompanying text.

[10] *See generally* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 195-96 (1973) (Brennan, J., dissenting); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 13-14 (1976); Fatzer, *Cameras in the Courtroom: The Kansas Opposition*, 18 WASHBURN L.J. 230, 233 (1979); Gerbner, *Trial*

est and most pressing questions in the area of courtroom cameras.[12]

Those few courts which have addressed the problems presented by electronic media coverage of judicial proceedings have focused primarily on whether such coverage would adversely affect the criminal defendant's constitutional right to a fair trial.[13] There are two major problems with this focus, however. The first is that it depends heavily, if not primarily, on empirical evidence to substantiate the effects of electronic coverage on the various courtroom participants—the jurors, witnesses, trial judge and attorneys—and how these effects might impair the criminal defendant's fair trial rights. The problem is that such empirical evidence is, at the moment at least, sparse and often conflicting.[14] The second problem with this approach is that it ignores or overlooks two other constitutional considerations: whether the electronic media have a first amendment right to attend and broadcast judicial proceedings, and whether the courtroom participants have a constitutionally protected privacy right strong enough to prevent such broadcasting.

The purpose of this Comment is to examine the merits of television's first amendment right to broadcast judicial proceedings, how this right coalesces and conflicts with other constitutional interests—including and emphasizing the privacy interests of the courtroom participants and how these constitutional considerations might be best accommodated.

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by Television: Are We at the Point of No Return?, 63 JUDICATURE 416, 417 (1980); Tongue & Lintott, *The Case Against Television in the Courtroom*, 16 WILLAMETTE L. REV. 777, 796-97 (1980). *See also* text accompanying notes 235-37 & 244 *infra*.

[11] *See generally* notes 238-44 *infra* and accompanying text.

[12] Consequently, the focus of this Comment is on the constitutional issues presented by the *televising* of courtroom proceedings. Throughout this Comment, however, the word "television" will be used interchangeably with the terms "electronic" and "broadcasting" media, which include radio, motion pictures, and still photography as well as television.

It should also be noted that this Comment is primarily concerned with the broadcasting of trial—as opposed to pretrial or appellate—proceedings, since it is during trials that courtroom broadcasting is most problematic. *See generally* notes 143-47 *infra*.

[13] *See, e.g.*, Chandler v. Florida, 449 U.S. 560 (1981); Estes v. Texas, 381 U.S. 532 (1965); Bradley v. Texas, 470 F.2d 785 (5th Cir. 1972); Bell v. Patterson, 279 F.Supp. 760 (D. Colo. 1968), *aff'd*, 402 F.2d 394 (10th Cir. 1968), *cert. denied*, 403 U.S. 955 (1971); Gonzales v. People, 165 Colo. 322, 438 P.2d 686 (1968); *In re* Hearings Concerning Canon 35, 132 Colo. 591, 296 P.2d 465 (1956); *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979); Lyles v. State, 330 P.2d 734 (Okla. Crim. App. 1958).

[14] *See* Chandler v. Florida, 449 U.S. 560, 576 n.11 (1981). As an illustration of the conflicting empirical data in the area of courtroom cameras, a survey of Florida jurors who had actually participated in televised trials found that a sizable majority did not believe that television coverage of court proceedings was either distracting to them or disruptive of the judicial process. *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 768-69 (Fla. 1979). In contrast, a survey taken in Ohio, which has also "experimented" with televised trials, discovered that fully half of the participating jurors were distracted by the cameras and felt that such equipment's presence was disruptive of the court process. THE BAR ASSOCIATION OF GREATER CLEVELAND, GREATER CLEVELAND BAR RENEWS OPPOSITION TO PERMITTING CAMERAS IN THE COURTROOM 5 (Mar. 28, 1980) (News Release) [hereinafter cited as CLEVELAND BAR NEWS RELEASE]. *See generally* notes 143-47 *infra*.

This Comment concludes that television and the other electronic media have a constitutional right to attend and broadcast court proceedings with their cameras and microphones, a right bolstered by the public's equally strong interest in receiving such broadcasts. These rights are based on the protection afforded by the first amendment to the processes of gathering, disseminating and receiving information—processes which together comprise what may be termed the "right of information triangle." It is further concluded that this first amendment right of the electronic media is not outweighed by any conflicting constitutional interests, with the single exception of the privacy claim of certain classes of witnesses.

Before proceeding with the discussion leading to these conclusions, some background on the issue of cameras in the courtroom is warranted. For this, it is both appropriate and necessary to turn to the two United States Supreme Court cases which have dealt directly with the question of televised trials.

I. THE SUPREME COURT ON TELEVISION IN THE COURTS: THE *Estes* AND *Chandler* CASES

A. Estes v. Texas: *A Conditional "No" to Courtroom Television*

In 1962, when the notorious case of Texas financier Billie Sol Estes[15] came before a standing-room-only Tyler, Texas courtroom, television was still a relatively new medium of mass communication. Partly because of this, and partly because of the reaction to and revulsion against the carnival-like media coverage of the Hauptmann trial,[16] the rules in all but two states expressly excluded electronic equipment from the courtroom.[17] Texas happened to be one of the two states permitting television and other electronic coverage of court proceedings, however,[18] and despite the objection of defendant Estes and the otherwise pervasive hostility toward the broadcasting of judicial proceedings, the *Estes* trial court opened its doors to the tools of the electronic media.

The scene at the defendant's pretrial hearing resembled an unsightly page out of the Hauptmann case: there were at least a dozen still, movie,

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[15] Estes v. Texas, 381 U.S. 532 (1965).

[16] *See* notes 2-3 *supra*.

[17] 381 U.S. at 540. The only two states which, at the time of the *Estes* trial, allowed television coverage of judicial proceedings were Texas and Colorado. *Id.* at 580 nn.38 & 39 (Warren, C.J., concurring). Colorado is the only state to have never adopted some sort of courtroom ban on the electronic media. *See In re* Hearings Concerning Canon 35, 132 Colo. 591, 296 P.2d 465 (1965) (the question of whether cameras may be allowed in the courtroom should be left to the discretion of the trial judge).

[18] Judicial Canon 28 of the Texas State Bar left it to the discretion of the trial judge as to whether to permit the televising of trial proceedings. *See* 381 U.S. at 535 (citing 27 TEX. B. J. 102 (1964)).

and television cameramen in the courtroom, "[c]ables and wires . . . snaked across the courtroom floor," and numerous microphones lay before the trial judge and on the counsel tables, jury box and witness stand.[19] Portions of the pretrial proceedings were televised live; other parts were broadcast on the various television stations' regularly scheduled newscasts.[20] Television coverage was again permitted at the trial of the defendant, although considerably more stringent restrictions were imposed on the number and placement of the electronic equipment, as well as on the amount and timing of the telecasting.[21]

Billie Sol Estes was found guilty of swindling, but three years later his conviction was reversed by the United States Supreme Court. In a 5-4 decision,[22] the Court held that the defendant's due process rights had been violated by the televising of his pretrial and trial proceedings.[23] Given the unusual conditions under which the defendant's pretrial hearing took place, and the fact that at the time of his trial the electronic media were banned from nearly all of the nation's courtrooms, it would have been very easy for the Supreme Court to limit its decision in *Estes* to its particular, peculiar fact situation. Clearly, however, at least four of the Justices in the *Estes* majority were opposed to such a limited ruling.[24] To the contrary, they were in favor of creating a per se constitutional rule banning television from the courts, at least in criminal proceedings. These Justices believed television coverage posed such a strong probability of prejudice to criminal defendants as to constitute an inherent denial of

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[19] 381 U.S. at 536. Perhaps the closest reminder of the Hauptmann trial travesty occurred when photographers at defendant Estes' pretrial hearing leaned over the shoulder of the defendant, who was seated at the counsel table, to snap a picture of the paper he was reading. *Id.* at 538.

[20] *Id.* at 536-37. Rebroadcasts of the pretrial hearing were also run by stations in place of the "Tonight Show" and the late night movie, evidence to Chief Justice Warren, at least, that "[t]he televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry." *Id.* at 571 (Warren, C.J., concurring). *But see* note 249 *infra*.

[21] *Id.* at 537-38.

[22] Justice Clark wrote the opinion for the Court in which Chief Justice Burger, Justices Douglas and Goldberg, and—to the extent indicated in his concurring opinion, *see* text accompanying notes 30-31 *infra*—Justice Harlan joined. Justice Stewart's dissenting opinion, which was joined by Justices Black, Brennan and White, argued that defendant Estes' due process rights had not been violated by the televising of his trial (as opposed to his pretrial hearing, an issue which the dissent felt was not before the Court), *id.* at 609-11, and that televising in general did not constitute a per se violation of the fair trial rights of criminal defendants.

[23] *Id.* at 535.

[24] These four Justices included: Justice Clark, writing for the Court, who noted that "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to the accused", 381 U.S. at 544; Chief Justice Warren, who wrote a separate concurring opinion wherein he argued that "the televising of criminal trials is inherently a denial of due process," *id.* at 552; and Justices Douglas and Goldberg, who joined Warren's concurring opinion.

their right to a fair trial,[25] a right protected by the due process clauses of the fifth and fourteenth amendments and by the sixth amendment's "impartial jury" provision.

It was not clear, however, whether Justice Harlan, the fifth vote necessary to reverse the defendant's conviction, likewise espoused a per se constitutional prohibition of televised trials, or favored a more limited holding. Doubt over the meaning of Harlan's concurring opinion[26]—and the *Estes* decision as a whole—lingered for sixteen years until *Chandler v. Florida*,[27] when the Supreme Court again put the medium of television on trial.

B. Chandler v. Florida: *A Reluctant "Yes" to Courtroom Television*

Writing for a unanimous Court,[28] Chief Justice Burger concluded in *Chandler* that Justice Harlan did not call for a per se constitutional rule against televised trials in his *Estes* concurring opinion.[29] The Chief Justice noted that Harlan had, at the very outset of his opinion, expressly limited his decisive concurrence "to the extent indicated in this opinion."[30] Moreover, Harlan had gone on to state that "*[a]t the present juncture* I can only conclude that televised trials, *at least in cases like this one*, . . . are constitutionally banned."[31] As Justice Harlan's opinion was the screw upon which the holding of *Estes* turned, Burger reasoned that the *Estes* case could "not . . . be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases under all circumstances."[32]

The precedential rubble of *Estes* having been removed, the path was clear for the *Chandler* Court's primary holding: the Constitution does not preclude a state from allowing the televising of judicial proceedings. The Court explained why:

> An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial

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[25] 381 U.S. at 537-38.

[26] *Id.* at 587.

[27] 449 U.S. 560 (1981). *Chandler* concerned the constitutionality of the Florida Supreme Court's amending Canon 3A(7) of the Florida Code of Judicial Conduct to permit the electronic coverage of all judicial proceedings at the trial court's discretion, even over the objection of the participants in the proceedings. *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979).

[28] Justices Stewart and White each wrote opinions concurring in the result reached by the Court. Justice Stevens did not participate in the case.

[29] 449 U.S. at 573.

[30] *Id.* at 571 (quoting Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring)).

[31] *Id.* at 573 (quoting Estes v. Texas, 381 U.S. 532, 596 (1965) (Harlan, J., concurring)) (emphasis added in *Chandler*).

[32] *Id.*

> broadcasts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matters. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.[33]

The Court in *Chandler* went on to note the lack of empirical evidence supporting the appellants'[34] contention that the televising of criminal trials inherently deprives criminal defendants of their fair trial rights.[35] It concluded the burden was on criminal defendants to demonstrate television coverage had a *specific* prejudicial effect on the jury or some other courtroom participant, thereby depriving such defendants of their constitutional right to a fair trial.[36] In light of the appellants' failure to sustain this burden, their convictions were upheld.[37]

Although the Supreme Court's decision in *Chandler* would have to be characterized as being pro-television, neither the case nor the Court itself can be said to stand as unwavering beacons upon which television cameras can focus in finding their way to the courthouse door. For example, Chief Justice Burger, no ardent advocate of the rights of the electronic media,[38] concluded his opinion by declaring that "there is no reason for this Court either to endorse or invalidate Florida's experiment [in allowing the televising of criminal trials]."[39] The Court's reluctance to stamp a permanent seal of approval on courtroom broadcasting was also implicitly conveyed through repeated references to the "experimental"

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[33] *Id.* at 574-75.

[34] The appellants were two Miami Beach policemen charged with burglary, whose trial was covered by television cameras over their objection. *Id.* at 567-68.

[35] *Id.* at 578-79.

[36] *Id.* at 581. *Contra* Estes v. Texas, where Justice Clark wrote for the Court:

> It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. . . . This is such a case.

381 U.S. at 542. *See also* note 44 *infra*.

[37] 449 U.S. at 583.

[38] The Chief Justice has written several opinions in which he has acknowledged the right of the government to impose restrictions and conditions on television and radio which are not and can not be levied on the print media. *See, e.g.*, CBS, Inc. v. FCC, 101 S. Ct. 2813, 2829-30 (1981); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 126 (1973); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (1966). Burger also authored the plurality opinion in Houchins v. KQED, Inc., 438 U.S. 1 (1978), where the Court upheld certain restrictions placed upon the public and news media's right of access to a county jail, and where Burger would have also upheld a restriction prohibiting electronic equipment from entering the jail at all—a view which failed, however, to carry a plurality of the Court. *See* notes 102-05 *infra* and accompanying text. More to the point, Chief Justice Burger has declared that there will be no television in the Supreme Court until after "my funeral." Wasby, *Laying Estes to Rest: A Case Note*, 5 JUST. SYS. J. 58, 61 (1979).

[39] 449 U.S. at 582.

nature of such broadcast coverage,[40] to the limited and inconclusive empirical data[41] and to the fact that "this Court has no supervisory authority over state courts."[42] Finally, and most subtly, this reluctance was conveyed by the *Chandler* Court's insistence (to the chagrin of Justices Stewart and White)[43] on merely distinguishing[44] rather than flatly overruling the decidedly anti-television *Estes* decision.

In view of the Supreme Court's vacillating and equivocal position on the merits of televised trials, it is important to determine whether the television medium has an affirmative constitutional right to attend and broadcast judicial proceedings with its audio-visual equipment. Assuming television does have such a right, any statute, court rule or order prohibiting television coverage of court proceedings can withstand constitutional scrutiny only if it is necessary to promote a countervailing interest of compelling or overriding dimensions.[45]

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[40] *Id.* at 578 ("The experimental status of electronic coverage of trials is also emphasized by the *amicus* brief of the Conference of Chief Justices."); *id.* at 579 ("To stay experimentation in things social and economic is a grave responsibility . . . . It is one of the happy incidents of the federal system that a single courageous State may . . . try novel social and economic experiments without risk to the rest of the country.") (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *id.* at 582 ("Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment.").

[41] *Id.* at 576 n.11 ("At the moment, . . . there is no unimpeachable empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings."); *id.* at 578-79 ("At present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial] process."); *id.* at 579 n.12 ("Further developments and more data are required before this issue can be finally resolved.").

[42] *Id.* at 570, 580. Chief Justice Burger confirmed that the Court in *Chandler* expressed no preference for courtroom television when, in an address before the Conference of Chief Justices, he stated that "[t]he central point of the [*Chandler*] decision is the recognition that the United States Supreme Court is not a supervisor of state courts." Winter, *Cameras in the Courtroom: What Next After Chandler?*, 64 A.B.A. J. 277, 277 (1981).

[43] In his opinion concurring in the result, Justice Stewart stated that Justice Harlan's concurrence in *Estes did* support a per se prohibition of courtroom cameras, and that therefore the *Chandler* Court should overrule rather than distinguish the *Estes* decision. 449 U.S. at 585-86. Justice White likewise believed *Estes* to be "fairly read as establishing a *per se* constitutional rule against televising any criminal trial if the defendant objects," and should be flatly overruled by the *Chandler* Court. *Id.* at 587 (White, J., concurring in the judgment).

[44] The word "merely" is used advisedly, since the practical effect of the *Chandler* case was to distinguish *Estes* out of existence. Indeed, by shifting the burden from the state having to prove that televised trials are fair in general, *see Estes*, 381 U.S. at 542, to the criminal defendant having to show specific instances of television-induced unfairness, *see Chandler*, 449 U.S. at 575, *Chandler* overruled *Estes* in substance if not in form. The fact that it chose to distinguish *Estes*—relying on a most ambiguous concurrence by Justice Harlan—may well reflect the Court's reluctance to totally destroy the strongest judicial dam to a potential torrent of televised trials.

[45] There is a long line of Supreme Court precedent for the proposition that significant

II. A PROLOGUE TO THE "RIGHT OF INFORMATION TRIANGLE"

Of the numerous purposes attributed to the first amendment's free speech and press guarantees,[46] the one perhaps most frequently and fer-

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government restriction of the first amendment's free speech and press guarantees will be "strictly scrutinized"—that is, such restriction must be necessary to further a compelling governmental interest. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (a "heavy burden [is] imposed as a condition to securing a prior restraint" on the press' right to report on judicial proceedings); Branzburg v. Hayes, 408 U.S. 665, 680 (1972) ("official action with adverse impact on First Amendment rights [must] be justified by a public interest that is 'compelling' or 'paramount' "); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 247 U.S. 47 (1919).

It has, however, been argued that the ban on courtroom cameras is merely a "time, place, and manner" restriction and thus need not pass the strict scrutiny test. *See, e.g.*, CBS, Inc. v. Lieberman, 439 F. Supp. 862, 868 (N.D. Ill. 1976):

> While the content of communication enjoys virtually absolute First Amendment protection, the manner of communication does not . . . . Assuming . . . that the First Amendment . . . protects the gathering of news at a public hearing, the question remains whether the manner of gathering news at such a hearing through television filming and taping can be regulated or prohibited.

The response to this argument is that a courtroom camera ban denies the electronic media their use of audio-visual equipment, equipment which produces sights and sounds that constitute "content" rather than "manner" of communication. *See* Zimmerman, *Overcoming Future Shock: Estes Revisited, Or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641, 668 ("Because the content conveyed by photographs or the electronic media cannot be duplicated in written or oral descriptions, the restraint on [courtroom] access directly restricts speech itself."). This response is supported by the fact that the United States Supreme Court has extended first amendment protection to the various forms of electronic media, including radio, *see, e.g.*, NBC v. United States, 319 U.S. 190, 226-27 (1943), motion pictures, *see, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952), and television, *see, e.g.*, Estes v. Texas, 381 U.S. 532, 539-40 (1965) (by implication); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 160-63 (Douglas, J., concurring).

Thus, the ban on courtroom cameras must be viewed as being more than a mere time, place and manner restriction. Indeed, if anything, it would be the imposition of guidelines pertaining to the type, placement and amount of electronic equipment that would constitute such a restriction.

Finally, it should be noted that the general use of the time, place and manner restriction distinction has been criticized as being both "irrelevant" and "unintelligible," and that, rather than focusing on the type of regulation, courts should more closely examine the justification for the regulation. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 585 n.4 (1978) (quoting Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (1975)).

[46] The first amendment states in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. For general discussions of the various purposes attributed to the first amendment's free speech and press clauses, see P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 197-203 (Supp. 1980); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-9 (1970); L. TRIBE, *supra* note 45, § 12-1.

vently discussed in recent years is that of protecting and encouraging the "free flow of information."[47] Although the precise constitutional parameters of what may be called the "right of information" have not yet been set by the United States Supreme Court,[48] there is little doubt or dispute that the first amendment exists in large part to safeguard the information process.[49] For as James Madison once observed in a timeless passage: "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[50]

The right of information may logically be viewed as a first amendment "triangle," the three legs being the rights to *gather, disseminate,* and *receive* information.[51] These three rights, separable in theory, are highly interdependent in reality: if any one should be infringed or nullified, the other two are likewise impaired or lost. The question, in the context of cameras in the courtroom, is whether and to what extent these three rights of information are applicable to the electronic media and their

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[47] *See, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-77 (1980); Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J., dissenting); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764-65 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Branzburg v. Hayes, 408 U.S. 665, 725-26 (1972) (Stewart, J., dissenting); Rosenbloom v. Metromedia, 403 U.S. 29, 41-44 (1971). *See also Symposium, The First Amendment and the Right to Know,* 1976 WASH. U.L.Q. 1; Note, *The Right of the Press to Gather Information,* 71 COLUM. L. REV. 838 (1971); Note, *The Rights of the Public and the Press to Gather Information,* 87 HARV. L. REV. 1505 (1974).

[48] This is at least partly because the Court has been prone to interpose this "right of information" aspect of the first amendment with the broad and amorphous "freedom of expression" concept. *See, e.g.,* Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[49] *See* Houchins v. KQED, Inc., 483 U.S. 1 (1978), where Justice Stevens noted: "The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution." *Id.* at 30 (Stevens, J., dissenting). *See also* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Mills v. Alabama, 384 U.S. 214, 218-19 (1966); Associated Press v. United States, 326 U.S. 1, 20 (1945); Thornhill v. Alabama, 310 U.S. 88, 102 (1940); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

[50] 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

[51] *See generally* Emerson, *Legal Foundations of the Right to Know,* 1976 WASH. U.L.Q. 1, where Professor Thomas Emerson stated:

> It is clear at the outset that the right to know fits readily into the first amendment and the whole system of freedom of expression. Reduced to its simplest terms the concept includes two closely related features: First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others. Together these constitute the reverse side of the coin from the right to communicate. But the coin is one piece, namely the system of freedom of expression.

Id. at 2.

broadcasting of judicial proceedings.[52] Assuming a degree of applicability of constitutional proportions, it follows that courtroom broadcasting, instead of simply being "experimented" with by the courts, would be mandated by the first and "most majestic"[53] constitutional amendment.

III. Gathering Information: The Right of Television to Attend Judicial Proceedings

A. Branzburg v. Hayes: *The Case for a Constitutional Right to Gather Information*

In *Branzburg v. Hayes*,[54] the Supreme Court for the first time expressly recognized the right to gather information as having constitutional dimensions. The issue in *Branzburg* was whether news reporters could be required to reveal their news sources to grand juries. A bare majority of the Court[55] held that reporters could be so compelled, at least where their testimony was necessary to promote the compelling state interest in ensuring effective grand jury proceedings.[56] Significantly, the majority adopted this "strict scrutiny" test only because it found some merit in the petitioner reporters' claim that their right to gather news was protected by the first amendment, and that this right might be impaired by the forced disclosure of otherwise confidential sources of information.[57] "[W]ithout some protection for seeking out the news," acknowledged the majority, "freedom of the press could be eviscerated."[58] The four dissenting Justices, while disagreeing with the majority's conclusion that compelling reporters to divulge their news sources did not violate the first amendment,[59] fully agreed that the first amendment protected the right

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[52] Presumably, any one of these three "information" rights would be sufficiently sturdy ground on which to base a first amendment right of television coverage of judicial proceedings. Because these three rights are closely if not completely interdependent, however, as a practical matter they must all fail or succeed together in their application to the problem of televised trials.

[53] L. Tribe, *supra* note 45, § 12-1, at 576.

[54] 408 U.S. 665 (1972).

[55] Justice White's opinion for the Court was joined by Chief Justice Burger and Justices Blackmun and Rehnquist. Justice Powell concurred in a separate opinion "to emphasize what seems to me the limited nature of the Court's holding." *Id.* at 709. That holding, according to Powell, was that conflicts between the news media's first amendment news-gathering right and the duty of all citizens to give relevant testimony before grand juries must be resolved on an ad hoc basis. *Id.* at 709-10 (Powell, J., concurring).

[56] *Id.* at 690. The majority emphasized the fact that any other rule would "grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.*

[57] *Id.* at 679-81, 693-95.

[58] *Id.* at 681.

[59] In a dissenting opinion joined by Justices Brennan and Marshall, Justice Stewart wrote that, at least in the specific cases before the Court, the first amendment did protect the news reporters' privilege not to reveal their news sources to grand juries. *Id.* at 746-52. Jus-

to gather information.[60]

The rationale behind this first amendment right of news-gathering was neither explained nor expounded upon by the *Branzburg* majority. It would appear, however, to be grounded in two possible theories. The first is that the right to gather information is the logical and necessary antecedent of the rights to disseminate and receive information, rights which have previously been held to be protected by the first amendment.[61] In his dissenting opinion in *Branzburg*, Justice Stewart elaborated:

> We have . . . recognized that there is a right to publish without prior governmental approval, a right to distribute information, and a right to receive printed matter.
>
> No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.[62]

The second possible basis for the constitutional right to gather information is that such a right helps ensure and promote a representative and stable government, which in itself is another primary purpose of the first amendment's freedoms.[63] As Justice Brennan recently observed:

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model . . . thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.[64]

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tice Douglas also dissented, arguing that the first amendment was an "absolute" and should not be balanced against competing state interests. *Id.* at 713-15.

[60] *Id.* at 715 (Douglas, J., dissenting); *id.* at 727-28 (Stewart, J., dissenting, joined by Justices Brennan and Marshall).

[61] *See generally* text accompanying notes 125-29 & 215-27 *infra*.

[62] 408 U.S. 665, 727-28 (1972) (Stewart, J., dissenting) (citations omitted). *See also In re* Mack, where Justice Musmanno of the Pennsylvania Supreme Court waxed eloquently in dissent: "A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdue." 386 Pa. 251, 273, 126 A.2d 679, 689 (1956), *cert. denied*, 352 U.S. 1002 (1957). *But see* Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

[63] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); Stromberg v. California, 283 U.S. 359, 369 (1931). *See also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[64] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587-88 (1980) (Brennan, J., con-

Because the gathering of information is one of the "indispensable conditions of meaningful communication," Brennan believed it to be protected by the first amendment.[65] He acknowledged, however, that the constitutional right to gather news was and should not be an unlimited one. Rather, stated Brennan, its scope must be "assayed by considering the information sought and the opposing interests invaded."[66] After carefully evaluating such factors in the context of criminal trial proceedings, he reached the same conclusion as did six of his brethren in the "watershed case"[67] of *Richmond Newspapers, Inc. v. Virginia*:[68] the first amendment guarantees a right of access to criminal trials.[69]

B. Richmond Newspapers, Inc. v. Virginia: *The Case for a Constitutional Right to Gather Information from the Courtroom*

In his lead opinion in *Richmond Newspapers*,[70] Chief Justice Burger enumerated the reasons why trials constitute a source of information that

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curring in the judgment) (citations and footnotes omitted). *See also* Houchins v. KQED, Inc., 458 U.S. 1, 31-32, (Stevens, J., dissenting); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

[65] 448 U.S. at 586-89 (Brennan, J., concurring in the judgment). *See also* Branzburg v. Hayes, 408 U.S. 665, 713-15 (1972) (Douglas, J., dissenting); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254-57.

[66] 448 U.S. at 588 (Brennan, J., concurring in the judgment).

[67] This was the description used by Justice Stevens in a separate concurring opinion in *Richmond Newspapers*. *Id.* at 582.

[68] 448 U.S. 555 (1980), *discussed in The Supreme Court 1979 Term*, 94 HARV. L. REV. 75, 149-59 (1980); Note, *Public Trials and a First Amendment Right of Access: A Presumption of Openness*, 60 NEB. L. REV. 169, 185-98 (1981).

[69] 448 U.S. at 580. The phrases "right of access" and "right to gather information" are basically synonymous. Justice Brennan used them interchangeably in his concurring opinion. *Id.* at 584. Chief Justice Burger likewise suggested any possible distinction between the two terms was unimportant when he noted: "It is not crucial whether we describe this right to attend criminal trials . . . as a 'right of access,' or a right to gather information, for we have recognized that without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 576 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

[70] There were seven separate opinions in *Richmond Newspapers*. Chief Justice Burger's opinion for the Court was joined by Justices White and Stevens, each of whom wrote separate concurring opinions. Justice Brennan, with whom Justice Marshall joined, concurred in the Court's judgment and its locating the source of a constitutional right of access in the first amendment, but went further than Burger by stating that the first amendment's "structural role" was to secure "self-government," 448 U.S. at 587, and guaranteeing access to criminal trials helped promote that role by educating the public as to the administration of justice. *Id.* at 593-97. Justices Stewart and Blackmun also wrote separate concurring opinions, the latter accepting the first amendment-based right of judicial access only as a "secondary position," believing that such right was better grounded in the sixth amendment's public trial provision. *Id.* at 603-04. Justice Rehnquist alone dissented, stating that neither the first nor any other amendment prohibits states from allowing trials to be closed when the presiding judge, prosecuting attorney and criminal defendant have agreed to such closure. *Id.* at 606. Justice Powell did not participate in the case.

is particularly amenable to a constitutional right of attendance: they are under governmental rather than private control;[71] they have historically been open to the public;[72] their free accessibility helps promote the fair and proper administration of justice, which is the single overriding purpose of judicial proceedings;[73] and they represent a vital part of government which is or at least should be of special concern to the general citizenry.[74] Alone, each of these characteristics presented a persuasive reason for mandating open trials; together, they made trial proceedings the logical choice[75] for what would be the Supreme Court's first explicit recognition of a constitutionally guaranteed right of access to a source of information.

The only question remaining for the *Richmond Newspapers* Court was on which constitutional peg it would hang the right to attend criminal trials.[76] The Court chose the first amendment,[77] with Chief Justice Burger

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[71] 448 U.S. at 575-79. The fact that a trial constitutes a source of "government" rather than "private" information may well be the single most important impetus behind the first amendment right of trial attendance. As Professor Emerson has commented:

> In my judgment the greatest contribution that could be made in this whole realm of law would be explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information from the government. There is a firm, indeed overwhelming, theoretical base for accepting this position . . . . The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information . . . . Whether or not such a guarantee of the right to know is the sole purpose of the first amendment, it is surely a main element of that provision and should be recognized as such.

Emerson, *supra* note 51, at 14.

[72] 448 U.S. at 564-69.

[73] *Id.* at 569-72.

[74] *Id.* at 575. Specifically, the Chief Justice declared: "Plainly, it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; . . . recognition of this pervades the centuries-old history of open trials and the opinions of this Court." *Id. See also* Landmark Communications, Inc. v. Virginia, 438 U.S. 829, 848 (1978), where Justice Stewart stated: "There could hardly be a higher governmental interest than a state's interest in the quality of its judiciary."

[75] This choice was not only logical but impelled in light of the enormous confusion which arose in the aftermath of the Court's decision in Gannett Co. v. DePasquale, 443 U.S. 368 (1979). In *Gannett*, a highly splintered Court held that a criminal pretrial hearing could be closed to the public and the news media when the accused, the prosecutor and the trial judge have all agreed to closure in order to protect the defendant's constitutional fair trial rights. Mainly because of the majority opinion's repeated references to the closure of "trials," *id.* at 370-94 *passim*, the biggest puzzle left by the *Gannett* decision was whether trials as well as pretrial proceedings could be closed upon the agreement of the trial participants—a puzzle the *Richmond Newspapers* Court attempted to piece together.

[76] At the outset of his opinion, Chief Justice Burger expressly limited the issue in *Richmond Newspapers* to whether there was a constitutional right "to attend *criminal trials*." 448 U.S. 555, 558 (1980)(emphasis added). And although Burger likewise limited the Court's holding to criminal trial proceedings, *id.* at 580, he did observe in a footnote that "historically both civil and criminal trials have been presumptively open." *Id.* at 580 n.17. It would

explaining the choice by noting that the freedoms of speech, press, assembly and petition "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[78] "What this means in the context of trials," concluded Burger, "is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."[79] While noting that this trial attendance right was not absolute, Burger stated that it could be infringed, and criminal trials closed, only if the trial judge has made "articulated" findings of some "overriding interest," and has no "alternative solutions" for safeguarding the criminal defendant's right to a fair trial.[80]

There is no question that under *Richmond Newspapers* the news media in general have as strong a first amendment-based claim to gather information from the courtroom as does the public generally.[81] The Chief Justice made this clear, and indeed, stopped just short of declaring that the news media have an even *greater* right of trial attendance than the general citizenry,[82] when he observed that:

> Instead of acquiring information about trials by first-hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided

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thus be reasonable to assume that the *Richmond Newspapers* decision applies to civil as well as criminal trials. *See The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 156 n.42 (1980) (citations omitted).

[77] 448 U.S. 555, 575-80 (1980). The other constitutional contender for championing the right of trial attendance was the sixth amendment's "public trial" guarantee. However, the appeal of this provision had been considerably diluted by the Court's holding in the *Gannett* case that all of the sixth amendment's guarantees, including the "public trial" one, were "personal" to the criminally accused. 443 U.S. 368, 380-81 (1979).

[78] 448 U.S. at 575.

[79] *Id.* at 576.

[80] *Id.* at 580-81.

[81] *Id.* at 572-73, 578.

[82] Such a declaration would have marked a significant turnaround in the Chief Justice's position on the issue of public/press access rights, which has strongly and consistently been that the news media have no greater right of access to sources of information than does the public generally. Burger was, for instance, part of the majority in the three prison access cases—Houchins v. KQED, Inc., 438 U.S. 1 (1978) (plurality opinion written by Chief Justice Burger), Saxbe v. Washington Post Co., 417 U.S. 843 (1974), and Pell v. Procunier, 417 U.S. 817 (1974)—in which the Court held that the news media have no greater right of access to prisons or prison inmates than does the general public. He was also in the majority in Branzburg v. Hayes, 408 U.S. 665 (1972), which held that reporters do not have a greater testimonial privilege than members of the public-at-large. And in his concurring opinion in First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), he went to great lengths to explain why, in his view, the first amendment's "press clause" does not confer special status on the news media. *See id.* at 797-802.

> special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . . ."[63]

The issue left unresolved by the *Richmond Newspapers* case, and of primary importance to this Comment, however, is whether the first amendment right to gather information from the courtroom extends to the camera and microphone, the basic tools of television and the other electronic media. It is an issue that was not before the Supreme Court in either of its cameras in the courtroom cases, *Estes v. Texas*[64] and *Chandler v. Florida*.[65] Moreover, the few lower courts which have addressed this issue have done so in a cursory and unpersuasive fashion.[66] For this

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[63] 448 U.S. 555, 572-73 (1980) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in the judgment)). A similar observation was made by Justice Brennan in his concurring opinion in *Richmond Newspapers:*

> Since the media's right of access is at least equal to that of the general public, . . . this case is resolved by a decision that the state statute unconstitutionally restricts public access to trials. As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the "agent" of interested citizens, and funnels information about trials to a large number of individuals.

448 U.S. at 586 n.2 (Brennan, J., concurring in the judgment).

[64] 381 U.S. 532 (1965). Admittedly, Justice Clark's opinion for the Court in *Estes* did lable as a "misconception" the argument that "the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television." *Id.* at 539. However, this and any other first amendment "right of access" statements made in *Estes* must be considered dicta at best, since the only issue before the Court was whether the presence of cameras in the courtroom deprived defendant Estes of his due process rights. *See id.* at 535; *id.* at 604, 614 (Stewart, J., dissenting). Moreover, Justice Clark concluded that "[w]hen the advance in these arts permit reporting by printing press or by television without their present hazards to a fair trial *we will have another case.*" *Id.* at 540 (emphasis added). This remark suggests that the *Estes* majority employed a balancing test between the criminal defendant's fair trial rights and a right of constitutional dimensions on the part of the electronic media to attend trials. *See* Zimmerman, *supra* note 45, at 649-50.

In short, it cannot be said that the majority in *Estes* was opposed to affording first amendment protection to the use of electronic equipment at trials. Perhaps even more significantly, it seems clear that the four dissenters in *Estes* believed the issue of televised trials implicated the first amendment. As Justice Stewart noted:

> There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

381 U.S. at 604 (Stewart, J., dissenting).

[65] 449 U.S. 560 (1981). As in *Estes*, the sole question in *Chandler* was whether a state could *permit* the televising of trial proceedings—a question whose constitutional ambits do not involve any first amendment claims of the electronic media.

[66] As noted by the Court in *Chandler*, 449 U.S. at 569, one state court which resolved this issue in the negative was the Florida Supreme Court in *In re* Post-Newsweek Stations, Flor-

reason, it is necessary to turn to a 1978 Supreme Court case, *Houchins v. KQED, Inc.*[87] Although *Houchins* was not directly concerned with the question of whether the electronic media should be allowed to attend judicial proceedings with their audio-visual equipment, it may well provide a large part of the answer.

C. Houchins v. KQED, Inc.: *The Case for a Constitutional Right to Gather Information from the Courtroom with the Camera and Microphone*

Houchins was the last of a troika of Supreme Court cases involving the access rights of the public and press to penal institutions.[88] The issue in

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ida, Inc., 370 So.2d 764 (Fla. 1979). In rejecting the petitioner television station's claim that the first amendment conferred upon the electronic media a constitutional right to bring their equipment into court, *id.* at 774, the Florida Supreme Court relied on Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), where the U.S. Supreme Court had stated that "there is no constitutional right to have [live witness] testimony recorded and broadcast." *Id.* at 610 (citing Estes v. Texas, 381 U.S. 532, 539-42 (1965)). For at least two compelling reasons, however, it appears that the Florida court's reliance on *Warner Communications* was substantially misplaced.

In the first place, *Warner Communications* involved a unique factual situation—an attempt by the respondent broadcasting company to make copies of tape recordings of White House conversations which had been introduced into evidence at the criminal trial of petitioner Nixon's former advisers. Thus, sensitive and complex problems of executive privilege were involved. As one commentator has noted: "Under such circumstances, the Court may, understandably, have been less concerned with its development of the law than with its desire to reach an appropriate result." Zimmerman, *supra* note 45, at 652 (citations omitted).

More significantly, however, the respondent in *Warner Communications* sought access to copies of tape recordings which were not available to the general public. 435 U.S. at 609. In effect, the respondent was claiming that it had a right of access to information that was sealed off to the public generally. Viewing the issue in this light, the Supreme Court had little qualm about ruling for the petitioner, given that there was a long line of precedent for the proposition that the first amendment news-gathering rights of the news media are not superior to those of the general public. *See, e.g.*, cases cited note 107 *infra*.

Given the unique factual setting of *Warner Communications* and its inappositeness to the specific issue of televised trials, the Florida Supreme Court's rejection in *Post-Newsweek Stations* of a first amendment right of electronic media trial access—a result based primarily on *Warner Communications*—is undeserving of much weight. This is especially true when one considers that most state courts which have addressed the issue of courtroom cameras acknowledge that the broadcasting media do have a right of some first amendment dimensions to attend legal proceedings with their electronic equipment. *See, e.g., In re* Hearings Concerning Canon 35, 132 Colo. 591, 296 P.2d 465 (1956); Atlanta Newspapers, Inc. v. Grimes, 216 Ga. 74, 114 S.E.2d 421 (1960), *cert. denied*, 364 U.S. 290 (1960); Hudson v. State, 132 S.E.2d 508 (Ga. App. 1963); Lyles v. State, 330 P.2d 734 (Okla. Crim. App. 1958).

[87] 438 U.S. 1 (1978). For discussions of the *Houchins* case and its ramifications, see J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 495-504 (1979); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 68-70 (Supp. 1979).

[88] *Houchins* followed Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington

Houchins was whether the respondent broadcaster's first amendment rights had been violated by certain restrictions imposed by the Sheriff of Alameda County, California, on "public tours" of the Alameda County jail. The respondent had obtained a preliminary injunction from a federal district court enjoining the sheriff from denying news media representatives access to the notorious "Little Greystone" area of the jail, from conducting interviews with prison inmates and from using audio-visual equipment inside the jail.[89] The trial court's order was upheld by the Ninth Circuit on interlocutory appeal.[90] The Supreme Court, however, with two Justices not participating[91] and the remaining seven closely divided, reversed.

Chief Justice Burger's opinion for the Court, which was joined by Justices White and Rehnquist, concluded that the tour restrictions were not violative of the first amendment, since that amendment did not guarantee a right of access to sources of information within government control.[92] Moreover, stated Burger, the effect of the trial court's preliminary injunction was to give the news media a superior right of access over the general public, "a right which is not essential to guarantee the freedom to communicate or publish."[93]

Justice Stevens, joined in dissent by Justices Brennan and Powell, argued that the first amendment's protection of the "full and free flow of information" was eviscerated by the restrictions, restrictions which deprived the public of information concerning a unique and important part of society—prisons.[94] And because there were no legitimate penal justifications for the restrictions, the dissenters submitted that the preliminary injunction should have been upheld in its entirety.[95]

The middle-man in the 3-1-3 decision was Justice Stewart, who agreed with Chief Justice Burger's basic thesis that the first amendment mandates neither a right of access to government-controlled sources of information nor a special access right for the institutional media.[96] Stewart thus concurred in the Court's judgment that the decisions below had to be reversed.[97] With regard to the specific restriction barring cameras and tape recorders from the jail, however, Justice Stewart, perhaps the

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Post Co., 417 U.S. 843 (1974), where the Court held, in 5-4 decisions, that the news media do not have a greater right of access than the general public to the California and federal prison systems, respectively.

[89] 438 U.S. at 6.

[90] 546 F.2d 284 (9th Cir. 1976).

[91] Justices Marshall and Blackmun did not participate in the *Houchins* decision.

[92] 438 U.S. at 14-15. It bears noting that *Houchins* came two years before *Richmond Newspapers*, the first Supreme Court decision to recognize a right to gather news from government-controlled sources of information. *See* notes 71-76 *supra* and accompanying text.

[93] 438 U.S. at 12.

[94] *Id.* at 36-38 (Stevens, J., dissenting).

[95] *Id.* at 40.

[96] *Id.* at 16 (Stewart, J., concurring in the judgment).

[97] *Id.* at 18.

Court's staunchest supporter of the electronic media's constitutional rights,[98] stated:

> A person touring [the] jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. . . . [T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.[99]

Stewart went on to declare that "the First and Fourteenth Amendments required the sheriff to give members of the press *effective* access to the same areas" which the public was allowed to visit,[100] and that accordingly, the jail should have been opened to the electronic media's ordinary news-gathering tools, the camera and microphone. He concluded that although the preliminary injunction issued by the trial court was overbroad, the appellant broadcaster was constitutionally entitled to some injunctive relief on remand.[101]

If television and the other electronic media are eventually to succeed in establishing a first amendment right to attend judicial proceedings with their electronic equipment, three facets of Justice Stewart's concurrence in *Houchins* will likely serve as the basis for this right.

The first is that Stewart's espousal of "effective access" to sources of information was approved—implicitly at least—by the three dissenting Justices in *Houchins*, thus making it the plurality view and presumably giving it some precedential value.[102] Admittedly, Justice Stevens' dissenting opinion did not expressly accede to Stewart's view that the exclusion of electronic equipment from the jail violated the broadcasting media's first amendment-based right of effective access. Such agreement may be inferred, however, from the dissent's concluding that the jail restrictions *in toto* violated the first amendment's protection of the information process. In fact, Stevens' dissent sounded a first amendment note that has

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[98] This is evidenced by Justice Stewart's concurring opinion in *Houchins* and his dissenting opinion in *Estes*, 381 U.S. 532, 615 (1965), where he stated: "The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." With Stewart's retirement from the Court, the electronic media have lost possibly their most powerful advocate in terms of the "right of access" question in general, and the right to attend and broadcast judicial proceedings issue in particular.

[99] 438 U.S. at 17 (Stewart, J., concurring in the judgment).

[100] *Id.*

[101] *Id.* at 18-19.

[102] *See generally* J. BARRON & C. DIENES, *supra* note 87, at 502-04; L. TRIBE, *supra* note 87, at 68; Kelso & Pawluc, *Focus on Cameras in the Courtroom: The Florida Experience, The California Experiment, and the Pending Decision in Chandler v. Florida*, 12 PAC. L.J. 1, 28-29 (1980).

been played by the Supreme Court a number of times in the past,[103] and which bodes well for a first amendment right of courtroom broadcasting:

> Our system of self-government assumes the existence of an informed citizenry. . . . Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance. . . .
>
> [T]his protection is not for the private benefit of those who might qualify as representatives of the "press" but to insure that the citizens are fully informed regarding matters of public interest and importance.[104]

Thus, as Professor Tribe has noted, "Justice Stewart and the three dissenters would appear to have provided enough votes to sustain that part of the district court order requiring the sheriff . . . to permit the media's use of cameras and recording equipment."[105]

The second critical point concerning Justice Stewart's *Houchins* concurrence is that it calls for "effective" *equality* between the news media and the general public for purposes of news gathering, and not for conferring special or superior rights upon media representatives.[106] Thus, not only does it avoid the constitutional axe that has felled news media claimants in the past,[107] but it also affords a disarmingly simple and efficient solution to the nagging problem of media access rights. Hereafter, whenever a source of information is made available to the general public, the various news media would be constitutionally entitled to bring along their news-gathering tools, so long as to do so would not pose a serious threat to some overriding governmental interest.

It is vital that this "solution" not be viewed as marking a departure from established first amendment jurisprudence. To the contrary, Justice Stewart's call for effective news-gathering equality both flows from and furthers the Supreme Court's longtime recognition of the institutional media as the legitimate and necessary representatives of the public's first

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[103] *See* cases cited note 49 *supra*.

[104] 438 U.S. at 31-32.

[105] L. TRIBE, *supra* note 87, at 68.

[106] *See* 438 U.S. at 16 (Stewart, J., concurring). *But see* Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978).

[107] *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979) (news media have no "editorial privilege" for discovery purposes); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (press not entitled to special procedural protection from search and seizure under the fourth amendment); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (news media have no right of access to copies of tape recordings not available to the public generally); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) and Pell v. Procunier, 417 U.S. 817 (1974) (representatives of the press have no greater right of access to prisons than members of the general public); Branzburg v. Hayes, 408 U.S. 665 (1972) (newsmen have no special testimonial privilege).

amendment interest in being well-informed.[108] As the Court observed in *First National Bank of Boston v. Bellotti*,[109] "[t]he press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate."[110]

The "public representative" role of the news media is especially crucial in the context of judicial proceedings. The case most often cited for this proposition is *Sheppard v. Maxwell*,[111] where Justice Clark wrote for the Court: "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[112] It is apparent, then, that what Justice Brennan once noted about the first amendment's free press guarantee is also applicable to Stewart's effective access theory, which would allow the news media to obtain information with their normal news-gathering equipment: "[it is] not for the benefit of the press so much as for the benefit of all of us."[113]

The third, and, for purposes of the cameras in the courtroom issue, most important point about Justice Stewart's *Houchins* concurrence is that in addition to espousing effective news-gathering equality between the various news media and the general public, it advocates effective equality between the two types of news media—the print and the elec-

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[108] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) ("The press has a preferred position in our constitutional scheme . . . to bring fulfillment to the public's right to know."); Mills v. Alabama, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all of the people whom they were selected to serve."); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)("A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.").

[109] 435 U.S. 765 (1978).

[110] *Id.* at 781.

[111] 384 U.S. 333 (1966).

[112] *Id.* at 350. *Accord*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976)(Brennan, J., concurring in the judgment); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492-93 (1975). The particularly crucial role of the news media in the context of court proceedings was even noted in *Ex parte* Sturm, 152 Md. 114, 136 A. 312 (Ct. App. 1927), the first judicial decision dealing with—and going against—courtroom cameras: "The high importance of the press as an agency of modern civilization is nowhere more freely recognized than in courts of justice." 152 Md. at 123, 136 A. at 316.

[113] Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). *See also* L. TRIBE, *supra* note 87, where in discussing Stewart's "effective access" theory, Professor Tribe noted:

> The right at stake is the public's right to be informed. To give that right substance, common sense demands that one at least recognize the right of the press to have access on terms which would allow the press to record what it sees for presentation to the viewing public.

Id. at 69 n.67.

tronic.[114] It has already been acknowledged by a number of lower courts that the print media have a first amendment right to gather news from certain government-controlled sources of information with their usual reportorial tools, the pen and notepad.[115] Under Stewart's theory of effective equality, it follows that the electronic media are also constitutionally entitled to gather information from such sources with their traditional news-gathering implements, the camera and microphone.[116] For there can be no denying that radio and television are as dependent on such electronic equipment to effectively perform their informational role as are the print media on their writing tools.[117] As audio-visual forms of communication, it is the electronic media's capacity to capture and convey images

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[114] Although Stewart did not explicitly call for effective equality between the print and electronic media, it is the natural if not only deduction from his conclusion that the appellant broadcaster had a first amendment right to bring its electronic equipment into the jail. This deduction also follows from the Justice's ardent advocacy of the rights of the electronic media in general. *See* note 98 *supra*.

[115] *See, e.g.*, CBS, Inc. v. Lieberman, 439 F. Supp. 862, 866 (N.D. Ill. 1976) ("Defendants . . . concede a First Amendment right in those attending the [administrative] hearing to record or memoralize that which they see and hear by paper and pencil. No authority to the contrary has come to our attention."); Nevens v. City of Chino, 233 Cal. App. 2d 775, 778, 44 Cal. Rptr. 50, 52 (Dist. Ct. App. 1965) (acknowledging that a measure prohibiting "the use of pen, or pencil and paper" at public meetings implicates the first amendment's free speech and press clauses, and "would at once strike anyone as being an improper means of exerting official power"); Sigma Delta Chi v. Speaker, Maryland House of Delegates, 270 Md. 1, 8, 310 A.2d 156, 160 (1973) (noting that "the removal of pen and paper might frustrate *all* effective communication" and thus infringe first amendment rights, but holding that "the prohibition against tape recorders is a mere inconvenience" and thus constitutional); Sudol v. Borough of North Arlington, 137 N.J. Super. 149, 348 A.2d 216 (1975) (following reasoning and decision in Nevens v. City of Chino, and holding that citizens have a first amendment right to tape record municipal council meetings).

[116] *See* Zimmerman, *supra* note 45, at 659-65 (expanding on Stewart's *Houchins* concurrence and asserting that the first amendment guarantees a right of "technological access" to sources of information—thereby ensuring televised trials). *Compare* Nevens v. City of Chino, 233 Cal. App.2d 775, 44 Cal. Rptr. 50 (Dist. Ct. App. 1965) (city council could not prohibit the use of tape recorders at its meetings, reasoning that "if the making of a tape record is a . . . better method of memorializing the acts of a public body it should be encouraged") *and* Sudol v. Borough of North Arlington, 137 N.J. Super. 149, 154, 348 A.2d 216 (1975) (adopting decision in *Nevens*) *with* Sigma Delta Chi v. Speaker, Maryland House of Delegates, 270 Md. 1, 310 A.2d 156 (1973) (stating that "the prohibition against tape recorders [in legislative chambers] is a mere inconvenience," and thus constitutionally permissible). But see Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977), where the Fifth Circuit reversed the trial court's decision that a ban on the televising and other electronic coverage of state executions violated television's free press rights. The appellate court relied on the *Pell* and *Saxbe* decisions, *see* note 88 *supra*, in holding that allowing such filming would give the news media a *special* right of access to sources of information. 556 F.2d at 1279. The *Garrett* decision's applicability to the situation of televised trials is tenuous, however, since (1) it involved a unique fact situation—the televising of executions (the state was fearful that "[t]elevising an execution would amount to conducting a public execution," *id.*); and (2) it preceded the *Houchins* case (and, specifically, Justice Stewart's concurrence).

[117] *See, e.g.*, Nevens v. City of Chino, 233 Cal. App. 2d 775, 777, 44 Cal. Rptr. 50, 51-52 (Dist. Ct. App. 1965); Goldman & Larson, *supra* note 2, at 2061.

and sounds, their ability to attract and inform visually and aurally, which simultaneously sets them apart from and allows them to compete with their print counterparts.[118] Therefore, just as Stewart's call for effective equality can be utilized "to accomodate the practical distinctions between the press and the general public,"[119] so can it be employed to accomodate the technological distinctions between the two types of news media.

Justice Stewart's effective access theory, as applied to the situation of televised trials,[120] thus paves a first amendment pathway to the courthouse for the tools of the electronic media. For if, as the Court held in *Richmond Newspapers*,[121] the courtroom must be open to the general public (at least for purposes of criminal trials), any rule excluding cameras and microphones from such a source of information ostensibly violates the electronic media's first amendment-based right to gather information "effectively."[122] As one commentator has observed: "With

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[118] *See generally* Comstock, *The Impact of Television on American Institutions*, 28 J. COM. 12, 23 (1978); Wilson, *Justice in Living Color: The Case for Courtroom Television*, 60 A.B.A. J. 294, 296 (1974); Zimmerman, *supra* note 45, at 661-63. See also Associated Press v. United States, 326 U.S. 1, 13-14 (1945), where the Supreme Court acknowledged that effective news-gathering helps determine the competitive success of newspapers.

[119] 438 U.S. 1, 16 (1978) (Stewart, J., concurring in the judgment).

[120] Whether Stewart's effective access theory may be applied to a courtroom setting as well as a county jail is debatable. On the one hand, it could be argued that giving the news media effectively equal access to courtrooms is even more appropriate than with regard to prisons, since, as Chief Justice Burger observed in *Richmond Newspapers*, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." 448 U.S. 555, 575 (1980). On the other hand, it could be contended that jails are more deserving of effective news-gathering equality for the media because of the greater possibility of institutional abuse. *See* Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1320 (1978) (suggesting that giving the press a *special* right of access to prisons "makes greater sense . . . than in relation to the courts").

Given the fact that Justice Stewart made no attempt to specifically limit application of his effective access theory to the context of prisons, however, and taking into account the strong pro-news media language used in the *Richmond Newspapers* case, *see* note 83 *supra* and accompanying text, the assumption that Stewart's theory is as applicable to courts as it is to jails must be viewed as a reasonable one. *See* Kelso & Pawluc, *supra* note 102, at 28-29; Zimmerman, *supra* note 45, at 658-59. This assumption is further bolstered by Stewart's dissenting opinion in the *Estes* case, which implied that the electronic media have a first amendment right to attend and broadcast judicial proceedings. *See* note 84 *supra*.

[121] 448 U.S. 555 (1980).

[122] It could be argued that such a rule also violates the equal protection clause of the fourteenth amendment. For given the fact that the camera and microphone are as essential to the electronic media's news-gathering capabilities as the pen and notepad are to the print media's, the exclusion of only the former set of tools effectively discriminates against the radio and television media. *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949) ("The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated."). And because such an exclusion violates the electronic media's right of effective news-gathering—a right which is protected by the first amendment and is thus "fundamental"—it would have

exclusion of the principal news-gathering tool of television—the motion picture sound camera—television can fulfill only a small portion of its First Amendment capability."[123] Consequently, unless the courtroom camera ban can be justified by a compelling or overriding state interest,[124]

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to be subjected to "equal protection strict scrutiny." *See generally* Boddie v. Connecticut, 401 U.S. 371 (1971) (right of access to litigate); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (right to vote).

It is thus not enough to say—as Justice Clark did in Estes v. Texas, 381 U.S. 532-40 (1965)—that the exclusion of courtroom cameras is not discriminatory because the *journalists* of the electronic media are accorded just as great a right of access to courtrooms as those of the print media. *See also* Zimmerman, *supra* note 45, at 653-54. *Cf.* Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978) (holding that banning television equipment from state execution chambers does not deny television equal protection of the law, since the ban also "denies the print reporter use of his camera, and the radio reporter use of his tape recorder"). The discrimination lies not against the radio and television reporter, but against the radio and television *media*. It is a discrimination no less invidious, and entitled to no less protection from the equal protection clause. *See generally* Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses").

[123] Wilson, *supra* note 118, at 296.

[124] The state interests in protecting the criminal defendant's right to a fair trial and the courtroom participants' privacy rights are admittedly implicated in the question of whether television should be allowed to attend judicial proceedings. However, analysis of both these "compelling" interests is best deferred to Part IV of this Comment, which discusses television's right to broadcast court proceedings. This is because it is not the mere *presence* of cameras and microphones in court that affects fair trial and privacy rights so much as it is the combination of such presence and the fact that actual *broadcasting* of the proceedings will take place. In other words, unless television is allowed to broadcast court proceedings, its mere presence in the courtroom will have a negligible effect on the criminal defendant's fair trial rights (*e.g.*, jurors are unlikely to be adversely influenced by such presence if they know no broadcasting will occur). Similarly, television's presence in court absent actual broadcasting would have no impact on the trial participants' privacy rights since there must be public disclosure for there to be a right of privacy violation. *See* note 153 *infra*.

One argument that does have to be disposed of in the context of the electronic media's right to attend judicial proceedings is the "physical threat" argument. The thrust of this contention is that the reportorial tools of the electronic media are far more bulky and conspicuous than those of the print media, and thus allowing them into court would pose a grave threat to the orderly administration of the judicial process. *See* Estes v. Texas, 381 U.S. 532, 550-52 (1965) (by implication).

However, this contention, like the once-bulky electronic equipment, is anachronistic. Today, the television and movie camera is compact and noiseless, still cameras are equipped with high-speed lenses which obviate the need for the distracting flashbulb, microphones are either attached to the camera or are extremely small and wireless and extra lighting and obtrusive cables are unnecessary. *See* Loewen, *Cameras in the Courtroom: A Reconsideration*, 17 WASHBURN L.J. 504, 510-11 (1978); Comment, *The Televised Trial: A Perspective*, 7 CUM.-SAM. L. REV. 323, 327 (1976). Therefore, as long as proper guidelines regarding the type, amount and placement of the various audio-visual equipment are adopted, the purely physical differences between the reportorial tools of the print and the electronic media are insignificant. *See* Chandler v. Florida, 449 U.S. 560, 576 (1981) ("Not unimportant . . . is the change in television technology since 1962, when Estes was tried . . . [M]any of the negative factors found in *Estes*—cumbersome equipment, cables, distracting lighting, numerous camera technicians—are less substantial factors today than they were at that

it should no longer be countenanced.

IV. Disseminating Information: The Right of Television to Broadcast Judicial Proceedings

Television's constitutional right to gather news with its electronic equipment, which in the context of judicial proceedings means the right to enter courtrooms with cameras and microphones in tow, would have very little effect or value if such medium had no corresponding constitutional right to *broadcast* the sights and sounds of the courtroom. There are two strong reasons, however, why the electronic media's right to broadcast judicial proceedings is even more securely grounded in the first amendment than is their antecedent right to attend such proceedings and record the events which transpire therein.

A. Recognizing a First Amendment Right to Broadcast Judicial Proceedings

1. The Right to Disseminate Information

The first reason the electronic media's courtroom broadcasting rights are afforded substantial constitutional protection is simply stated: unlike the right to gather information, the general right to disseminate information has been long and emphatically recognized by the United States Supreme Court as protected by the first amendment's free speech and press guarantees.[125] It was slightly more than a century ago that the Court first stated that the rights to publish and circulate information, which are the two basic components of mass dissemination, constitute an "essential" purpose of the "freedom of the press."[126] Since that time, the Court has consistently looked upon government regulations which impair the news media's right to impart information with the most exacting eye.[127] For as Justice Black observed in *Associated Press v. United States*,[128] the first

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time."). This insignificance is further demonstrated by the fact that Canon 3A(7) of the ABA Code of Judicial Conduct, *see* note 7 *supra*, and most states currently allow electronic equipment into the courtroom for non-commercial broadcasting purposes (*e.g.*, for use in law schools). *See* Wilson, *supra* note 118, at 294-95.

[125] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (closure of criminal trials); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (prior restraint); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (statute requiring newspapers to print the reply of political candidates); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel action); Lovell v. City of Griffin, 303 U.S. 444 (1938) (ordinance prohibiting distribution of literature within city limits); Grosjean v. American Press Co., 297 U.S. 233 (1936) (tax on newspaper advertisements).

[126] *Ex parte* Jackson, 96 U.S. 877, 879 (1878).

[127] *See, e.g.*, cases cited note 125 *supra*.

[128] 326 U.S. 1 (1945).

amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[129]

It would be constitutional folly, then, to deny first amendment protection to the electronic media's broadcasting rights, since such media are currently the undisputed mass communication leaders in the dispensing of information to the public,[130] and represent, in the words of Justice Brennan, "potentially the most efficient and effective 'marketplace of ideas' ever devised."[131] It would be even greater folly to deny such protection in the context of broadcasting court proceedings, in view of the tre-

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[129] *Id.* at 20.

[130] *See* notes 235-37 & 244 *infra* and accompanying text.

[131] CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 195 (1973) (Brennan, J., dissenting). The concept of a "marketplace of ideas" is attributable to Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616 (1919).

Admittedly, there have been governmental restrictions placed on the electronic media's broadcasting rights which could not constitutionally be imposed on the print media's publication rights. *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC's "fairness doctrine," which required radio broadcasters to give political candidates who have been criticized in radio editorials the right to reply over the airwaves) *with* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down Florida statute which required newspapers to publish the reply of candidates criticized in newspaper editorials). The usual justification for these broadcasting restrictions is the so-called "scarcity doctrine." This doctrine posits that because there are a limited number of airwaves, those radio and television stations privileged to use such airwaves are subject to greater governmental regulation than their print counterparts, whose number is theoretically infinite and which do not utilize a "public resource." *See* CBS, Inc. v. Democratic Nat'l Comm. 412 U.S. 94, 125 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-90 (1969); NBC v. United States, 319 U.S. 190, 226-27 (1943).

There is reason to believe, however, that the scarcity doctrine is no longer a viable reason for placing restrictions not applied to the print media on the electronic media's broadcasting rights. Today's economic realities have led to fewer independent newspapers and more newspaper chains, thus posing the same first amendment problems—*i.e.*, control of the news media by a powerful few—as those inherent in the electronic media. *See, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666 (1967); Bollinger, *supra* note 10, at 10-15; Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 156-59 (1967). Furthermore, the scarcity doctrine may soon be a legal dinosaur, outdated by the advent of cable television, a technology which allows for a virtually unlimited number of television channels and hence "broadcasters." *See generally* Bollinger, *supra*, note 10, at 37-42; Emerson, *supra* note 51, at 11; LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25, 119-24 (1973).

Of greatest significance, however, is the fact that the scarcity doctrine is completely inapposite to the specific situation of televising judicial proceedings. This is because the doctrine's application is limited to cases involving the *public's* right of access to the electronic media, which in turn concerns what the government can *compel* the broadcasters to do. *See, e.g.*, cases cited *supra*. In contrast, the issue of televised trials involves the *electronic media's* right of access to judicial proceedings, which in turn concerns what the government can *forbid* broadcasters from doing. These are conceptually and legally different questions, and the resolution of the latter is not aided by use of the scarcity doctrine.

mendous public importance of such proceedings and the fact that greater public exposure to the judicial process enhances its fair and efficient administration.[182]

2. *The Prior Restraint Doctrine*

The second reason the broadcasting of court proceedings is so well protected by the first amendment's guarantees is that, proceeding on the premise the electronic media are constitutionally entitled to bring their equipment into the courtroom and record the proceedings, any subsequent court ruling proscribing the broadcasting of the proceedings may implicate the doctrine of prior restraint.

A prior restraint is a governmental order prohibiting the dissemination of information which has already been obtained but not yet communicated by the potential disseminator.[183] Unlike a "subsequent punishment," which at most "chills" speech by imposing a penalty on the speaker after the speech has been made, a prior restraint effectively "freezes" speech by not allowing it to occur in the first place.[184]

The doctrine of prior restraint posits that such restrictions on communication are presumptively violative of the first amendment and will be upheld only if the government can establish that the restriction is strictly necessary to further a compelling governmental interest.[185] The basic rationale behind this doctrine was explained fifty years ago by then Chief Justice Hughes in *Near v. Minnesota*:[186]

> [I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty [of freedom of the press] to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licensor, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press . . . ."[187]

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[182] *See* notes 71-74 *supra* & 229-30 *infra* and accompanying text.

[183] *See generally* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

[184] Nebraska Press Ass'n v. Stuart, 427 U.S. at 559; Emerson, *supra* note 133, at 648.

[185] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. at 558, 561; Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Near v. Minnesota, 283 U.S. 697, 716 (1931); Emerson, *supra* note 133, at 648.

[186] 283 U.S. 697 (1931).

[187] *Id.* at 713-14 (citations omitted).

Indeed, the present Chief Justice of the Supreme Court has declared, in the landmark case of *Nebraska Press Association v. Stuart*,[138] that prior restraints represent "the most serious and the least tolerable infringement on First Amendment rights."[139] This is especially true, Chief Justice Burger observed, "when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings . . . ."[140]

Assuming the electronic media are allowed to bring their equipment into the courtroom and record the proceedings, a restriction on the broadcasting of any aspect of such proceedings would constitute a prior restraint of significant dimensions, since it would effectively reduce the dissemination of information concerning the judicial system.[141] Accordingly,

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[138] 427 U.S. 539 (1976). The case involved the gruesome killing of an entire six-member family in a small Nebraska town. With media coverage of the case intensive and national in scope, the trial judge entered a pretrial order restraining the news media from disseminating accounts of the defendant's confession or other facts implicating the accused. *Id.* at 545. Writing for a bare majority, Chief Justice Burger held that the prior restraint was not justified under the particular facts of the case. *Id.* at 569-70. In an opinion concurring in the judgment, and receiving the support of four other Justices, Justice Brennan argued that prior restraints are constitutionally permissible only in certain, specific "exceptional" situations, and that a threat to a criminal defendant's fair trial rights is not one of them. *Id.* at 590-94.

[139] *Id.* at 559.

[140] *Id.* (citations omitted).

[141] *See* notes 233-34 *infra* and accompanying text. Assuming that a jurisdiction did *not* recognize a first amendment-based right of the electronic media to attend trials with their cameras and microphones (or alternatively, allowed electronic equipment in court but prohibited the televising of certain aspects of the proceedings), a ban on courtroom television coverage would not constitute a prior restraint per se, since it is ostensibly and technically the *gathering* of information—and not its *dissemination*—that is being infringed. *See* Fatzer, *supra* note 10, at 237; Zimmerman, *supra* note 45, at 654; *cf.* Note, *supra* note 120, at 1317-18 (the closure of a courtroom "cannot be considered a prior restraint unless an antecedent right of attendance has been recognized"). Consequently, some lower courts have refused to apply the prior restraint doctrine to orders prohibiting electronic media activity in and around the courtroom. *See, e.g.*, Seymour v. United States, 373 F.2d 629 (5th Cir. 1967) (court order prohibiting taking of photographs on same floor of building housing courtrooms is not an unconstitutional prior restraint); CBS, Inc. v. Lieberman, 439 F.Supp. 862 (N.D. Ill. 1976) (order banning the televising of an administrative hearing is not a prior restraint); *In re* Acuff, 331 F.Supp. 819 (D. N.M. 1971) (court rule proscribing photographic coverage on same floor as courtrooms does not constitute a prior restraint).

Even in jurisdictions which do not recognize a constitutional right on the electronic media's part to attend trials with their equipment, however, it could still be argued that a rule prohibiting the broadcasting of all or certain parts of judicial proceedings has the same ultimate effect as a prior restraint—that is, the damming of the full and free flow of information to the general public. *See* Comment, *supra* note 124, at 333-37; Note, *Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation*, 9 LOY. U. CHI. L.J. 910, 921-24 (1978). In fact, this argument has been indirectly accepted by

such a restriction could be justified only by a countervailing governmental interest of the "highest order."[142]

The governmental interest normally proffered in behalf of the courtroom television ban is protection of the criminal defendant's constitutionally-guaranteed right to a fair trial. Opponents of courtroom cameras contend that television coverage of judicial proceedings will have a psychological impact on the various trial participants—the jurors,[143] witnesses,[144] trial judge,[145] trial attorneys[146] and the criminal defen-

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an number of courts, which have applied the prior restraint doctrine to orders impairing the activities of the electronic media in judicial settings. *See, e.g.*, United States v. CBS, Inc., 497 F.2d 102 (5th Cir. 1974) (court order prohibiting sketches of court proceedings from being drawn or disseminated violates the first amendment, since the government failed to prove the sketching constituted an "imminent" threat to the judicial process); Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970) (rule banning electronic media coverage in the courtroom "or its environs" is an impermissible prior restraint, since it could be used to ban such coverage in areas which pose no "immediate" threat to the judicial proceedings); *In re* Hearings Concerning Canon 35, 132 Colo. 591, 600, 296 P.2d 465, 470 (1956) ("[t]o uphold Canon 35 [banning cameras from the courtroom] would be . . . to make effective the prior restraint upon freedom to publish").

[142] This was the term used by a unanimous Supreme Court in Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103 (1979), *discussed in* note 184 *infra*.

[143] Writing for the Court in *Estes*, 381 U.S. 532 (1965), Justice Clark stated that "[t]he potential impact of television on the jurors is perhaps of the greatest significance," since "[t]hey are the nerve center of the fact-finding process." *Id.* at 545. Clark proceeded to list four possible ways the presence of courtroom cameras could prejudice the jury against the criminally accused: (1) jurors may be "pressured" by the cameras' presence into reaching a verdict which conforms to community opinion of the defendant—an opinion that will usually be hostile given the type of trials likely to be televised; (2) jurors' awareness of the cameras will distract and prevent them from giving trial testimony the attention it deserves; (3) jurors, if not sequestered, may see television broadcasts of the trial and be improperly influenced by what is broadcast; and (4) new trials will be jeopardized because potential jurors will have seen the original trial on television and formed opinions as to the defendant's guilt or innocence. *Id.* at 545-47.

None of these "jury-prejudice" theories has been empirically substantiated, a fact noted by the Court in *Chandler*. *See* note 41 *supra* and accompanying text. Moreover, what sparse empirical evidence there is tends to refute rather than support these theories. *See, e.g., In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 768-69, 777-78 (Fla. 1979); Goldman & Larson, *supra* note 2, at 2040-41; Hoyt, *The Effects of Being Televised*, 21 J. BROADCASTING 487, 487 (1977); Netteburg, *Does Research Support the Estes Ban on Cameras in the Courtroom?*, 63 JUDICATURE 466, 474-75 (1980); Zimmerman, *supra* note 45, at 687-90. E.H. Short & Assocs., Inc., Evaluation of California's Experiment with Extended Media Coverage of Courts (Sept. 1981)(unpublished study commissioned by California Judicial Council). *But see* CLEVELAND BAR NEWS RELEASE, *supra* note 14. Perhaps of greatest detriment to the validity of these jury-prejudice theories, however, is that they fail to make a meaningful distinction between the effects on the jurors caused by courtroom coverage by the print as opposed to the electronic media. *See* sources cited *supra*.

[144] The most common arguments as to how witnesses might be adversely affected by courtroom television are: (1) as with jurors, witnesses might feel "pressured" into giving testimony which conforms to the community opinion of the accused (however, like the jury-prejudice theory, this is not supported by the available empirical evidence—*see* sources cited note 143 *supra*); (2) televising judicial proceedings might frustrate the "rule against witnesses"—*i.e.*, the rule of evidence which allows courts to bar certain witnesses from hear-

ing the testimony of other witnesses, *but see In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 777 (Fla. 1979); and (3) witnesses might be deterred from testifying if they know their testimony will be televised. This third argument is the most problematic, since it conceivably implicates both the criminal defendant's right to a fair trial (assuming the witness was to testify in the defendant's favor), *see* note 196 *infra*, and the witness' privacy rights, *see* text accompanying notes 186-97 *infra*. Because of these factors, this Comment concludes that the televising of certain witnesses may be constitutionally proscribed. *See* text accompanying notes 186-98 *infra*.

[145] It has been argued that judges will have to bear added responsibilities if television were allowed into the courtroom. *See* Estes v. Texas, 381 U.S. at 548. However, many of these extra duties could be mitigated by a set of guidelines specifying the precise amount and location of the electronic equipment. *See, e.g.*, Goldman & Larson, *supra* note 2, at 2033-55, Tornquist & Grifall, *Television in the Courtroom: Devil or Saint?*, 17 WILLAMETTE L. REV. 345, 356-57 (1981). The additional burden on the judge of having to decide the initial question of whether television should be allowed in the courtroom at all would be alleviated by recognizing a first amendment right of the electronic media to bring its equipment into judicial proceedings.

The theory that judges may be distracted from their duties by the presence of the camera's all-seeing eye, *see* Estes v. Texas, 381 U.S. at 548, has generally been rebuked by the available empirical data. *See* Short, Florence & Marsh, *An Assessment of Videotape in the Criminal Courts*, 1975 B.Y.U. L. REV. 423, 450; CLEVELAND BAR NEWS RELEASE, *supra* note 14, at 4-5; E.H. Short & Assocs., Inc., *supra* note 143. Such data should hardly be surprising, since in contrast to the other courtroom participants, judges are accustomed to performing their duties in front of an audience and giving their undivided attention to courtroom proceedings.

Finally, there is the notion that judges might be improperly influenced by the presence of television in their courts in making their rulings. However, as the Supreme Court observed in Craig v. Harney, 331 U.S. 367 (1947), "[j]udges are supposed to be men of fortitude, able to thrive in a hardy climate." *Id.* at 376.

[146] The three main theories as to how trial lawyers might be adversely affected by courtroom cameras are: (1) In deciding whether to take a case, they may be influenced by the prospect of being on television; (2) they may be too distracted by the cameras to perform their duties adequately; and (3) they may "play to the cameras" in their handling of a televised case and act in a manner that will further their own, and not necessarily their client's, best interests.

Empirical studies have indeed found that attorneys are aware of, distracted by, and feel nervous before the courtroom television camera to a greater extent than any of the other trial participants. *See In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 768-69 (Fla. 1979); CLEVELAND BAR NEWS RELEASE, *supra* note 14, at 5. *See also* Buchanan, Pryor, Meeske & Strawn, *The Florida Experiment*, 15 TRIAL 34 (1979). On the other hand, almost all of the Florida judges who presided over televised trials believed that the performance of trial attorneys was *not* adversely affected by the presence of cameras in court. *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d at 770; E.H. Short & Assocs., Inc., *supra* note 143. Moreover, a simulation-study conducted at Brigham Young University found that, as perceived by judges, attorneys seldom altered their style of presentation when before the television camera, and that there was no change in the frequency of attorney objections or in the amount of preparation time. Short, Florence & Marsh, *supra* note 145, at 449. These findings suggest that trial lawyers will be no less diligent or effective in their handling of a case that is being televised as opposed to one that is not.

Indeed, it could even be argued—and this argument applies to the jurors, witnesses, and judges as well—that allowing television cameras into court might well make trial attorneys perform their duties with *more* concern and efficiency, since their performance would be viewed by a massive television audience. *See In re* Hearings Concerning Canon 35, 132 Colo.

dant[147]—that will invariably prove harmful to the fair trial rights of the criminally accused. Given the constitutional primacy of the right to an impartial trial,[148] it is neither unexpected nor unwarranted that such a contention has been extensively scrutinized by numerous courts[149] and commentators.[150] Nonetheless, it is a contention that was disposed of in the *Chandler* case,[151] where the Supreme Court held that until there is empirical evidence indicating otherwise, television coverage of judicial proceedings cannot be said to represent an inherent threat to the criminal defendant's fair trial rights.[152]

The *Chandler* Court's momentary disposition of the fair trial argument does not mean television's right to broadcast judicial proceedings is a constitutionally unsurpassable one, however. For there is one other claim of constitutional dimensions which qualifies in certain respects as a compelling governmental interest, and which would in certain situations be significantly furthered by a rule restricting television's courtroom broadcasting rights. It is a claim which in the past has been either glossed over or ignored outright by courts and commentators, but whose importance in the future cannot help but grow as it is inevitably pressed in televised cases. That claim is the courtroom participants' right of privacy.

591, 598-99, 296 P.2d 465, 469-70 (1956).

[147] The *Estes* Court suggested that "the impact of courtroom television on the defendant . . . is a form of mental—if not physical—harassment, resembling a police line-up or the third degree." 381 U.S. at 549. The *Chandler* Court also expressed some concern that "the very broadcast of some trials [is] potentially a form of punishment in itself—a punishment before guilt." 449 U.S. at 580. However, in a passage that perhaps best summarizes the entire argument that allowing television coverage of judicial proceedings will jeopardize the criminal defendant's fair trial rights, the Court in *Chandler* concluded that "whether coverage of a few trials will, in practice, be the equivalent of a 'Yankee Stadium' setting . . . must . . . await the continuing experimentation." *Id.* at 580-81.

[148] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 586 (1976) (Brennan, J., concurring in judgment) ("So basic to our jurisprudence is the right to a fair trial that it has been called 'the most fundamental of all freedoms.' It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression.") (citations omitted).

[149] *See, e.g.*, cases cited note 13 *supra*.

[150] *See, e.g.*, Fatzer, *supra* note 10; Kelso & Pawluc, *supra* note 102, at 31-40; Tornquist & Grifall, *supra* note 145, at 360-63; Zimmerman, *supra* note 45, at 672-90; Note, *Televised Trials*, *supra* note 141, at 924-29; *Does Television Make a Fair Trial Impossible?—A Debate*, 64 JUDICATURE 145 (1980).

[151] 449 U.S. 560 (1981).

[152] *See* notes 33-37 *supra* and accompanying text. It is interesting to note that, with the lone exception of the *Estes* Court, whose decision was effectively distinguished out of existence in *Chandler*, *see* note 44 *supra*, courts which have addressed the question of whether television coverage of judicial proceedings violates the criminal defendant's fair trial rights have all answered it in the negative. *See, e.g.*, cases cited note 13 *supra*.

B. *The Right of Privacy: A Constitutional Thorn in the Side of Television's Courtroom Broadcasting Rights*

Although the right of privacy has been acknowledged and protected at common law since 1890,[153] its recognition as a right of constitutional proportions has always been hampered by the fact that nowhere does the federal Constitution explicitly guarantee an individual's privacy rights.[154] Ironically, it took "an uncommonly silly law"[155] in the seminal case of *Griswold v. Connecticut*[156] for the United States Supreme Court to finally, in 1965, expressly elevate privacy to the lofty stature of an independent constitutional right.

1. *The Scope of the Constitutional Privacy Right*

The seven Justices who comprised the majority[157] in *Griswold* all

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[153] This was the year that Samuel Warren and Louis Brandeis published an article entitled *The Right of Privacy*, 4 HARV. L. REV. 193 (1890), which one commentator has hailed as the "most influential law review article of all." Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966). The article called for recognition of a common law action in tort against the press for the disclosure of private facts about an individual which subjects "him to mental pain and distress," and which is of no concern to the general public. Warren & Brandeis, *supra* at 196. Such a tort action would be based on the individual's "right to privacy," which the authors described as the right to maintain one's "inviolate personality." *Id.* at 205.

Warren and Brandeis' privacy tort call would eventually be answered by a stream of courts and commentators. *See generally* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487-88 (1975); Time, Inc. v. Hill, 385 U.S. 374, 380-84 (1967); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 802-04 (4th ed. 1971); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 176-77. Today it is generally recognized that four different branches comprise the right of privacy tort: (1) public disclosure of private facts; (2) intrusion into another's physical solitude or seclusion; (3) publicity which places another in a "false light" before the public; and (4) appropriation of another's private name or likeness. RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1976); W. PROSSER, *supra*, § 117, at 804-14; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

The first branch, relating to the public disclosure of private facts, is the branch most relevant to the issue of televising judicial proceedings. Dean Prosser has listed three elements necessary to establish a prima facie privacy tort of public disclosure: (1) the disclosure must be "public"—*i.e.*, made to the public at large; (2) the facts disclosed must be "private"; and (3) the disclosure must be "offensive and objectionable to a reasonable person of ordinary sensibilities." W. PROSSER, *supra*, § 117, at 810-11.

[154] Certain specific provisions in the Bill of Rights, however, may be and have been interpreted as protecting the privacy interests of individuals. *See* note 158 *infra*.

[155] This was the description used by Justice Stewart in his dissenting opinion in *Griswold*, 381 U.S. 479, 527 (1965).

[156] 381 U.S. 479 (1965), *discussed in* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7-11 (1971); Posner, *supra* note 153, at 190-97.

[157] Justice Douglas' opinion for the Court was joined by Justices Clark, Goldberg, Brennan, and Chief Justice Warren. Justice Goldberg's separate concurring opinion was joined by Brennan and Warren. Justices Harlan and White each wrote opinions concurring in the Court's judgment. Justices Black and Stewart dissented, arguing that the law was "asinine"

agreed that the 1879 Connecticut statute which flatly prohibited the use of contraceptives was unconstitutional, and that the proper if not only basis for invalidating it was the right of marital privacy. Where to locate this right in the federal Constitution, however, spawned considerable disagreement.

Justice Douglas, writing for the Court, believed that intimate marital matters such as procreation lay within a "zone of privacy" created and protected by the penumbras of certain specific guarantees contained in the Bill of Rights.[158] In his concurring opinion, Justice Goldberg opted for the ninth amendment,[159] stating that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment."[160] Finally, Justices Harlan and White decided to revive the long dormant and disregarded substantive due process doctrine, believing the statute deprived married couples of the "liberty" guaranteed by the due process clause of the fourteenth amendment.[161]

Despite the *Griswold* Court's disagreement and uncertainty over the precise constitutional grounding for the right of privacy, *Griswold's* privacy base was subsequently broadened in a case of far greater relevance to the issue of televising judicial proceedings, *Whalen v. Roe*.[162] In *Whalen*, a unanimous Supreme Court for the first time expressly acknowledged that the constitutional right of privacy embodied more than

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but not unconstitutional, since the federal Constitution did not guarantee an independent general right of privacy. *See id.* at 508 (Black, J., dissenting); *id.* at 530 (Stewart, J., dissenting).

[158] The specific guarantees listed by Justice Douglas were the first amendment's "right of assembly" (freedom of association) provision; the third amendment's prohibition against the quartering of soldiers in homes without the homeowner's consent; the fourth amendment's protection against unreasonable search and seizure; and the fifth amendment's self-incrimination clause.

The Supreme Court had held prior to *Griswold* that these specific guarantees protect the individual from unwarranted governmental intrusion, a strand of privacy recognized at common law as well. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (fifth amendment); Mapp v. Ohio, 367 U.S. 643, 656 (fourth amendment—wire-tapping); NAACP v. Alabama 357 U.S. 449, 462 (1958) (first amendment freedom of association); Boyd v. United States, 116 U.S. 616, 630 (1886) (statute requiring compelling of documents for customs purposes violates fourth and fifth amendments). *See generally* Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833, 857 (1974).

[159] The ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

[160] 381 U.S. at 499 (Goldberg, J., concurring).

[161] *Id.* at 500 (Harlan, J., concurring in the judgment); *id.* at 502 (White, J., concurring in the judgment). Of the three main rationales for the constitutional right of privacy propounded in *Griswold*, this due process clause-"liberty" one has retained the most vitality, having been subsequently used by the Court in Roe v. Wade, 410 U.S. 113, 152-53 (1973), and Whalen v. Roe, 429 U.S. 589, 598-99 n.23 (1977) (by implication), *discussed in* text accompanying notes 162-68 *infra*.

[162] 429 U.S. 589 (1977).

the right to make decisions on intimate family matters pertaining to marriage, procreation, and child rearing.[163] For in addition to safeguarding "the interest in independence in making certain kinds of important decisions,"[164] declared the court, the constitutionally-guaranteed privacy right protected "the individual interest in avoiding disclosure of personal matters."[165]

The Court in *Whalen* nonetheless went on to hold that New York's Controlled Substances Act, which provided for computerized storage of the names and addresses of patients receiving certain potentially dangerous medications, did not "pose a sufficiently grievous threat" to either of the constitutionally-protected privacy interests.[166] It stressed the fact, however, that any disclosure of such information could be made only to authorized personnel in the New York Health Department, and not to the general public.[167] This fact was especially important to Justice Brennan, who observed in a concurring opinion that the "[b]road dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests."[168]

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[163] *See id.* at 599-600 (by implication).

[164] *Id.* at 599-600.

[165] *Id.* at 599. This statement seemingly flew in the face of Paul v. Davis, 424 U.S. 693 (1976), a case decided just a year prior to *Whalen*. In *Paul*, the Court held that the state's circulating a flyer which contained the name and photograph of arrested shoplifters did not violate the constitutional rights of the respondent, who had been charged with shoplifting at the time of the flyer's circulation (a charge which was subsequently dismissed). The Court reasoned:

> Respondent's claim . . . is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713.

One commentator has interpreted the *Paul* case to mean "that the right of privacy is a right to act and not a right to keep information private." Posner, *supra* note 153, at 214. However, as Justice Brennan noted in his dissenting opinion in *Paul*: "[S]ince there has not been substantial briefing or oral argument on [the right of privacy question], the Court's pronouncements are certainly unnecessary." 424 U.S. at 735 n.18 (Brennan, J., dissenting). In light of the Supreme Court's subsequent observations in *Whalen* and Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977), *discussed in* note 168 *infra*, the *Paul* Court's pronouncements on the constitutional ambits of the privacy right may have little remaining viability as well.

[166] *Id.* at 600.

[167] *Id.* at 602. Thus, noted the Court, "[s]uch disclosures . . . are [not] meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care . . . [such as] disclosures of private medical informaton to doctors, to hospital personnel, to insurance companies, and to public health agencies . . . ." *Id.*

[168] *Id.* at 606 (Brennan, J., concurring). The validity of this statement was questioned by Justice Stewart in a separate concurring opinion. Stewart maintained his belief, first expressed in dissent in *Griswold*, 381 U.S. at 530, that the Constitution did not provide for a general right of privacy. 429 U.S. at 706-08 (by implication).

The Court's expansion in *Whalen* of the constitutional right of privacy to include a "freedom from public disclosure of private information" strand was perhaps inevitable, given that this strand entails the "right to confidentiality"[169]—the right to maintain a shroud of secrecy over certain aspects of one's life.[170] This right can be said to constitute "privacy" in the most basic sense, for as one right of privacy scholar has noted: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[171] The problem with this freedom from disclosure thread of privacy, however, is that by its very nature it comes into conflict with the first amendment's free press guarantee, inasmuch as it is

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It was Justice Brennan's view on the constitutional parameters of privacy, however, that would prevail in a case decided the same term as *Whalen*; Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977). There, the Court, speaking through Justice Brennan, quoted with approval the *Whalen* cases's conferring constitutional status upon the privacy interest in "avoiding disclosure of personal matters . . . ." *Id.* at 457 (quoting *Whalen*, 429 U.S. at 599). Justice Brennan further stated: "We may agree with appellant that . . . public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." 433 U.S. at 457.

Although acknowledging the appellant's "legitimate expectation of privacy in his personal communications," the Court in *Nixon* held that such a right was outweighed by "the public interest in preserving [presidential] materials." *Id.* at 465. The Court went on to uphold the Presidential Recordings and Materials Preservation Act, which provides for the archival screening of all presidential materials to determine which are of historical value. *Id.* at 465.

The *Whalen-Nixon* espousal of a constitutional privacy right to be free from certain disclosures has been adopted by a number of lower courts. *See, e.g,* Plante v. Gonzalez, 575 F.2d 1119, 1127-37 (5th Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979); Shuman v. City of Philadelphia, 470 F. Supp. 449, 457-61 (E.D. Pa. 1979); Martinelli v. Dist. Court of Denver, 612 P.2d 1083, 1091-93 (Colo. 1980) (en banc); Byron, Harless, Schaffer, Reid and Assocs. v. State *ex rel.* Schellenberg, 360 So.2d 83, 89-99 (Fla. Dist. Ct. App. 1978).

[169] Plante v. Gonzalez, 575 F.2d at 1132 (citing Gerety, *Redefining Privacy,* 12 HARV. C.R.-C.L. L. REV. 233 (1977)).

[170] Indeed, commentators had recognized even prior to the *Whalen* and *Nixon* decisions that the constitutional privacy right encompassed the freedom *from* certain disclosures of private facts as well as the freedom *to* make certain fundamental decisions. *See, e.g.,* Gerety, *supra* note 169; Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision,* 64 CALIF. L. REV. 1447 (1976).

[171] A. WESTIN, PRIVACY AND FREEDOM 7 (1967). *See also* Fried, *Privacy,* 77 YALE L.J. 475, 482 (1968) ("As a first approximation, privacy seems to be related to secrecy, to limiting the knowledge of others about oneself . . . . Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves."); Lusky, *Invasion of Privacy: A Clarification of Concepts,* 72 COLUM. L. REV. 693, 709 (1972) ("Privacy is the condition enjoyed by one who can control the communication of information about oneself."); Warren & Brandeis, *supra* note 153, at 198 ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."). *But see* Posner, *supra* note 153, at 175 ('[P]rivacy as secrecy has in my opinion a weaker claim to the protection of society than the interest in being free from intrusions that disrupt private activities without unmasking—that is, without producing information that may have social value.").

the news media's function to disclose information to the general public.[172] This conflict is clearly evident in the context of televised trials, which involves a confrontation between the electronic media's first amendment right to broadcast judicial proceedings and the courtroom participants' constitutional right to be free from public disclosures of certain private facts. Both these rights are deserving of government protection; the question is how to best accommodate them. Although this question has not yet been directly addressed by the courts, some insight into its possible resolution may be gleaned from the Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn.*[173] This 1975 case was the first and so far only Supreme Court decision to have dealt with the common law right of privacy in the context of the news media's disclosure of truthful but private facts.[174]

2. *Accommodating the Right of Privacy with the First Amendment*

The issue in *Cox* was whether the appellant broadcasting company could be held criminally and civilly liable for reporting on television the name of appellee's deceased daughter, a rape victim. The report violated a state statute which made it a misdemeanor for any news media to disclose the identity of rape victims.[175] In ruling for the broadcasting company, the Court held that the first amendment's free speech and press guarantees outweighed the appellee's right of privacy interests.[176] Writing for the majority,[177] Justice White reasoned that the privacy claim, though "powerful"[178] and supported by "impressive credentials,"[179] was seriously undermined by the fact that the information reported was contained in

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[172] *See, e.g.,* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975) ("Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent . . . ."); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 534, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971) ("The right to keep information private was bound to clash with the right to disseminate information to the public."). *See also* Emerson, *supra* note 51, at 20 ("The clash between the right of privacy and the right to know is obvious. One is almost the exact opposite of the other.").

[173] 420 U.S. 469 (1975).

[174] *See* Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases,* 124 U. PA. L. REV. 1385, 1388 (1976).

[175] 420 U.S. at 471-72.

[176] *Id.* at 496-97.

[177] Justice White's opinion for the Court was joined by Justices Brennan, Stewart, Marshall, Blackmun and Powell. Chief Justice Burger and Justice Douglas each concurred in the judgment. Justice Rehnquist dissented on grounds unrelated to the first amendment-right of privacy issue.

[178] 420 U.S. at 487.

[179] *Id.* at 489.

public records—specifically, the rape indictment:[180]

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served . . . . The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.[181]

The Court concluded that "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."[182]

Although the *Cox* decision has been criticized for failing to adequately accommodate the privacy interests of the appellee,[183] the Supreme Court would later implicitly affirm *Cox* in a number of cases making clear the Court's strong preference for the first amendment over an individual's interest in being free from certain public disclosures.[184] Certainly, if *Cox*

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[180] *Id.* at 494-95.

[181] *Id.* at 495.

[182] *Id.*

[183] *See, e.g.*, Posner, *supra* note 153, at 207-09.

[184] A rapid succession of cases involving the public disclosure of truthful, private facts in judicially-related settings would lend support to *Cox*. In Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam), the Court struck down a pretrial court order prohibiting the news media from disseminating the name and photograph of a juvenile charged with second-degree murder. The Court held the order to be a violation of the first amendment's free press guarantee, relying on the *Cox* and *Nebraska Press* decisions. *Id.* at 310-12.

A year after *Oklahoma Publishing*, a unanimous Supreme Court in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), reversed the conviction of a newspaper for publishing an article "which accurately reported on a pending inquiry by the Virginia Judiciary Inquiry and Review Commission and identified the state judge whose conduct was being investigated." *Id.* at 831. In declaring the statute which prohibited such publications unconstitutional, the Court stated:

> The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the news media. The article published by Landmark provided actual factual information . . . , and in doing so clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.

Id. at 839 (citation omitted).

At the heels of *Landmark Communications* came yet another unanimous Supreme Court decision, Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), which involved a state statute requiring newspapers—but not radio or television—to seek and secure the approval of the juvenile court before reporting the names of youths charged as juvenile offenders. *Id.* at 98. The Court noted that "[w]hether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information, . . . the highest form of state interest [is required] to sustain its validity." *Id.* at 101-02. The Court concluded that the statute failed to pass this "strict scrutiny" test, as the proffered state interest of protecting the anonymity of juvenile offenders was inadequate to justify the statute's severe in-

were directly applicable to the situation of televised trials, it would be a most useful shield for the electronic media in defending against privacy claims of courtroom participants. The case strongly suggests that any truthful information concerning the judiciary and lawfully obtained by the news media—the electronic media included[185]—may be disseminated with little regard to how "private" such information may be.[186] The one possible limitation on such disclosures—that the information be "newsworthy" or of "public significance"[187]—may be no limitation at all in light of the *Cox* Court's quoting with approval[188] the following passage from *Craig v. Harney*:[189] "A trial is a public event. What transpires in the court room is public property . . . . Those who see and hear what transpired can report it with impunity."[190]

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fringement upon the first amendment's free press guarantee. *Id.* at 104. Moreover, even assuming the state interest was a sufficiently compelling one, the statute did not promote it since only newspapers were forbidden from disclosing the names of the charged juveniles, and not the electronic media. *Id.* at 104-05. In an opinion concurring in the judgment, Justice Rehnquist argued that the state interest in protecting "the beneficient and rehabilitative purposes of a State's juvenile court system *was* an interest of the "highest order," *id.* at 107, but that the statute failed because of its discrimination against the print media, *id.* at 110.

It should be noted that, unlike *Cox*, this trio of cases was primarily concerned with an individual's *reputation*—which has not been accorded constitutional protection by the Supreme Court, *see* Paul v. Davis, 424 U.S. 693, 711-12 (1975)—and not with a person's right of privacy. Nonetheless, because of the exceedingly close connection between the freedom from disclosure strand of privacy and the defamation-loss of reputation concept (indeed, a rule prohibiting the televising of certain witnesses may be said to be directed primarily towards preserving their reputations), these cases can be considered in the same light—and certainly of the same predeliction—as the *Cox* decision. At the very least, as one commentator has noted, "[t]hese cases . . . leave little doubt that, except in cases involving imminent national military catastrophe, the Court will not permit previous restraints upon, or subsequent punishment for, publication in a mass medium of accurate information that the publisher has lawfully acquired." Cox, *The Supreme Court, 1979 Term—Foreward, Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 17 (1980).

[185] It must be remembered that the *Cox* case concerned a public disclosure made on *television*, which the Court upheld against a right of privacy-based attack. *See* text accompanying notes 175-82 *supra*.

[186] *See also* cases cited note 184 *supra*.

[187] *See generally* Gilbert v. Medical Economics Co., 665 F.2d 305, 307-09 (10th Cir. 1981); RESTATEMENT (SECOND) OF TORTS § 652 (1976); Comment, *supra* note 174, at 1400-06.

[188] 420 U.S. at 492-93.

[189] 331 U.S. 367 (1947). *See also* Warren & Brandeis, *supra* note 153, at 216 ("the right to privacy is not invaded by any publication made in a court of justice . . . or . . . in any other public body").

[190] 331 U.S. at 374. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), however, the Court retreated slightly from this near-absolute view regarding reports of judicial proceedings. In *Firestone*, a majority of the Court held that the ex-wife of a member of the Firestone family did not become a public figure by the mere fact of her going through divorce proceedings. In a passage of particular value to the privacy interests of courtroom participants, Justice Rehnquist wrote for the Court:

> It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling

It is apparent, however, that the *Cox* decision is *not* directly on point to the specific issue of whether the electronic media should be allowed to broadcast judicial proceedings over a courtroom participant's privacy-based objection. In the first place, the case involved a right of privacy-freedom from disclosure claim of only tortious—and not constitutional—dimensions. A constitutionally protected right to be free from certain public disclosures is recognizable after *Whalen*,[191] and may be especially viable in those states which have an explicit right of privacy provision in their state constitutions.[192] Presumably, a constitutional privacy claim has greater stature than one based upon common law or statutory privacy rights, and can be impaired only by a concomitantly stronger governmental interest.

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all judicial proceedings matters of "public or general interest" . . . . [W]hile participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will . . . . There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom.

Id. at 455, 457.

Moreover, not all jurisdictions may be willing to accept the notion that all facets of open judicial proceedings are automatically newsworthy and thus amenable to mass public disclosure. The California Supreme Court, for example, has adopted an ad hoc balancing approach to determine if a particular piece of information is newsworthy. As the court stated in Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971): "We consider '(1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety.' " *Id.* at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875 (citations omitted).

[191] 429 U.S. 589 (1977).

[192] Currently, there are six states—Alaska, Arizona, California, Hawaii, Montana and Washington—whose state constitutions provide for an independent right of privacy in broad, general terms. *See* ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § I; HAWAII CONST. art. I, § 6; MONT. CONST. art. II, § 10; WASH. CONST. art. I, § 7.

In these states, it is likely that courts will recognize a constitutional privacy right which is even more expansive than that so far delineated by the U.S. Supreme Court. This, at least, has been the approach taken by the Alaska Supreme Court in interpreting its constitutional privacy provision, which provides in part: "The right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22. *See, e.g.*, Messerli v. State, 626 P.2d 81, 83 (Alaska 1981); State v. Glass, 583 P.2d 872 (Alaska 1978); Woods & Rhode, Inc. v. State, 565 P.2d 138, 149 (Alaska 1977). As the Alaska court stated in the *Glass* case: "Although there is no recorded legislative history of Alaska's right to privacy provision, it is clear that it affords broader protection than the penumbral right inferred from other constitutional provisions. Were that not the case, there would have been no need to amend the constitution." 583 P.2d at 878-79.

Even in those states which protect the right of privacy through tort law only, however, it is important to heed Professor Posner's declaration that "[t]he interests in liberty and security reflected in state tort law, including the tort law of privacy, are entitled to substantial consideration in determining whether a challenged law violates the First Amendment, whether or not those interests are independently protected by the Constitution against governmental invasion." Posner, *supra* note 153, at 209 n.97.

More importantly, however, *Cox* involved the mere reporting of facts—specifically, the identity of a person—from a cold record. It was not concerned with the actual televising of an individual during frequently emotional and heated court proceedings. The two situations are manifestly inapposite, with the latter posing a far more serious right of privacy problem.[193] For in the pursuit of the "whole truth," judicial proceedings can place a heavy burden on the shoulders of court participants: often, the most intimate of facts must be elicited, the most degrading of experiences recounted. Disclosure of such intimate matters will be made considerably more difficult and painful if they are allowed to be televised, since television has an ability to capture and transmit the appearance, expressions, and emotions of the courtroom participants that is unmatched by other forms of mass communication.[194] As one commentator has warned: "Not only does television transport a large audience into the courtroom, the eye of the television camera is constant and thorough. Thus, television has remarkable potential for expropriating sentiments and vulnerabilities and transforming them from an individual's property to the property of all who watch."[195]

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[193] As a practical matter, the extent to which the televising of judicial proceedings poses right of privacy problems depends on the type of courtroom camera provisions adopted by a particular jurisdiction. In those jurisdictions which adopt "consent" provisions—*i.e.*, provisions that allow the televising of criminal/civil proceedings only with the consent of the criminal defendant/civil litigants, or the televising of a particular witness or juror only with that person's consent—the right of privacy does not pose a significant problem. This is because the conferring of such consent operates as a waiver of one's privacy interests. *See* W. PROSSER, *supra* note 153, at 817; Warren & Brandeis, *supra* note 153, at 218. *But cf.* Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (consent of individual to disclosure of aspects concerning his public life does not necessarily extend to the disclosure of certain intimate aspects of his private life).

A potentially crippling problem with consent provisions, however, is that courtroom participants may so infrequently give their consent to being televised that television's first amendment right to broadcast judicial proceedings will be effectively and unduly curtailed. Indeed, Florida was forced to scrap its consent requirement because "the attempt to conduct the experimental [televised] trials, subject to participant consent, met with total failure." *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 766 (Fla. 1979).

The alternative to the consent provision is what might be termed the "veto-approval" provision: *i.e.*, allow the trial participants to affirmatively veto their being televised subject to the trial judge's approval. The most recent compilation by the National Center for State Courts reveals that of the 22 states which currently permit the televising of trial proceedings, nine of them have consent provisions, while the other 13 have provisions similar to the veto-approval one, in that television coverage is proscribed only if the defendant or some other trial participant expressly objects to his or her being televised. NATIONAL CENTER FOR STATE COURTS, *supra* note 8.

[194] *See, e.g.*, Estes v. Texas, 381 U.S. 532, 545-50 (1965); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 534, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971); Boone, *TV in the Courtroom: Is Something Being Stolen From Us?*, 9 HUMAN RIGHTS 24, 27 (1981); Graham, *Cameras in the Courtroom: A Dialogue*, 64 A.B.A. J. 545, 548 (1978); Note, *supra* note 141, at 915, 917.

[195] Boone, *supra* note 194, at 27. Although there is little dispute that television's audio-visual characteristics present more problematic privacy questions than do the print media's

Consequently, even though judicial proceedings are public events and all that unfolds therein is arguably inherently newsworthy, it does not necessarily follow that the *televising* of such proceedings should survive any and all right of privacy-based objections. For as the Second Circuit Court of Appeals noted in *Sidis v. F-R Publishing Corp.*,[196] a leading

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descriptive capabilities, *see* sources cited note 194 *supra*, there is some contention as to whether television's ability to reach a much larger audience than its print counterparts likewise casts a more ominous cloud over the trial participants' privacy rights. On the one hand, it could be argued that under tort privacy law a disclosure is "public" once it is made to the citizenry at large. *See* W. PROSSER, *supra* note 153, § 117, at 810-11. Thus, the fact that television reaches more people than the other mass communications media does not mean its transmission of information has a greater detrimental effect on the courtroom participants' privacy interests. *See* Note, *Constitutional Aspects of Television in the Courtroom*, 35 U. CIN. L. REV. 48, 54 (1966). On the other hand, it has been submitted that the above argument "ignores the fact that much of what goes on in a trial is basically private, receiving little attention in standard news coverage. . . . While most . . . details about the defendant's life would go unreported or unnoticed in standard news coverage, television would broadcast this information to millions of people." Note, *supra* note 141, at 916. *See also* Posner, *supra* note 153, at 208 ("the right to complain about publicity should not be forfeited merely because the information in question is known to a few people").

This debate over the "quantitative" differences between television and other mass media is largely immaterial, however, since it seems clear that it is their "qualitative" differences which pose the primary threat to the trial participants' privacy rights. Nonetheless, it does serve to flush out another constitutional guarantee implicated in the issue of televised trials: the "public trial" provision of the sixth amendment.

Most discussions of the public trial guarantee have centered on whether this guarantee may be used by the electronic media to mandate the broadcasting of court proceedings—the argument being that a primary purpose of the provision is to help keep the public well-informed on the judicial system. *See, e.g.*, Comment, *supra* note 124, at 338-39; Note, *supra* note 141, at 919-21; Note, *supra*, at 51-54. Such discussions, however, were made moot by the Supreme Court's holding in Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979), that the public trial provision, along with the other sixth amendment guarantees, is "personal" to the criminally accused.

In closing out one "public trial" provision issue, however, the *Gannett* Court may have opened up a second: whether the public trial guarantee can be used by the *criminal defendant* to *prohibit* the televising of his court proceedings. Notwithstanding the fact that the criminally accused do not have the power to compel a *private* trial, it could be contended they have the right to insist that their trial not be *too* public. In other words, assuming that courts can prohibit trials from being conducted in a stadium or auditorium, *see, e.g.*, Roberts v. Nebraska, 158 N.W. 930 (Neb. 1916), it could be argued that they should likewise be empowered to forbid the live telecasting of trials, which "enlarges the trial audience" to an even greater extent.

This argument is not without its flaws. Physically speaking, there is a difference between the "impermissibly large" audience in, for example, a theater, which is *visually* perceptible to the courtroom participants, and the television-viewing audience, whose presence cannot be felt via the participants' physical senses. *See generally* Zimmerman, *supra* note 45, at 676. Nonetheless, it is an argument deserving further consideration in light of the Court's holding in *Gannett* that the public trial provision is for the sole benefit of the criminal defendant.

[196] 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940). The case concerned a "Where Are They Now?" article published in 1937 in the New Yorker magazine, which recounted the life story of William James Sidis, a famous child prodigy of the early 1910's.

right of privacy-first amendment case: "Revelations may be so intimate and so unwarranted in view of the [plaintiff's] position as to outrage the community's notions of decency."[197]

Such "revelations" may be particularly "intimate" and "unwarranted" with respect to the televising of witnesses, who alone among courtroom participants have to take the stand and be forced to disclose frequently embarrassing facts and undergo occasionally painful cross-examinations—all in the course of performing a "public duty."[198] Thus, of all the courtroom participants, it is the witness whose privacy interests deserve the most protection from the unyielding and possibly invidious effects of television coverage.[199] This is especially true with regard to certain classes of witnesses, such as the victim of a sex crime,[200] who would stand to lose a great and disproportionate amount of their "inviolate personality"[201] should their identity or testimony be revealed on television.[202]

It should be noted that a rule prohibiting the televising of certain classes of witnesses works little injury to television's first amendment right of judicial broadcasting, since that medium would still be constitutionally privileged to enter the courtroom and televise other aspects of the pro-

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The Second Circuit upheld the trial court's dismissal of appellant Sidis' right of privacy cause of action, ruling that he was once a "public figure" and "his subsequent life history . . . was still a matter of public concern." *Id.* at 809.

[197] *Id.* at 809.

[198] This notion of the witnesses' "public duty" can, however, be a dual-edged sword. Not only may it be used to defend the privacy interests of witnesses, but it can also be used to attack such interests. The Supreme Court demonstrated the latter use in United States v. Calandra, 414 U.S. 338 (1974), stating:

> The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure.

Id. at 345 (quoting Blair v. United States, 250 U.S. 273, 281 (1919)).

[199] Indeed, the distinction between the privacy right of witnesses and that of the other courtroom participants has been acknowledged by those amenable to courtroom television as well as those opposed. *See, e.g.*, Chandler v. Florida, 449 U.S. 560, 576-77 (1981) (noting that one of the "significant" safeguards of the Florida cameras in the courtroom experiment was that "Florida admonishes its courts to take special pains to protect certain witnesses . . . from the glare of publicity and the tensions of being 'on camera' "); *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 778-79 (Fla. 1979); Tornquist & Grifall, *supra* note 145, at 357; Zimmerman, *supra* note 45, at 704-06; Note, *supra* note 195, at 52-53.

[200] *See, e.g.*, Chandler v. Florida, 449 U.S. at 577; *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d at 779. *But see* Zimmerman, *supra* note 45, at 706-07 (arguing that "courts should be particularly wary" of prohibiting the televising of the complaining witness in sexual assault cases since "[a]ppearing before an audience composed of jurors, spectators, print reporters, court artists, and the defendant is stressful in itself; the witness's anguish is unlikely to be fundamentally changed by the expanded range of unseen spectators").

[201] Warren & Brandeis, *supra* note 153, at 205.

[202] Other such special witnesses might include undercover law enforcement officers, persons under witness protection plans, prisoners, relatives of victims, and the very young. *See* Chandler v. Florida, 449 U.S. at 577; *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d at 779.

ceedings. Additionally, it might well enhance the fact-finding function of the judicial process by obtaining the unfettered testimony of otherwise camera-shy witnesses.[203] And finally, it would go a long way towards protecting the privacy interests of these special witnesses, recognizing, in the eloquent words of Justice Harlan, "that the individual's concern with privacy is the key to the dignity which is the promise of civilized society."[204]

It is vital that this protection of the privacy rights of certain witnesses not be carried too far, however, lest there be unnecessary impairment of television's first amendment right of courtroom broadcasting. Accordingly, the burden should be placed on such witnesses to show that (1) they are indeed "special" and will be affected by being televised to a significantly more detrimental extent than would witnesses in general, and (2) television coverage of their testimony will be, in a qualitative sense, of greater harm to their privacy interests than would print media coverage.[205]

Moreover, prohibiting the televising of the other courtroom participants does not appear to be constitutionally warranted in view of their relatively weak privacy claims. The criminally accused, for example, have little privacy interests before trial, having been arrested and indicted by a grand jury (which conducts its proceedings in private),[206] and have even

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[203] *See* Estes v. Texas, 381 U.S. at 547. It might also enhance the criminal defendant's right to a fair trial, since witnesses who have testimony that would help a notorious defendant may be reluctant to testify before television cameras. As one commentator has noted: "While criminal contempt is available, the choice of the witness to remain silent may severely prejudice the defendant's sixth amendment rights. When the ability to proceed with a fair trial is thrown into doubt, it may be preferable to exclude recording equipment from that segment of the trial." Zimmerman, *supra* note 45, at 705-06.

[204] Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960, 962 (1970) (Harlan, J., dissenting from denial of *cert.*). Justice Brandeis made a similar observation some 50 years earlier in his famous dissent in Olmstead v. United States, 277 U.S. 438 (1928), calling the "right to be let alone . . . the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478.

[205] *See In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d at 779. In deciding whether this burden of proof has been sustained, a trial court could employ the test used in tort privacy law—*i.e.*, whether the disclosure would be "offensive and objectionable to a reasonable man of ordinary sensibilities." W. PROSSER, *supra* note 153, § 117 at 811. It must be noted, however, that in at least two states—Maryland and Wisconsin—a presumption of validity attaches to objections to being televised as raised by "special" witnesses (e.g., minors, police informants), and at least one state—New Mexico—expressly prohibits the broadcasting of such witnesses. National Center for State Courts, *supra* note 8.

[206] It could be argued, then, that criminal defendants are "public figures" with respect to their particular charged crime, even though they do not voluntarily seek the public spotlight. *See, e.g.*, Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 536-37, 483 P.2d 34, 39, 93 Cal. Rptr. 866, 871-72 (1971) (but holding that there is a difference between *recent* crimes/offenders and *long past* crimes/offenders for privacy purposes); Lyles v. State, 330 P.2d 734, 742 (Okla. Crim. App. 1958). And it is well-established law that the privacy right of public figures is considerably weaker than that of "private" individuals. *See, e.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940); Carlisle v. Fawcett Publications, Inc., 201 Cal. App.2d 733, 20 Cal. Rptr. 405 (1962); Reardon v. News-

less during trial, since evidentiary rules often allow much of a defendant's private life to be publicly exposed and dissected.[207] As far as the trial judge and attorney are concerned, the fact that they are officers of the court and legal professionals substantially weakens any privacy-based objections they may have to being televised.[208] And while it is true that ju-

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Journal Company, 53 Del. 29, 164 A.2d 263 (1960). *Compare* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (holding that public figures must establish "actual malice" in order to prevail in a defamation action) *with* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (non-public figures need only establish negligence on the part of the defendant disseminator to recover damages for defamation).

Thus, even though of all the trial participants it is the criminally accused whose private lives are likely to be the most closely scrutinized at trial, they would have the greatest difficulty in making a persuasive right of privacy-based objection to being televised. *See* Kelso & Pawluc, *supra* note 102, at 38 n.299; Note, *supra* note 195, at 53. This is particularly so in light of the fact that honoring the criminal defendant's privacy objection would mean prohibiting the televising of the entire trial, which has a far greater detrimental effect on television's right of judicial broadcasting than would the granting of, say, a witness' privacy objection to being televised.

[207] The privacy rights of civil litigants likewise appears to be too weak to justify placing a restriction on television's broadcasting rights. Often, and this is especially true with regard to civil trials noteworthy enough to be televised, either or both the plaintiff and the defendant are "public figures," a position from which it is extremely difficult to launch a right of privacy attack.

Further, as to the plaintiff, state courts have generally held that plaintiffs waive much of their right to privacy with their bringing the action into the courtroom. *See, e.g.*, Berg v. Minneapolis Star & Tribune Co., 79 F.Supp. 957 (D. Minn. 1948) (rejecting a claim of invasion of privacy against a newspaper for publishing a photograph of the plaintiff's child taken in court during a child custody dispute); Langford v. Vanderbilt University, 199 Tenn. 389, 287 S.W.2d 32 (1956) (holding that a university newspaper's publication of information contained in a libel complaint is not a tortious invasion of privacy). *But see* Time, Inc. v. Firestone, 424 U.S. 448 (1975) (mere bringing of action does not establish plaintiff as public figure for defamation purposes).

Defendants in civil suits who are not public figures presumably have a stronger privacy claim than their plaintiff counterparts, but such claim would still probably fail against the countervailing first amendment-free press protection afforded the electronic media's broadcasting rights. For not only is the principle of "newsworthiness" applicable to civil as well as criminal proceedings, but as one commentator has noted: "when one willingly or unwillingly becomes an actor in, or otherwise identified with, an occurrence of public or general interest, . . . he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with a true account of such occurrence." Blashfield, *The Case of the Controversial Canon*, 48 A.B.A. J. 429, 433 (1962).

Finally, it must be noted that honoring the civil defendant's privacy-based objections would result in substantial harm to the electronic media's first amendment broadcasting rights, since it would preclude the televising of most if not all of the trial. In short, as with the criminal defendant, the civil litigants' privacy rights appear to be insufficient to restrict the televising of civil proceedings.

[208] *See generally* Spann, *Cameras in the Courtroom—For Better or for Worse*, 64 A.B.A. J. 797, 797 (1978). *See also* W. PROSSER, *supra* note 153, § 117, at 810 ("The plaintiff cannot complain when an occupation in which he publicly engages is called to public attention.").

Judges, moreover, are "public officials," who are (like "public figures") afforded substantially less protection from public disclosures than are private individuals. *See, e.g.*, Warren & Brandeis, *supra* note 153, at 214-16. *See* New York Times Co. v. Sullivan, 376 U.S. 254

rors are like witnesses in that they are not on trial, are not legal professionals, and are merely performing a public duty (often with considerable and understandable reluctance), they are unlike witnesses in that they need not take the stand and run the potentially painful and humiliating guantlet of cross-examination.[209] Thus, the jurors' privacy interests, though deserving of some protection,[210] appear to fall short of the degree required to impose significant restrictions on television's judicial broadcasting rights.

Even with a liberal view toward protecting the privacy rights of certain witnesses, it appears that in the process of accommodating the conflicting constitutional claims of the electronic media and the courtroom participants, it is the latter who must do most of the accommodating. Although this outcome may at first glance seem both unwise and unfair, given the nature of the respective competing parties, there are several reasons why such a result is constitutionally justifiable, if not desirable.

There is, first of all, the high public importance of judicial proceedings and the great need for information about them[211]—a need which judicial broadcasts would certainly help fulfill. Second, there is the hard fact that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[212] On this point, it bears noting that the televising of courtroom participants only magnifies what is already open to public view, because unless the proceedings are completely closed to the public, court spectators can see and hear all that television's audio-visual equipment can record.[213]

(1964) (holding that in order to recover on a defamation action, public officials are held to a higher standard of proof than private individuals—*i.e.*, public officials must establish that the defamatory article was published with knowledge of its falsity or with reckless disregard for its truth).

And although trial attorneys are neither "de facto public officials" nor "public figures," *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974), it could be argued that, unlike the trial judge, trial attorneys generally have had a choice in whether to take a particular case or not. And since, at the time such a choice is made, it would normally be readily apparent whether a case is noteworthy or notorious enough to be televised, trial lawyers should not be later heard to complain about the effects of courtroom television on their privacy rights.

[209] It should be noted that jurors may be subjected to personal and potentially embarrassing questions during voir dire. Thus, where the threat to the juror's privacy posed by television coverage of the voir dire process reaches the same level of danger applicable to the special witness' privacy rights, *see* note 205 *supra* and accompanying text, such coverage should be prohibited.

[210] Such "protection" could entail a provision prohibiting the taking of close-up shots of individual jurors—a provision which has in fact been adopted by a number of states that currently allow television coverage of judicial proceedings. *See* NATIONAL CENTER FOR STATE COURTS, *supra* note 8.

[211] *See* notes 71-74 *supra* & 224-25 *infra* and accompanying text.

[212] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (Brennan, J.).

[213] *See generally* W. PROSSER, *supra* note 153, § 117, at 811 ("It seems to be generally

Finally, and most significantly, a close inspection of the problem reveals that the constitutional conflict, and the subsequent accommodation, is not merely between the privacy interests of the courtroom participants and the broadcasting rights of the electronic media. There is another right of constitutional stature involved: the right of the public to receive television and radio broadcasts of judicial proceedings. And it is in large part because this right is so closely aligned with the electronic media's courtroom broadcasting rights that the trial participants' privacy claim is a justifiable, albeit noble, loser.

V. Receiving Information: The Right of the Public to Receive Broadcasts of Judicial Proceedings

Although the first two legs of the first amendment "right of information triangle"—the rights to gather and disseminate information—could theoretically exist by themselves, such an existence would be a rather ineffective one without the third leg, the right to *receive* information. Like the tree falling in the forest with no one there to hear it, the meaningful existence of the right of information is tenuous in the absence of the public's right to receive information from those willing to gather and disseminate it. Indeed, in many respects, it is this last leg of the information triangle that is the most deserving and in need of first amendment protection, for as Justice Douglas has noted, "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting."[214]

A. *The Contours of the Right to Receive Information*

"In a variety of contexts," the United States Supreme Court has held that the right to "receive information and ideas" is protected by the first amendment's guarantees.[215] In *Martin v. Struthers*,[216] the Court explained the basis for this right:

> The right of freedom of speech and press has broad scope. The authors of

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agreed that anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what anyone present would be free to see.") (citations omitted).

Additionally, it bears noting that sketch artists are permitted to draw courtroom participants, the press is free to write down all that occurs, and—outside the courtroom—cameramen are allowed to take photographs and television shots of the various judicial participants.

[214] Branzburg v. Hayes, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting).

[215] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

[216] 319 U.S. 141 (1943).

> the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.[217]

The Court in *Martin* went on to invalidate a city ordinance which prohibited persons distributing handbills and circulars from ringing the door bells or knocking on the doors of residences.[218]

The right to receive information would later be relied upon by the Court to strike down numerous other government regulations. In *Thomas v. Collins*,[219] a state statute requiring labor organizers to register with a designated state official before soliciting union membership was held to be violative of the first amendment rights of the labor organizer to speak and the workers "to hear what he had to say."[220] Similarly, in *Lamont v. Postmaster General*,[221] the Court held unconstitutional a federal act which allowed the Postmaster General to detain "communist political propaganda" in the mail, ruling that such a statute constituted "a limitation on the unfettered exercise of the addressee's First Amendment rights."[222] Stated Justice Brennan in concurrence: "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[223]

Other situations where the Supreme Court has invalidated government statutes and regulations because of their impairment of the first amendment right to receive information include: *Stanley v. Georgia*,[224] which involved a law making the private possession of obscene material a crime; *Procunier v. Martinez*,[225] which concerned prison regulations authorizing substantial censorship of the outgoing mail of inmates; and *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,[226] which dealt with a statute prohibiting the advertising of prescription drug

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[217] *Id.* at 143 (citations omitted). *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-90 (1969), where the Court stated:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged . . . .

[218] *Id.* at 149.

[219] 323 U.S. 516 (1945).

[220] *Id.* at 534.

[221] 381 U.S. 301 (1965).

[222] *Id.* at 305.

[223] *Id.* at 308 (Brennan, J., concurring).

[224] 394 U.S. 557 (1969).

[225] 416 U.S. 396 (1974).

[226] 425 U.S. 748 (1976).

prices.[227]

B. *Recognizing a First Amendment Right to Receive Broadcasts of Judicial Proceedings*

In reviewing the various contexts in which the United States Supreme Court has recognized a first amendment-based right to receive information—the distribution of circulars door-to-door, the solicitation of union membership, the mailing of communist propaganda, the possession of obscene material, the censorship of prison correspondence, and the advertising of drug prices—it would not be unreasonable to place the "broadcasting of judicial proceedings" near the top of the list in terms of general public and first amendment importance. For as Justice Brennan observed in his concurring opinion in *Nebraska Press Association v. Stuart*:[228] "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government."[229]

Indeed, a long line of Supreme Court cases can be cited for the proposition that, to an extent perhaps greater than other governmental operations, the judicial system has long been dependent on strong public knowledge and interest to ensure its fair and effective administration.[230] And unlike days of yore when such public knowledge was garnered and interest satisfied in person at the courthouse, today it is almost entirely accomplished through and by the news media.[231] This makes the value of news concerning the judicial process transmitted via television, the most powerful and pervasive communication medium,[232] that much more indispensable.

Yet, to the extent that there remains a ban on courtroom cameras and audio equipment, the amount of air time devoted to judicial proceedings will be relatively minimal.[233] This is because, in the words of one commentator: "The present technique of using artists' sketches is so primative and expensive that frequently judicial matters are simply not cov-

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[227] *See also* Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972) (acknowledging the first amendment right of the appellee university professors to hear in person Ernest Mandel, a Marxist journalist from Belgium, but deferring to the "plenary congressional power to make policies and rules for exclusion of aliens").

[228] 427 U.S. 539 (1976).

[229] *Id.* at 587 (Brennan, J., concurring in the judgment).

[230] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); *In re* Oliver, 333 U.S. 257, 268-71 (1948).

[231] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 572-73.

[232] *See* sources cited note 10 *supra*. *See also* notes 235-37 *infra* and accompanying text.

[233] *See* Graham, *supra* note 194, at 547; Spann, *supra* note 208, at 797.

ered. The use of courtroom sketches seems so stilted and archaic that often, in a situation of borderline news value, TV editors . . . opt not to cover court proceedings."[234] The courtroom television prohibition therefore directly and significantly infringes upon the public's first amendment right to receive information concerning governmental processes, the most critical of which may well be judicial proceedings.

Numbers alone make this first amendment infringement a substantial one. Today, slightly more than two-thirds of all Americans consider television to be their principal source of news, and a startlingly high one-third rely solely on television for their daily news.[235] Whereas nearly all American homes have at least one television set which is on an average of seven hours each day, only about half of all Americans buy daily newspapers.[236] Moreover, television remains the most "believable" medium by a more than two-to-one margin over the runner-up, newspapers.[237] These figures indicate that the denial of television broadcasts of *any* news, including coverage of courtroom proceedings, significantly detracts from the public's acquisition of (presumably credible) information.

In addition to this sizable "quantitative" edge over its print counterparts in terms of capacity for informing the public about the judicial system, television has a substantial "qualitative" advantage as well.[238] Because only a picture can precisely capture visual images and only a tape recording can fully capture sounds, television—the one medium with both audio and visual capabilities—is capable of capturing the "reality" of the courtroom far better than any other form of mass communication.[239] Although this proposition has been disputed by some courtroom television antagonists,[240] even Justice Harlan, whose vote in *Estes v. Texas*[241] gave television its second-rate status in the courts, agreed that "televising [trials] might well provide the most accurate and comprehensive means of conveying their content to the public."[242] And as a California appellate court once observed: "Accuracy in reporting the transactions of a public governing body should never be penalized, particularly in a democracy, where truth is often said to be supreme."[243] In terms of both the quantity

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[234] Graham, *supra* note 194, at 547.

[235] ROPER ORGANIZATION, INC., PUBLIC PERCEPTIONS OF TELEVISION AND THE OTHER MASS MEDIA: A TWENTY-YEAR REVIEW, 1959-1978 (1979) [hereinafter cited as ROPER SURVEY].

[236] Fahringer, *Cameras in the Courtroom (TV or not TV—That is the Question)*, TRIAL DIPLOMACY J., Winter 1980-81, at 5.

[237] ROPER SURVEY, *supra* note 235.

[238] *See, e.g.*, Davis, *Television in Our Courts: The Proven Advantages, The Unproven Dangers*, 64 JUDICATURE 85, 86 (1980); Kelso & Pawluc, *supra* note 102, at 30.

[239] *See* Davis, *supra* note 238, at 86.

[240] *See, e.g.*, Gerbner, *supra* note 10, at 419-20. ("Television will create popular spectacles of great appeal but deceptive authenticity as it selects and interprets trials to fit the existing pattern of law in the world of television.").

[241] 381 U.S. 532 (1965).

[242] *Id.* at 589 (Harlan, J., concurring).

[243] Nevens v. City of Chino, 233 Cal. App.2d 775, 778, 44 Cal. Rptr. 50, 52 (Dist. Ct. App.

and quality of news received, then, the exclusion of cameras and microphones from the courts has a considerable detrimental impact on the public's constitutional right to be informed about its legal system.[244]

The counter-argument to the view that the public has a first amendment-based right to receive courtroom broadcasts is two-pronged: first, it is not the purpose of a trial to inform or educate the public;[245] and second, even if such were a legitimate purpose, permitting the televising of trials would do little to promote it, since such broadcasts will invariably be more "entertaining" than "informative."[246]

The first part of this counter-argument, however, misstates the issue. That issue is not whether the function of a trial is to educate the public, but rather, whether an educated public aids in furthering the fair and proper administration of justice, which *is* the single overriding purpose of trials and other judicial proceedings.[247] Viewed in this light, the defectiveness of the first part of the counter-argument becomes readily apparent, since an informed public is undeniably one of the key elements in the safeguarding of the judicial process.[248]

The soundness of the counter-argument's second part is equally suspect. Regardless of whether radio and television are considered primarily entertainment oriented, no one questions the fact that they also serve to inform and enlighten the general citizenry.[249] This is borne out by survey

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1965) (city council resolution banning the tape recording of council proceedings violated the first amendment's free speech and press guarantees).

[244] *Cf.* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 196 (1973) (Brennan, J., dissenting) ("The current dominance of the electronic media as the most effective means of reaching the public" requires that the public be given access rights to the airwaves in order to fulfill "the concept of 'full and free discussion' ").

[245] Estes v. Texas, 381 U.S. at 575 (Warren, C.J., concurring). *But see* Wasby, *supra* note 38, at 64:

> Counter to Warren's claim, trials do have an educational component. Education may not be the trial's principal purpose, but trials do serve to remind people that the courts exist and thus may help determine future crime. More important, they help inform people about how a crucial part of our government operates. The absence of television—and broadcasting generally—limits the public's ability to learn.

[246] Estes v. Texas, 381 U.S. at 571-74 (Warren, C.J., concurring). *Accord,* Gerbner, *supra* note 10, at 420-24; Tongue & Lintott, *supra* note 10, at 785. *See also* Chandler v. Florida, 449 U.S. 560, 580 (1981) ("Selection of which trials, or parts of trials, to broadcast . . . will be governed by such factors as the nature of the crime and the status and position of the accused—or of the victim; the effect may be to titillate rather than to educate and inform.").

[247] *See generally* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73 (1980); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 412-13 (1979) (Blackmun, J., concurring in part, dissenting in part); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

[248] *See* notes 229-30 *supra* and accompanying text.

[249] *See* Estes v. Texas, 381 U.S. at 589 (Harlan, J., concurring):

> Unquestionably, television has become a very effective medium for transmitting news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public

findings indicating that radio and television together constitute the major sources of *news* for almost twice as many Americans as do newspapers and magazines combined.[250] Nevertheless, there are commonly expressed fears that radio and television's inherently commercialistic nature will result in only the most sensational cases being broadcast, replete with distorted editing and with showings of solemn legal proceedings interspersed with detergent and dog food commercials.[251]

Although these fears may be justified to a certain extent, they lose much of their luster when it is realized that they are equally applicable—yet never applied—to the print media.[252] Newspapers and magazines are also motivated by the financial bottom line[253] and have space limitations affecting the amount of coverage they can give to any particular story. Therefore, like their electronic counterparts, the print media generally cover only the most noteworthy and notorious cases, employ considerable and potentially distorting editing,[254] and at times juxtapose their news stories about judicial proceedings with mundane advertisements.[255] In spite of this, the Florida Supreme Court has observed, "the image and majesty of the judiciary has survived unsullied."[256]

Indeed, while there is no cogent reason to believe television broadcasts of trials will have a negligible or negative effect on the public's knowledge and perception of the judicial system, there is good reason to conclude

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with the judicial process in action.

Moreover, any attempt to make a constitutionally meaningful distinction between the dissemination/receiving of "information" and "entertainment" is destined to fail. For as the Supreme Court stated in Winters v. New York, 333 U.S. 507 (1948):

> The line between the informing and the entertaining is too elusive for the protection of that basic right [of freedom of the press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.

Id. at 510. *Accord,* Stanley v. Georgia, 394 U.S. 557, 566 (1969) ("The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if such a line can be drawn at all."); Jenkins v. Dell Publishing Co., 251 F.2d 447, 451 (3d Cir. 1958), *cert. denied* 357 U.S. 921 (1958) ("[I]t is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged."). *See also* Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J. LAW & ECON. 15, 28-30 (1967).

[250] ROPER SURVEY, *supra* note 235.

[251] Estes v. Texas, 381 U.S. 532, 571-74 (1965) (Warren, C.J., concurring); Fahringer, *supra* note 236, at 5.

[252] *See In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 776 (Fla. 1979); Davis, *supra* note 238, at 87-89.

[253] *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 161 (1973) (Douglas, J., concurring); Jenkins v. Dell Publishing Co., 251 F.2d 447, 451 (3d Cir. 1958), *cert. denied,* 357 U.S. 921 (1958).

[254] 412 U.S. at 124-25. *See also In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d at 776; Zimmerman, *supra* note 45, at 695.

[255] *See In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d at 776; CBS v. Democratic Nat'l Comm., 412 U.S. at 117-19.

[256] *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d at 776.

such broadcasts will have a substantial, positive effect.[257] The mere fact that many more citizens will be introduced to the real-life workings of the judicial process will in itself be a major benefit of permitting broadcasts of courtroom proceedings.[258] This benefit is heightened when one considers that public knowledge of the legal system is "regrettably" and "deplorably" low,[259] and public confidence in the judicial and legal professions not much higher.[260] Furthermore, the presence of television equipment in court may well have a salutory effect on courtroom participants, who realize their actions and words will be actually seen and heard in a great many living rooms.[261] This, at least, has been the result when the activities of the legislative and executive branches have been televised, such activities having been "enhanced rather than degraded," with a concomitant increase in the public's faith and confidence in these

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[257] *See, e.g.*, Davis, *supra* note 238, at 88-89; Kelso & Pawluc, *supra* note 102, at 29-31; Tornquist & Grifall, *supra* note 145, at 363-67; Wasby, *supra* note 38, at 64-65; Wilson, *supra* note 118, at 295, 297. The fact that the broadcasting of judicial proceedings will further rather than detract from the public interest makes the situation of televised trials completely inapposite from that presented in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), where the Supreme Court upheld the FCC's power to regulate the radio broadcasting of obscene words (specifically, comedian George Carlin's monologue using the "seven dirty words"). The Court's primary rationale for its holding was that radio listeners (especially young children) had the right not to have to listen to such broadcasts, even if for only the short interval it would take them to change the station or turn off their radio. *Id.* at 748-50. The *Pacifica* Court's great concern for the interests of the electronic media audience suggests that the case can be used to *bolster* the right of the electronic media to broadcast court proceedings, since such broadcasts do more public good than harm.

[258] *See* Kelso & Pawluc, *supra* note 102, at 30-31; Tornquist & Grifall, *supra* note 145, at 364.

[259] *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d at 781. *Accord, In re* Hearings Concerning Canon 35, 132 Colo. 591, 597, 296 P.2d 465, 469 (1956); Lyles v. Oklahoma, 330 P.2d 734, 742-43 (Okla. Crim. App. 1958); Heflin, *Fair Trial v. Free Press: Time for a Rehearing?*, 61 JUDICATURE 154, 155 (1977); Weinstein & Zimmerman, *Let the People Observe Their Courts*, 61 JUDICATURE 156, 156-57 (1977).

[260] *See* Kelso & Pawluc, *supra* note 102, at 30 (citing YANKLEVICH, SKELLY & WHITE, INC., THE PUBLIC IMAGE OF COURTS: HIGHLIGHTS OF THE GENERAL PUBLIC, JUDGES, LAWYERS AND COMMUNITY LEADERS (1978) (prepared for the NATIONAL CENTER FOR STATE COURTS)); Tornquist & Grifall, *supra* note 145, at 366 n.89.

To those judges and lawyers who, seeking to keep a partial cloak of mystery over their respective professions, view such low public opinion as an acceptable price to pay for keeping television out of the courts, *see, e.g.*, Kielbowicz, *supra* note 2, at 23, the Oklahoma Criminal Court of Appeals in Lyles v. Oklahoma, 330 P.2d 734 (Okla. Crim. App. 1958) responded:

> The courts do not belong to the lawyers but are institutions by, of, and for the people. In this modern age, it is well that the veil of mysticism surrounding our courts be removed and the people be confronted with reality. We are not afraid or ashamed and we must be consistent.

Id. at 743. *See also* Bridges v. California, 314 U.S. 252 (1941) ("an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect"). *Id.* at 270-71.

[261] *See* sources cited note 257 *supra*.

branches of the government.[262]

In short, the arguments against a first amendment-based right of the general public to receive television and radio broadcasts of judicial proceedings are unsound. And to the extent the public's right to receive information is promoted by the televising of courtroom proceedings, the electronic media's constitutional right to attend and broadcast such proceedings is strengthened accordingly.

VI. Conclusion

This Comment proposes that the first amendment's protection of the information process can be used to lay a constitutional foundation upon which the electronic media can record and broadcast judicial proceedings. The information process begins with the right to gather information, a right which may be extrapolated under Justice Stewart's concurring opinion in *Houchins* to ensure effective news-gathering equality for the electronic media. Read in conjunction with *Richmond Newspapers,* which mandates open trials, Stewart's effective access theory may well be the key to unlocking the courtroom door to the audio-visual equipment of the electronic media.

Once that door is opened, and television allowed to record all that transpires in the courtroom, the strong general right to disseminate information and the prior restraint doctrine provide persuasive reasons for permitting the broadcasting of judicial proceedings. With the Supreme Court's momentary disposition of the criminal defendant's fair trial claim in *Chandler,* the major obstacle to courtroom broadcasting is now the privacy rights of the various court participants. This claim, however, except as pressed by certain classes of witnesses, does not appear to be powerful enough to override the electronic media's first amendment-based broadcasting rights.

The flow of information that begins with the gathering of information and continues with its dissemination must necessarily end with its receipt. And it is the public's right to receive information which provides the final and perhaps strongest link in the argument supporting a first amendment right of courtroom broadcasting. For to the extent such broadcasting gives the public better insight into the judicial system, it helps make that system—a system as mysterious to the public as it is important—a better one for all. The "right of information triangle" becomes complete, and sufficiently compelling to justify the elevation of the electronic media's right to attend and broadcast courtroom proceed-

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[262] *In re* Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 781 (Fla. 1979). *See also In re* Hearings Concerning Canon 35, 132 Colo. 591, 598, 296 P.2d 465, 469 (1956); Zimmerman, *supra* note 45, at 690.

ings—with and through their cameras and microphones—to constitutional status.

David N. Kuriyama

STATE-FEDERAL JURISDICTIONAL CONFLICT OVER THE INTERNAL WATERS AND SUBMERGED LANDS OF THE NORTHWESTERN HAWAIIAN ISLANDS

Walk softly.
Walk softly, stranger.
The land on which you stand is Holy ground. . .
a place of unspoiled beauty, colored by the hand of God.
And you who stand upon this land will someday too
remember sun-washed sands and quiet days, and
moments crystallized in time.
Walk softly, stranger,
for you stand on Holy ground.

—A testimonial to the beauty of the Northwestern Hawaiian Islands left by a Coast Guardsman on East Island, French Frigate Shoals.

The internal waters and submerged lands of the Northwestern Hawaiian Islands, a chain of small, low, rocky islets and coral atolls extending more than 1,000 miles in a northwesterly direction from the island of Niihau of the main Hawaiian Islands,[1] are a potential source of

[1] The Hawaiian chain of 132 islands, reefs and shoals can be roughly separated into three geologic sections: 1) The eight main islands and the small islands off their shores; 2) the rocky islets in the center; and 3) the low islands of sand and coral at the northwest end. The Northwestern Hawaiian Islands comprise those in the latter two groups, and include numerous guyots, seamounts, shoals, banks and reefs as structural parts of the archipelago. Specifically, the Northwestern Hawaiian Islands, also known as the Leeward Islands, from east to west include Nihoa, Necker Island, French Frigate Shoals with La Perouse Pinnacle, Gardner Pinnacles, Maro Reef, Laysan Island, Lisianski Island, Pearl and Hermes Reef, the Midway Islands and Kure Atoll. The State of Hawaii formally consists of all the islands in the archipelago with the exception of the Midway Islands, *see* HAWAII CONST. art. XV, § 1, which were annexed by the United States in 1867, *see* A. Taylor, Islands of the Hawaiian Domain (Jan. 1931)(unpublished compilation of historical and government documents relating to the Hawaiian domain in State Archives, Dep't of Accounting and General Services, State of Hawaii); Downes v. Bidwell, 182 U.S. 244, 304 (1901)(White, J., concurring), and which were set aside by Executive Order in 1903 for naval purposes and are under the jurisdiction of the U.S. Dep't of Defense. Exec. Order No. 199A (1903). Geologically, the Northwestern Hawaiian Islands differ significantly from the eight main islands, which are characterized by high mountains, relatively large land masses and a wide variety of plants and animals. Gardner Pinnacles, La Perouse Pinnacle, Nihoa and Necker Island are predominantly barren rock. The first two are tiny rock islands which jut dramatically from the ocean to heights of 190 and 122 feet above sea level, respectively. They are devoid of vegetation and have a snow-capped appearance because of a covering of guano left by large seabird nesting colonies. Nihoa, the highest of the refuge islands, rises

valuable fisheries and other natural resources.[2] The State of Hawaii could benefit from the utilization of these resources, and has asserted jurisdiction over the internal waters and submerged lands of the Northwestern Hawaiian Islands pursuant to its proprietary rights over the territorial waters of the state[3] as defined under the Submerged Lands Act of 1953.[4]

The Northwestern Hawaiian Islands are also the home of millions of seabirds, of endangered and threatened wildlife, and provide an unique unspoiled undersea laboratory for scientific research.[5] The federal government also asserts jurisdiction over a significant portion of the internal waters and submerged lands of the islands, and the resources contained therein, under the authority of Executive Order 1019.[6] The Order created the Hawaiian Islands Reservation, now known

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910 feet above sea level. The island possesses a striking series of high and precipitous cliffs. Necker Island is considerably smaller than Nihoa, consisting primarily of exposed rocks, with some low vegetation growing along its upper portions. All four of these islands lack fringing reefs, and since the water surrounding them drops off rapidly, the area is not as productive of fish life as are the coral atolls further west.

French Frigate Shoals, Maro Reef, Laysan Island, Lisianski Island and Pearl and Hermes Reef are geologically classified as emerged coral atolls or near atolls. Coralline algae are the principal constituents of the living and emerged reefs. The highest of the reefs in this group is only about five feet above sea level. French Frigate Shoals is the largest unit with 108,000 acres, but only 65 acres of the Shoals rise above mean high tide. La Perouse Pinnacle is the predominant landmark at the otherwise low atoll. Pearl and Hermes Reef, like French Frigate Shoals, is typical of an atoll with a fringing reef. Laysan and Lisianski Islands are near atolls with low, elongated centrally located islands girded with extensive coral reefs. These islands have highly fertile soil with a dense, almost lush, low vegetative cover. Maro Reef is a near atoll which is entirely submerged at high tide except for a single rock extending some two feet above sea level on the north side. Maro Reef is unique as an example of a marine reef ecosystem not associated with any emergent land mass. S. CARLQUIST, HAWAII: A NATURAL HISTORY - GEOLOGY, CLIMATE, NATIVE FLORA AND FAUNA ABOVE THE SHORELINE 375-428 (1970); Grace & Nishimoto, *Marine Atlas of Hawaii - Bays and Harbors* 145-55 (University of Hawaii Sea Grant College Program Misc. Rep. No. 1, Jan. 1974).

[2] *See* notes 31-41 *infra* and accompanying text.

[3] *See* notes 100-01 & 117 *infra* and accompanying text.

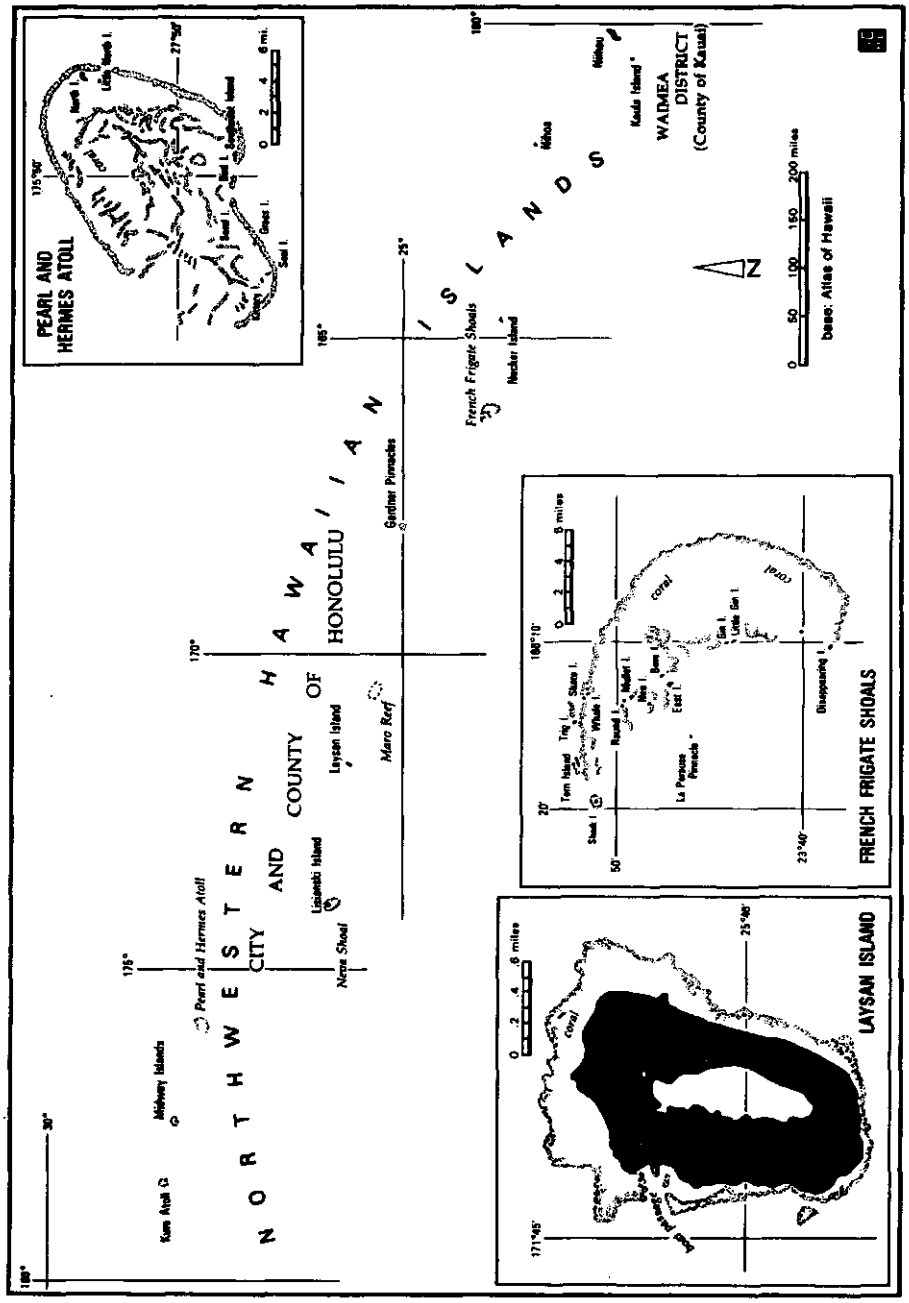
[4] Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-43 (1976). *See also* notes 124-33 *infra* and accompanying text.

[5] *See* notes 24-29 *infra* and accompanying text.

[6] Exec. Order No. 1019 (1909), *reprinted in* United States v. Schlemmer, 3 U.S. Dist. Ct. Hawaii 546, 547 (1910):

> It is hereby ordered that the following islets and reefs, namely: Cure [Kure] Island, Pearl and Hermes Reef, Lysianski or Pell Island, Laysan Island, Mary [Maro] Reef, Dowsetts Reef, Gardiner Island, Two Brothers Reef, French Frigate Shoal, Necker Island, Frost Shoal and Bird Island [Nihoa], situated in the Pacific Ocean at and near the extreme western extension of the Hawaiian archipelago between the latitudes twenty-three degrees and twenty-nine degrees north, and longitudes one hundred and sixty degrees and one hundred and eighty degrees west from Greenwich, and located within the area segregated by the broken lines shown upon the diagram hereto attached and made a part of this order, are hereby reserved and set apart, subject to valid existing rights, for the use of the Department of Agriculture as a preserve and

The Northwestern Hawaiian Islands



Courtesy of George Hall, Dep't of Geography, University of Hawaii

as the Hawaiian Islands National Wildlife Refuge,[7] in order to protect various native birds inhabiting the islands.

The U.S. Fish and Wildlife Service, which presently administers the refuge, claims that the refuge boundaries must necessarily extend over the submerged reefs, shoals and internal lagoon waters of the islands[8] in

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breeding ground for native birds. It is unlawful for any person to hunt, trap, capture, wilfully disturb, or kill any bird of any kind whatever, or take the eggs of such birds within the limits of this reservation except under such rules and regulations as may be prescribed from time to time by the Secretary of Agriculture. Warning is expressly given to all persons not to commit any of the acts herein enumerated and which are prohibited by law.

This reservation to be known as the Hawaiian Islands Reservation.

Of the 12 islets, reefs and atolls listed in Exec. Order 1019, only eight are presently managed as part of the refuge by the U.S. Fish and Wildlife Service. Dowsetts Reef, Frost Shoal and Two Brothers Reef are entirely submerged reefs which are no longer designated on marine charts and their current existence is doubtful. *See* Morris, *How the Territory of Hawaii Grew and What Domain It Covers*, in HAWAIIAN HISTORICAL SOCIETY FORTY-SECOND ANNUAL REPORT FOR THE YEAR 1933 13, 28 (1934). Kure Atoll was placed under the control and jurisdiction of the Secretary of the Navy on February 20, 1936, pursuant to an Executive Order issued by President Franklin D. Roosevelt. Exec. Order No. 7299 (1936), *reprinted in* Index to the Islands of the Territory of Hawaii, Including Other Islands Under the Sovereignty of the United States Scattered in the North Pacific 40 (1953 Supp.)(unpublished manuscript in State Archives, Dep't of Accounting and General Services, State of Hawaii) [hereinafter cited as Index to the Islands]. It was subsequently restored to the jurisdiction of the Territory of Hawaii by President Truman in 1952, Exec. Order No. 10413 (1952), *reprinted in* 3 C.F.R. 909 (1949-1953 Compilation), with a reservation for the Navy to maintain a radar facility on the island.

[7] The Hawaiian Islands Reservation was redesignated the Hawaiian Islands National Wildlife Refuge by Presidential Proclamation on July 25, 1940. Pres. Proc. No. 2416 (July 25, 1940), *reprinted in* 54 Stat. 2717-19. *See* note 73 *infra* and accompanying text.

[8] It is undisputed that the refuge encompasses the emerged lands of the reefs, islets and atolls specifically mentioned in Executive Order 1019, with the noted exceptions of Dowsetts Reef, Frost Shoal, Two Brothers Reef and Kure Atoll. *See* note 6 *supra*. The jurisdictional dispute essentially centers upon the internal lagoon waters of the islands and the submerged lands thereunder. This involves an area of approximately 254,000 acres, and is primarily focused on the internal lagoon waters and submerged lands of Pearl and Hermes Reef and French Frigate Shoals, and the waters and submerged lands surrounding Maro Reef and Laysan Island.

There also exists a dispute between the U.S. Fish and Wildlife Service and the state as to jurisdiction over Tern Island, which is the largest of the various islands constituting the atoll of French Frigate Shoals. The U.S. Navy during World War II built an airstrip on the island, constructed barracks, water tanks and storage facilities, and dredged a channel through the lagoon for ship access. This was done without any formal or informal right or authority. In 1948 the Navy, no longer in need of the outpost and faced with various requests for use of the island for commercial fishing purposes, conveyed the island to the Territory of Hawaii. The Territory subsequently issued a use permit to the U.S. Coast Guard in 1952, which established a Loran Transmitting Station on the island. The Coast Guard terminated its operations on the island in 1979. U.S. Fish and Wildlife Service personnel currently maintain operations on the island.

In 1979 the Hawaii State Legislature adopted resolutions requesting the Governor to take immediate action toward the acquisition and return of Tern Island and its facilities to the state. S. Res. 133, 10th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 498 (1979); S.

order to preserve the wilderness character of the refuge and to assure the area is devoted to uses which are consistent with the purposes and goals of the refuge.[9] On the other hand, it has been suggested that current and proposed federal policies governing the refuge are overrestrictive, and that refuge objectives can be fulfilled and maintained without precluding regulated utilization of the resources of the islands.[10]

Despite various negotiations between the state and the federal government,[11] the jurisdictional conflict has yet to be satisfactorily resolved. The federal government maintains that through Executive Order 1019 the United States rightfully reserved the Northwestern Hawaiian Islands, together with the surrounding submerged lands and internal waters, as a federal wildlife refuge. This reservation arguably precludes any state assertion of territorial jurisdiction. The federal government, through the Department of the Interior, has also proposed the inclusion of all the emerged lands of the refuge in the National Wilderness Preservation System.[12] The designation of these areas as wilderness[13] would provide the

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Con. Res. 27, 10th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 861 (1979). The state was then and remains interested in utilizing Tern Island as a support base for commercial fishing operations in the Northwestern Hawaiian Islands. The federal government's position is that the Navy never had title to convey Tern Island to the Territory of Hawaii, that such conveyance was void, and that the federal government retains jurisdiction over Tern Island pursuant to Executive Order 1019, *supra* note 6. Letter from Gary R. Catron, Assistant to the U.S. Secretary of the Interior, to Spark M. Matsunaga, U.S. Senator, State of Hawaii (June 29, 1979). A recent Biological Opinion of the National Marine Fisheries Service regarding proposed use of Tern Island as a fisheries support station recommends retention of exclusive Fish and Wildlife Service jurisdiction over Tern Island and no "increase in the use of Tern Island by man" in order to protect the endangered monk seal and threatened green sea turtle for which the island is a primary habitat. NATIONAL MARINE FISHERIES SERVICE, U.S. DEP'T OF THE INTERIOR, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION AND BIOLOGICAL OPINION (Mar. 11, 1981) [hereinafter cited as BIOLOGICAL OPINION]. *See generally* Altonn, *Tern to Take a Turn When It's All Settled*, Honolulu Star-Bulletin, May 25, 1978, § A at 14, col. 1; Tenbruggencate, *Tern Island: Where Birds Flock by Thousands and Refuge Folks Live Pioneer Life*, Honolulu Advertiser, Nov. 9, 1981, § B at 1, col. 2.

[9] *See* note 12 *infra*.

[10] Memorandum from John P. Craven, State of Hawaii Marine Affairs Coordinator, to Governor George R. Ariyoshi (June 20, 1978).

[11] *See* notes 105-12 *infra* and accompanying text.

[12] The Dep't of the Interior originally proposed in 1973 that 1,765 acres of emerged lands and 302,171 acres of appurtenant reefs, shoals and submerged lands be designated wilderness areas. BUREAU OF SPORT FISHERIES AND WILDLIFE, U.S. DEP'T OF THE INTERIOR, HAWAIIAN ISLANDS WILDERNESS PROPOSAL (1973) [hereinafter cited as WILDERNESS PROPOSAL]. This proposal was subsequently amended to include only the emerged lands in the wilderness designation. *See* notes 111-12 & 118 *infra* and accompanying text. The Dep't of the Interior assumed at this time that the refuge boundaries extended over the submerged lands contained in the wilderness proposal, on the ground that "there is a presumption that the Presidential Order which created the refuge also included within it sufficient area to make it possible to administer the area in the manner intended." BUREAU OF SPORT FISHERIES AND WILDLIFE, U.S. DEP'T OF THE INTERIOR, PRELIMINARY DRAFT OF THE WILDERNESS STUDY REPORT FOR THE HAWAIIAN ISLANDS NATIONAL WILDLIFE REFUGE (1973).

wildlife therein with optimum protection from man's encroachment, but would also virtually preclude commercial utilization of the natural resources within the designated wilderness area.[14] The state, however, has asserted that the submerged lands and internal waters of the islands are within the territorial jurisdiction of the state, and that these areas were not included within the wildlife reservation effected under Executive Order 1019.[15] The state in this regard can rely upon a significant historical pattern of federal acquiescence to state control and management of the islands' internal waters to support its claim of jurisdiction.[16]

The critical legal question in the jurisdictional dispute centers on the intended scope of the boundaries of the wildlife reservation established under Executive Order 1019. Executive history is lacking in this regard, thus the intent of the Order must be gleaned from its express language, and from the construction given to it by federal and state agencies and officials as evidenced by the historical actions of these parties regarding the refuge. Underlying the legal issues in this conflict are competing policy considerations which also must be addressed if a satisfactory resolution is to be achieved. The State of Hawaii has considerable interest in the ability to utilize the natural fisheries and other resources in the waters of the Northwestern Hawaiian Islands. On the other hand, the islands are a safe haven for various wildlife whose life-systems could be

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The management objectives for the proposed wilderness area were delineated in the WILDERNESS PROPOSAL as follows:

(1) Assure the survival of threatened native wildlife.

(2) Maintain all elements of the native flora and fauna in as natural a state as possible.

(3) Allow the physical and biological processes to proceed naturally to the extent possible without loss to the native flora and fauna.

(4) Expand man's understanding and appreciation of wildlife, wildlands and his role in this environment.

(5) Communicate to the public an understanding of the values and benefits of the Hawaiian Islands Refuge.

(6) Establish selected areas within the refuge for environmental reference, observation and scientific study.

(7) Seek out, identify and preserve historic and archeological sites and objects for appropriate scientific study.

See also U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT FOR THE PROPOSED HAWAIIAN ISLANDS WILDERNESS AREA (Sept. 30, 1975) [hereinafter cited as ENVIRONMENTAL STATEMENT].

[13] The Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (current version at 16 U.S.C. §§ 1121-36 (1976)), directed the Secretary of the Interior to review, within ten years of the effective date of the Act, every roadless area of 5,000 acres or more and every wooded island within the National Wildlife Refuge System, and to report to the President his recommendations as to the suitability of such area for preservation as wilderness. 16 U.S.C. § 1132(c) (1976). Wilderness is defined at 16 U.S.C. § 1131(c) (1976).

[14] No commercial exploitation of natural resources in wilderness areas is allowed unless specifically provided for by Congress. 16 U.S.C. § 1133(c) (1976).

[15] *See* notes 100-01 & 117 *infra* and accompanying text.

[16] *See* text accompanying notes 62-85 *infra*.

seriously affected by human encroachment.[17]

This Comment first evaluates the respective federal and state interests which are at stake in this dispute. It then traces the history of the islands and evaluates this history in light of the competing claims of jurisdiction. It also assesses the relative merits of the competing legal claims of jurisdiction. It concludes that the state has a stronger legal claim to jurisdiction over the internal waters and submerged lands of the islands. However, any state program of resource utilization in the area will have to be carefully regulated pursuant to applicable federal and state conservation laws and pursuant to guidelines based upon studies of the natural resources and wildlife of the islands.[18] A balance between resource utiliza-

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[17] *See* notes 21-23 *infra* and accompanying text.

[18] The utilization of the resources found in the internal waters and submerged lands of the islands is hampered by a lack of adequate baseline data on the living resources of the area. The potential of the area and the need for a comprehensive resource survey was recognized as early as 1974 in the following report to the Governor of Hawaii:

> NORTHWESTERN HAWAIIAN ISLANDS STOCK ASSESSMENT
>
> With increasing pressure on the fisheries resources of Hawaii's main islands . . . it is becoming essential that the State undertake an assessment of [the] potential of new areas and latent resources. In particular, the waters of the Northwestern Hawaiian Archipelago, stretching from Kauai to Kure Islands, are within reach of the new vessels now entering Hawaiian fisheries. This new fishing capability, together with the recent proposal to establish a marine wilderness reserve . . . suggest that an effort to assess the commercial and recreational potential of the area should be undertaken in the near future . . . . A data base is necessary for effective utilization and management of this still unknown resource.
>
> RECOMMENDATIONS
>
> We are concerned about increasing pressures toward a Federal declaration of the Northwestern Hawaiian Islands as a "natural wilderness area," a stop in advance of any meaningful knowledge of the extent and value of marine resources in these islands.
>
> [The State] should request that any Federal declaration of the Northwestern Hawaiian Islands as a "natural wilderness area" should follow, and be based upon, a survey of the fishery and precious coral resources in those islands. As a fall-back position, the [State] should request a stipulation in any such declaration that carefully selected areas of such a preserve can be opened to controlled resources utilization.

GOVERNOR'S ADVISORY COMMITTEE ON SCIENCE AND TECHNOLOGY, DEP'T OF PLANNING AND ECONOMIC DEVELOPMENT, STATE OF HAWAII, HAWAII AND THE SEA - 1974 6-3, 6-4 (1974).

In recognition of the need for comprehensive data, an agreement was entered into on May 23, 1977, by the National Marine Fisheries Service of the U.S. Department of Commerce, the Fish and Wildlife Service of the U.S. Department of the Interior, and the Department of Land and Natural Resources of the State of Hawaii to conduct a survey and assessment of the living resources of the islands. TRIPARTITE COOPERATIVE AGREEMENT FOR THE SURVEY AND ASSESSMENT OF THE LIVING RESOURCES OF THE NORTHWESTERN HAWAIIAN ISLANDS (May 23, 1977) [hereinafter cited as TRIPARTITE COOPERATIVE AGREEMENT].

The purpose of the study as set out in the agreement is to provide a detailed survey and assessment of the biological resources of the islands to form a foundation upon which to base management decisions concerning long-range uses and preservation of the living resources. The breakdown of research responsibilities for the survey was made in line with organizational expertise and jurisdiction. Under the agreement the Fish and Wildlife Service assumed responsibility for seabirds, the State Division of Fish and Game for the nearshore

tion and environmental preservation may be difficult to achieve. The results of scientific studies currently being made[19] should help to indicate whether a carefully administered fisheries program can be implemented which will allow controlled utilization of the resources of the islands and which will also adequately protect and preserve the various wildlife and their natural environment.

I. The Wildlife and Natural Resources of the Northwestern Hawaiian Islands: Federal vs. State Interests

A. *Federal Interests*

The federal government asserts that federal jurisdiction over the submerged lands and internal waters of the Northwestern Hawaiian Islands as part of the Northwestern Hawaiian Islands Wildlife Refuge, and the designation of the emerged lands of the area as wilderness, is necessary to maintain and protect the area's wildlife and natural resources.[20] Uncontrolled exploitation of the natural resources of the islands could wreak havoc with the fragile ecosystems of the refuge.[21] Since the wildlife of the

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fishery resources and the National Marine Fisheries Service for the Hawaiian monk seal and green sea turtle, whose habitats are within the area, and for the slope, banks and offshore resources. The University of Hawaii Sea Grant College Program has also been involved since 1979 with studies on inshore and deep water precious corals in the area, and with other studies complementing those carried out by the other three agencies.

The study is in its fifth year, and the results of the immense data collection should assist in making intelligent future management decisions affecting the area. In April 1980 a symposium on the status of resource investigations was convened. The symposium was undertaken "to interchange research results and ideas and to incorporate this information in planning the remaining two years of research." *Proceedings of the Symposium on the Status of Resource Investigations in the Northwestern Hawaiian Islands* (R. Grigg & R. Pfund eds., University of Hawaii Sea Grant College Program Misc. Rep. No. 4, 1980) [hereinafter cited as *Symposium Proceedings*].

[19] Tripartite Cooperative Agreement, *supra* note 18.

[20] *See* note 12 *supra* and accompanying text.

[21] Island ecosystems are particularly susceptible to disruption by outside influences. The relatively short history of the islands is fraught with cases of uncontrolled exploitation of the area's resources. One example of the irreversible damage caused by man's encroachment was in conjunction with the exploitation of the seabirds and guano on Laysan Island. The island was once inhabited by four endemic land birds - the Laysan millerbird, the Laysan rail, the Laysan honeycreeper and the Laysan teal - all found nowhere else in the world. In 1902, enterpreneur Max Schlemmer, manager of the North Pacific Phosphate and Fertilizer Company, mined guano for fertilizer and harvested albatross eggs for albumen for the production of photographic paper. If these actions alone did not cause harm to the Laysan ecosystem, his importation of rabbits for pets, food and possible commercial canning certainly did.

In the absence of natural enemies, the rabbits proliferated, devoured the vegetation and decimated the habitats of Laysan's rare birds. By the early 1920's the Laysan rail and miller-bird were both extinct. In the spring of 1923, with the scientists of the Tanager expedition on hand to witness and document the event, a swirling sandstorm caused the demise

islands are interrelated with, if not directly dependent upon the oceans, harvesting resources from the surrounding waters might seriously endanger the wildlife.[23] Federal jurisdiction over the islands and their internal waters as a single ecological unit would afford maximum protection against man's invasion and possible destructive influences in the area.[23]

The wildlife that require protection include a large population of migratory seabirds. The tiny islands and large oceanic reefs and shoals are nesting and breeding grounds for more than ten million seabirds.[24] The birds assemble there annually from the far reaches of the Central Pacific.[25] Also dependent upon the islands and surrounding waters are the endangered Hawaiian monk seal and the threatened green sea turtle.[26] Almost the entire remaining world population of approximately 1,000 Hawaiian monk seals reside in the refuge,[27] and the last important nesting

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of the last three remaining Laysan honeycreepers to pass quietly out of existence.

Rabbits from Laysan were later transferred to Lisianski Island for the humanitarian purpose of providing food for future seamen who might become stranded on the island. The rabbits there proceeded to have the same disastrous effects on Lisianski Island as occurred on Laysan. The rabbits on Laysan were exterminated in 1923 by scientists on the Tanager expedition and the rabbits on Lisianski proceeded to literally eat themselves out of house and home, and eventually died of starvation. Whitmore, *Bird Life Among Lava Rock and Coral Sand: The Chronical of a Scientific Expedition to Little-Known Islands of Hawaii*, 48:1 NAT'L GEOGRAPHIC 77 (July 1925); Eliot, *Hawaii's Far-Flung Wildlife Paradise*, 152:5 NAT'L GEOGRAPHIC 672 (May 1978).

[23] The wildlife depend to a large extent on the marine resources of the refuge. Seabirds feed mainly on fish and squid, the green sea turtle grazes on marine algae and the Hawaiian monk seal feeds on octopus, fish and lobster. *See* note 185 *infra* and accompanying text. Current studies of the living resources in the islands should yield further information on the interdependencies of these resources. *See* note 18 *supra*.

[24] *See* Benson, *Sea Refuge - All Want to Get Into Act*, Honolulu Advertiser, July 26, 1976, § A at 3, col. 1.

[25] Among the 18 different species that are present are two species each of albatross and shearwaters, three species each of petrels and boobies, six species of terns and one species each of frigate and tropic birds. Harrison & Hida, *The Status of Seabird Research in the Northwestern Hawaiian Islands*, in *Symposium Proceedings*, *supra* note 18, at 17. The refuge is also the home of four endangered endemic land birds: the Laysan finch, Nihoa finch, Nihoa millerbird and the Laysan teal, which is perhaps the world's rarest duck. ENVIRONMENTAL STATEMENT, *supra* note 12, at 16-18. *See also* U.S. FISH AND WILDLIFE SERVICE, DEP'T OF THE INTERIOR, HAWAII'S ENDANGERED WILDLIFE (1968).

[26] WILDERNESS PROPOSAL, *supra* note 12.

[27] Pursuant to the Endangered Species Conservation Act of 1973, 16 U.S.C. §§ 1531-43 (1976), the Hawaiian monk seal has been designated an endangered species and the green sea turtle has been designated a threatened species. 50 C.F.R. §§ 17.11-17.12 (1980), 45 Fed. Reg. 33,772 & 33,777 (1980). An endangered species is one that is threatened with extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(4) (1976). A threatened species is one that is likely to become endangered in the foreseeable future. 16 U.S.C. § 1532(15) (1976). The Endangered Species Act also provides for the designation of an endangered or threatened species' habitat as a "Critical Habitat," which helps to ensure protection of the species. 16 U.S.C. § 1532(5)(A) (1976). Critical habitat designation has been considered but as yet not been made with respect to the endangered and threatened species within the Northwestern Hawaiian Islands.

[27] ENVIRONMENTAL STATEMENT, *supra* note 12, at 15-16. *See also* WILDERNESS PROPOSAL,

site in the North Central Pacific for the green sea turtle exists at French Frigate Shoals.[28] The importance of protecting and preserving the waters of the reefs and shoals has also been recognized. Not only are the waters a source of food for the islands' wildlife, but they are an immense undisturbed laboratory harboring several rare species of marine life.[29]

B. Hawaii's Interests

State jurisdiction over the internal waters and submerged lands of the Northwestern Hawaiian Islands would be of geographic, economic and political benefit to Hawaii. Geographically, the state could clarify its territorial boundaries and effectively assert control over approximately 254,000 acres of submerged lands and waters in the islands.[30] Economically, it would be beneficial for the state to control and manage the development and utilization of the various natural resources of the area, especially the fisheries resources. Limited biological surveys of the waters indicate that there exist sufficient populations of a variety of fish which could sustain a fisheries industry.[31] Impressive are the numbers and sizes of commercially

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supra note 12.

[28] Balazs, *A Review of Basic Biological Data on the Green Turtle in the Northwestern Hawaiian Islands*, in *Symposium Proceedings*, *supra* note 18, at 42.

[29] WILDERNESS PROPOSAL, *supra* note 12. The proposal states:

> The shallow waters of the reefs and shoals are a productive source of food for the islands' wildlife, but apart from this value is their great potential as undisturbed natural laboratories. Marine life exists here as undisturbed by man as is possible in the modern world—a great opportunity to extend our knowledge of the sea. When the refuge was created over half a century ago, the survival of the sea bird colonies was the prime consideration. In the intervening years it has become evident that perpetuation of an island's entire biological system rather than bits and pieces of that system is the proper objective of the refuge.

[30] *See* note 8 *supra*.

[31] ENVIRONMENTAL STATEMENT, *supra* note 12, at 14. *See also* DEP'T OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, HAWAII FISHERIES DEVELOPMENT PLAN (1979) [hereinafter cited as DEVELOPMENT PLAN]; Okamoto & Kawamoto, *Progress Report on the Nearshore Fishery Resource Assessment of the Northwestern Hawaiian Islands: 1977 to 1979*, in *Symposium Proceedings*, *supra* note 18, at 71. The TRIPARTITE COOPERATIVE AGREEMENT, *supra* note 18, at 7-8 states:

> [T]he Northwestern Hawaiian Islands have received increasing attention from both foreign and domestic fishermen. Several kinds of foreign fishing vessels have been fishing in the vicinity of the Hawaiian Archipelago, for example, tuna pole-and-line vessels, tuna longline vessels, trawlers, coral draggers, and handline vessels. Local Hawaiian commercial fishermen, their total average harvest amounting to 7,000 tons annually, are interested in both inshore and offshore fishery resources that may exist there, and feel that a logical expansion of their present fishery is to the northwest. Whereas in the past, the local fleet of small wooden sampans were primarily limited to fishing within the main Hawaiian Islands, today large, modern fishing vessels are beginning to appear in Kewalo Basin and Honolulu Harbor on the island of Oahu. These newer vessels, refrigerated and with cruising ranges of hundreds to thousands of miles, can travel with relative ease to and from more distant fishing grounds, and

valuable inshore reef fish.[32] There may also be sufficient shellfish populations to supplement the commercial markets for kona crabs[33] and spiny lobsters.[34] Furthermore, other natural resources such as coral, sand, minerals and guano could potentially be extracted from the area.[35] There is also potential recreational and sports fishing uses of the area.[36]

The resources in the disputed internal island waters are supplemented by various other fisheries resources found within and outside the territorial waters surrounding the islands. Pelagic fish species,[37] particularly tuna, constitute a significant resource which is not being tapped to its full potential in the Northwestern Hawaiian Islands.[38] Access to baitfish

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some now fish in the lower areas of the Northwestern Hawaiian Islands.

[32] An abundant variety of fish, including jacks (*papio-ulua, omilu, butaguchi*), mackerels (*akule, opelu*), threadfins (*moi*), parrotfish (*uhu*), rudderfish (*nenue*), mullets (*'ama'ama, uouoa*), squirrelfish (*u'u or menpachi*), surgeonfish (*manini, kole, kala*), flag-tail fish (*aholehole*), wrass (*hinalea*) and goatfish (*weke, moana, kumu*) have been found. TRIPARTITE COOPERATIVE AGREEMENT, *supra* note 18, at 10-11. Okamoto & Kawamoto, *supra* note 31, at 73-74, 77, made the following observations:

> Surveys in the inner nearshore zone revealed large concentrations of *aholehole (Kuhlia sandvicensis), moi (Polydactylus sexfilis), iao (Pranesus insularem),* and *'ama'ama (Mugil cephalus)* throughout most of the island areas . . . .
>
> The largest concentration of shoaling fishes in the inner nearshore zone was observed in 1977, when an estimated 16,000 pounds of one to five-pound size *moi,* 1,000 pounds of three to five-pound size *'ama'ama,* and 100 pounds of one-pound size *akule (Trachurops crumenophthalmus)* were recorded from . . . Pearl and Hermes Reef. . . .
>
> In terms of catchability [of white *ulua*] . . . we found that for a school of fish containing about 200 individuals, up to 40 fish weighing between 2 and 10 pounds could be caught with two handlines . . . within the first half hour of fishing at Maro Reef and Lisianski Island.

[33] HAWAII AND THE SEA - 1974, *supra* note 18, at 6-7 states, "[T]he Kona crab fishery appears capable of expanding into other areas, particularly the Northwestern Hawaiian Islands." *See also* DEVELOPMENT PLAN, *supra* note 31, at 142.

[34] DEVELOPMENT PLAN, *supra* note 31, at xix; Okamoto & Kawamoto, *supra* note 31, at 79.

[35] ENVIRONMENTAL STATEMENT, *supra* note 12, at 22; DEVELOPMENT PLAN, *supra* note 31, at 143-50.

[36] TRIPARTITE COOPERATIVE AGREEMENT, *supra* note 18, at 8 states, "[T]he demand for quality recreational fishing by visitors and residents has increased to the extent that there is growing effort to expend the range of sport fishing northward beyond the main Hawaiian Islands."

[37] The pelagic fish species referred to include both true pelagic species and coastal pelagic species. The true pelagic species include bigeye tuna, yellowfin tuna, albacore, northern bluefin tuna, skipjack tuna, swordfish, marlin, shortbill spearfish, sailfish, dolphin (*mahimahi*) and sharks. The coastal pelagic species include *ono, kawakawa,* rainbow runner, bigeye scad (*akule*), Japanese mackerel and four species of mackerel scad (*opelu*). Uchiyama, *Survey of the Pelagic Fishes of the Northwestern Hawaiian Islands,* in *Symposium Proceedings, supra* note 18, at 251-52.

[38] Currently, there is no commercial fishery for the coastal pelagic fish species in the Northwestern Hawaiian Islands. The fishery for the true pelagic fishes is so undeveloped that apparent abundance studies of these species have been dependent upon Japanese and other foreign fishing operations catch statistics. *Id.,* at 252, 262.

An estimate of potential fishery yield from Hawaiian waters is about two to four times the

within the internal waters of the islands would enhance the development of the pelagic fisheries industry. The islands might also be utilized to provide harbor and processing facilities close to the fishing areas.[39] Also known to be present in numbers capable of supporting a fishery are bottomfish[40] and spiny lobsters.[41]

Politically, the state's establishment of jurisdiction over the internal waters and submerged lands of the Northwestern Hawaiian Islands would significantly enhance the state's ability to oversee, protect and utilize its natural ocean resources. As a mid-ocean archipelago, the State of Hawaii is vitally interdependent with its surrounding waters.[42] State determinations of the course of its own economic development and territorial integrity are functions arguably essential to its existence as a separate and independent sovereign state.[43] A successful claim of state jurisdiction over the internal waters and submerged lands of the islands might also enhance the state's bargaining position with the federal government as to the proposed use of Tern Island at French Frigate Shoals for a fisheries support station.[44]

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average annual catch of tuna in Hawaiian waters in the past two decades. Since fishing around the main Hawaiian Islands is close to the maximum sustainable catch per unit effort, it has been stated that "an increase in landings per effort would require exploitation of new fishing grounds offshore or in the Northwestern Hawaiian Islands . . . ." Hirota, Taguchi, Shuman & Jahn, *Distributions of Plankton Stocks, Productivity, and Potential Fishery Yield in Hawaiian Waters*, in *Symposium Proceedings*, *supra* note 18, at 191, 202.

[39] DEVELOPMENT PLAN, *supra* note 31, at 204-07, 245-52, 263-64. This would also apply to deep sea mineral mining and precious coral harvesting. *Id.*, at 143-50. The state is interested in utilizing Tern Island at French Frigate Shoals for this purpose. *See* note 8 *supra*.

[40] A small commercial fishery of Northwestern Hawaiian Island bottomfishing has been in existence since at least 1948. The commercially important bottomfish known to be most common in the area include *opakapaka, ehu, onaga, kalekale, gindai, butaguchi, kahala* and *hapu'upu'u*. Moffitt, *A Preliminary Report on Bottomfishing in the Northwestern Hawaiian Islands*, in *Symposium Proceedings*, *supra* note 18, at 216.

[41] Commercial fishermen presently exploit the lobster resources of the Northwestern Hawaiian Islands. Fishing mainly occurs in the areas around Necker Island. Polovina & Tagami, *Population Estimates and Yield-Per-Recruit Analysis for the Spiny Lobster, Panulirus marginatus, at Necker Island*, in *Symposium Proceedings*, *supra* note 18, at 149.

Exploratory surveys conducted by the National Marine Fisheries Service have shown high concentrations of lobster in the vicinity of Necker Island and Maro Reef. The Gardner Pinnacles, Raita Bank and Laysan Island areas have also shown potential. In initial surveys, the proportion of legal sized lobster was relatively high in most areas. Uchida, Uchiyama, Humphreys & Tagami, *Biology, Distribution, and Estimates of Apparent Abundance of the Spiny Lobster, Panulirus marginatus, in Waters of the Northwestern Hawaiian Islands*, in *Symposium Proceedings*, *supra* note 18, at 121.

[42] *See* Schmitt, Luke, Yee, Stroud & Kerns, *The Hawaiian Archipelago: Defining the Boundaries of the State* 63-68 (University of Hawaii Sea Grant College Program Working Paper No. 16, Oct. 1975).

[43] *See* National League of Cities v. Usery, 526 U.S. 833 (1976).

[44] *See* note 8 *supra*.

II. The History of Jurisdiction and Boundaries in the Refuge Islands

A. *Discovery and Early Claims*

The Northwestern Hawaiian Islands were discovered by European and American explorers in a span of about seventy years in the late 18th and early 19th centuries.[45] The first American claims to several of the islands were made pursuant to the Guano Islands Act of 1856.[46] After the passage of this Act, all of the Hawaiian Islands northwest of Nihoa were fair game for adventurous Americans desiring to occupy and use the islands under the protection of the United States.[47] Lisianski Island, French Frigate Shoals and Pearl and Hermes Reef were claimed under the Act, but in each of these cases all of the conditions needed to formalize the claims were never completed.[48] Thus, no guano claim ever merited recognition by the United States.

Several of the Northwestern Hawaiian Islands were formally annexed by the Hawaiian government during the 19th century, including Nihoa,

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[45] Nihoa was discovered in April 1789 by Capt. Douglas of the British vessel *Iphegenia*. Necker Island and French Frigate Shoals were discovered by French explorer La Perouse in 1786. Gardner Pinnacles and Maro Reef were found by Capt. Allen of the American whaler *Maro* in June 1820. Laysan Island was discovered by Capt. Stanikowitch of the Russian vessel *Moller* in 1828. Lisianski Island was found by Capt. Lisianski of the Russian ship *Neva* in 1805. Pearl and Hermes Reef was discovered when two English whaling vessels, the *Pearl* and the *Hermes*, ran aground on its reefs in 1822. Kure Atoll was discovered by Capt. Brooks of the American vessel *Gambia* in 1859. Morris, *supra* note 6, at 13-36; E. Bryan, The Northwestern Hawaiian Islands: An Annotated Biobliography 6-24 (1978).

[46] Guano Islands Act of 1856, ch. 164, 11 Stat. 119 (current version at 48 U.S.C. §§ 1411-19 (1976)).

[47] *Id.* The elements of a valid claim under the Act include: discovery of guano on an uninhabited and unclaimed island, taken possession of and occupied by an American citizen, and registration of the claim with the Department of State. 48 U.S.C. §§ 1411-12 (1976). Upon satisfaction of the required conditions, the Act provides that "such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States." 48 U.S.C. § 1411 (1976). In effect, the claimant acts on behalf of the United States, and the claimed area is annexed as territory of the United States upon designation by the President. The claimant retains only a revocable license to occupy the claimed area and remove the guano, which has been construed as an estate at the will of the United States. Duncan v. Navassa Phosphate Co., 137 U.S. 647, 651-52 (1891); 9 Op. Att'y Gen. 30 (1857).

[48] In 1854, an American vessel named *San Diego* left notice on Lisianski Island that it was claiming the island on behalf of parties in San Francisco. However, no claim was ever filed. In a letter to the Secretary of the Navy dated February 7, 1859, Lt. Brooke of the *Fenimore Cooper* claimed possession of French Frigate Shoals under the Guano Act. His claim filed with the U.S. Consul in Honolulu, however, was never completed. Following the claim by Lt. Brooke, a George Baker notified the Secretary of State of his guano claim to French Frigate Shoals as successor to the crew of the *Fenimore Cooper*. However, Baker also failed to complete the claim. Pearl and Hermes Reef was subject to a guano claim in 1859 by Captain Brooks of the *Gambia*, but no actual occupation or claim was ever filed. C. Kurata, Jurisdictional Issues in the Northwestern Hawaiian Islands (Jan. 1979) (unpublished manuscript in Office of Marine Affairs Coordinator, State of Hawaii).

Necker Island, French Frigate Shoals, Laysan Island, Lisianski Island and Kure Atoll.[49] In addition, Pearl and Hermes Reef was visited by representatives of the Hawaiian Kingdom in 1857, but it is not clear if it was officially annexed at this time.[50] In 1893, the Provisional Government of Hawaii sent a statement of public lands to the United States, as part of its efforts towards annexation, which included essentially the entire chain of islands and reefs of the Northwestern Hawaiian Islands.[51] Thus upon annexation of the Hawaiian Islands by the United States in 1898, the Northwestern Hawaiian Islands were established as part of the domain of the Hawaiian Islands and were part of the territory acquired by the United States at that time.[52] The Organic Act of 1900,[53] which estab-

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[49] Nihoa was annexed in 1822 by Capt. Sumner on behalf of Queen Kaahumanu. Necker Island was annexed by Capt. King on May 26, 1894, and French Frigate Shoals on July 13, 1895, on behalf of the Republic of Hawaii. Laysan Island was annexed on May 1, 1857, and Lisianski Island on May 11, 1857, by Capt. Paty. Kure Atoll was annexed by Col. Boyd on Sept. 20, 1886. Morris, *supra* note 6, at 13-36; E. BRYAN, *supra* note 46.

[50] E. BRYAN, *supra* note 46, at 24. Capt. Paty visited Pearl and Hermes Reef in 1857, at the time he was claiming Laysan Island and Lisianski Island for the Hawaiian Kingdom. *See* note 49 *supra*.

[51] Letter from Charles L. Carter, Commissioner of the Provisional Government of Hawaii, to John W. Foster, U.S. Secretary of State (Feb. 11, 1893), *reprinted in* HAWAIIAN ISLANDS: REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE, JANUARY 1, 1893 - MARCH 10, 1894, 1047-48 (1894). The letter contained the following list of public lands comprising the territory of Hawaii:

NAME	AREA
Hawaii	4,210 sq. mi.
Maui	760 " "
Oahu	600 " "
Kauai	590 " "
Molokai	270 " "
Lanai	150 " "
Niihau	97 " "
Kahoolawe	63 " "
Nihoa or Bird Island	Not Surveyed
Johnsons or Cornwallis	" "
Neckers	" "
French Frigate Shoals	" "
Brothers Reef	" "
Garden Island [Gardner Pinnacles]	" "
Allens Reef	" "
Laysan Island	" "
Lisianski Island	" "
Philadelphia or Bunkers	" "
Pearl or Hermes Reef	" "
Middle Island (Midway or Brooks Island)	" "
Ocean Island [Kure Atoll]	" "
Palmyra Island	" "

and all outlying and adjoining reefs, atolls, islets and unnamed islands.

[52] Annexation of the Hawaiian Islands was effected by the Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750, which simply described the annexed territory as "the Hawaiian

lished the Territory of Hawaii, authorized the newly created Territory to take possession and control of the public property ceded to the United States upon annexation, which included the Northwestern Hawaiian Islands.[54]

B. Establishment of the Refuge

On February 3, 1909, President Theodore Roosevelt issued Executive Order 1019 which set aside selected reefs and islets of the Northwestern Hawaiian Islands as a native bird reservation.[55] The Order was issued in response to the continued yearly killing of thousands of seabirds for their plummage, skins and eggs.[56] The Japanese had been observed fishing and

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Islands and their dependencies." *Id.* The Joint Resolution provided for the appointment of five commissioners by the President to recommend legislation necessary to incorporate and organize the annexed territory. *Id.* The report of this commission specifically listed Nihoa, Necker Island, French Frigate Shoals, Gardner Pinnacles, Laysan Island, Lisianski Island and Kure Atoll as being part of the Hawaiian Islands, but failed to incorporate the Provisional Government's 1893 claim to Dowsetts Reef, Maro Reef, Brooks Shoal, Gambia Shoal and Pearl and Hermes Reef. HAWAIIAN COMMISSION REPORT, S. Doc. No. 16, 55th Cong., 3rd Sess. 4 (1898). However, the report noted that "[t]he statistics available in regard to the public lands belonging to the Republic of Hawaii at the time of the cession to the United States are not of that absolute or definite character that they can be accepted as conclusive of areas and values." *Id.*

An unofficial compilation of the Hawaiian domain at the time of annexation, however, included Nihoa, Necker Island, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Pearl and Hermes Reef, Laysan Island, Lisianski Island and Kure Atoll. Thrum, *Islands Comprising the Hawaiian Republic,* in HAWAIIAN ALMANAC AND ANNUAL FOR 1898 165 (1898). Furthermore, the leasing of various islands by the Hawaiian government to the North Pacific Phosphate and Fertilizer Company in the 1890's evidences these areas were within the Hawaiian domain. Twenty-year leases were issued for Laysan Island and Lisianski Island on March 20, 1890, and 25 year leases were issued for Pearl and Hermes Reef, French Frigate Shoals and Kure Atoll on February 15, 1894. Morris, *supra* note 6, at 21-26; E. BRYAN, *supra* note 46, at 12-19.

[53] Organic Act of Apr. 30, 1900, ch. 339, 31 Stat. 141.

[54] *Id.*, § 91.

[55] *See* note 6 *supra.*

[56] Letter from the Governor of the Territory of Hawaii to the Secretary of the Interior (July 6, 1903). The Governor initiated an interagency review of efforts to combat bird depredation through the Secretary of the Interior based on complaints of massive bird killings by Japanese on Midway.

Extensive depredation was also recorded on Laysan Island and Lisianski Island. On Laysan Island, American businessman Max Schlemmer proposed to kill over 20,000 sea and land birds a season. He intended to turn over the bird skins to the Territorial Government who would then sell them and retain ten percent of the proceeds as royalty. The Territorial Government turned down his proposal. Ely & Clapp, *The Natural History of Laysan Island, Northwestern Hawaiian Islands* 37-38 (Smithsonian Institute Atoll Research Bulletin No. 171, Dec. 1973).

At Lisianski Island the Revenue Cutter *Thetis* was dispatched in 1904 to remove Japanese from the island. When the party arrived, they found the Japanese with approximately 121,000 whole birds and 162,000 pairs of wings. Clapp & Wirtz, *The Natural History of*

taking birds in the Northwestern Hawaiian Islands since the 1880's. The Japanese had a strong interest in such operations because of a ready and lucrative market for stuffed birds and feather products.[57] Although agreements had been made with the Japanese in 1903[58] and 1905[59] to halt the destruction of the seabirds, the depredation nevertheless continued.

As publicity about the seabird killings spread, a growing conservation movement concerned about the welfare of the birds began to build. Continuing pressure to protect the birds was exerted until 1909, when the demand for birds and feather products had grown so significantly on the world market that fears existed that Americans would promote the exploitation.[60] In response to a growing conservation lobby, to the Secretary's previous warnings and in recognition that customs, immigration and labor laws were being violated, Executive Order 1019 was issued. The Executive Order brought these islands within the scope of the Refuge Trespass Act of 1906,[61] which set out penalties for the unauthorized hunting or capture of protected birds and eggs.

C. *The First Jurisdictional Dispute*

Refuge administration during the early years was under the Bureau of Biological Survey, U.S. Department of Agriculture. The federal administration's initial questions of jurisdiction concerned the extent of its authority to oversee commercial fishing operations within the lagoon at Pearl and Hermes Reef. The issue first arose when pearl oysters were discovered in the lagoon of Pearl and Hermes Reef by Captain William Anderson of the schooner *Lanikai* in 1928.[62] Soon after the discovery, Cap-

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Lisianski Island, Northwestern Hawaiian Islands 27 (Smithsonian Institute Atoll Research Bulletin No. 186, Feb. 1975).

[57] Letter from E.G. Babbit, American Vice-Consul General to Japan, to the Assistant Secretary of State (Feb. 6, 1909). This letter relates how Japan exported $496,809 worth of stuffed birds and feather products between 1905 and 1908. These products were sent to the United States, Europe and Hong Kong. *Id.*

[58] The 1903 agreement was referred to in a letter from the Secretary of the Interior to President Theodore Roosevelt, which proposed Executive Order 1019 (February 3, 1909).

[59] Letter from Lloyd C. Griscom of the United States Legation in Tokyo to John Hay, Secretary of State (Mar. 13, 1905).

[60] Letter from the Secretary of the Interior to President Theodore Roosevelt, *supra* note 58. The Secretary reported in the letter that:

> [It] now appears that there is grave danger that the slaughter of these valuable sea scavangers is continuing or is soon to be resumed with the assistance of citizens of the United States and of the Territory of Hawaii who will deliver the bird carcasses to the former Japanese poachers, thus relieving the latter from the danger of prosecution by their own government.

[61] Act of June 28, 1906, ch. 3565, 34 Stat. 536 (current version at 18 U.S.C. § 41 (1976)).

[62] Galtsoff, *Pearl and Hermes Reef, Hawaii: Hydrographic and Biological Observations* 3 (Bernice P. Bishop Museum Bulletin No. 107, 1933); Bryan, *Pearl and Hermes Reef*, 49:10 PARADISE OF THE PACIFIC 19 (Oct. 1937).

tain Anderson and Lorrin A. Thurston formed a new enterprise called the Hawaiian Sea Products Company, Limited, and applied to the Bureau of Biological Survey for a lease of Pearl and Hermes Reef to exploit the pearl shell resource.[63]

Faced with this request, the U.S. Department of Agriculture was required to clarify the extent of its jurisdiction over the internal waters and submerged lands of Pearl and Hermes Reef. According to a March 28, 1929, report from Thurston's attorney, Charles Marshall, to Hawaii's delegate to Congress, S.K. Houston, the Solicitor of the Department, Judge Williams, determined that the U.S. Department of Agriculture had absolute jurisdiction over the emerged lands of Pearl and Hermes Reef pursuant to Executive Order 1019, but that the Territory of Hawaii retained control over all submerged lands and waters seaward of the mean high water mark.[64]

In light of this determination, Hawaii's Territorial Governor, W.R. Farrington, proposed to the Secretary of the Interior that federal control of Pearl and Hermes Reef be transferred to the territory. The Governor questioned the authority and practicality of federal administration beyond assuring protection of native birds, and expressed a desire to issue commercial fishing leases by public auction. The Governor thus proposed

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[63] Galtsoff, *supra;* Bryan, *supra.*

[64] Letter from Charles Marshall to Territory of Hawaii Delegate to Congress S.K. Houston (Mar. 28, 1929). The report specifically stated:

> The Department of Agriculture considers that no jurisdiction is conferred upon it by the Executive Order on the waters surrounding the actual islands and that the regulations of the fishing in those waters is entirely with the Territorial Government . . . . [N]either the Bureau of Fisheries through the Department of Commerce nor the Department of Agriculture under the Executive Order had or claimed any jurisdiction over the shell beds. The Bureau of Fisheries people were very much interested in conserving those beds but were unable to do so because they had no appropriation for any investigation of the beds nor did they have any jurisdiction over them without Executive Order.

The Dep't of Agriculture's position as to the extent of the refuge boundaries was also verified by Governor W.R. Farrington of the Territory of Hawaii. In a memorandum prepared by the Governor for the Secretary of the Interior, the Governor noted that "[t]he Department of Agriculture discovered that its authority stopped at the high water mark. From the high water mark, presumably to the three mile limit, the Territory of Hawaii has full jurisdiction . . . . The authority of the Territory of Hawaii over the fisheries or land under the water from the high water mark to the three mile limit seemed to be unquestioned." Gov. W.R. FARRINGTON, MEMORANDUM ON THE ADMINISTRATIVE CONTROL OF PEARL AND HERMES REEF (June 19, 1929), conveyed in a letter from W.R. Durham, Secretary to the Governor, Territory of Hawaii, to the Hon. S.K. Houston, Hawaii Delegate to Congress (June 19, 1929). The federal position was also subsequently verified by the Territorial Commissioner of Public Lands, who reported in 1930 that the jurisdiction of "the Department of Agriculture [over the area set aside under Executive Order 1019] is confined . . . to the land area above high water mark . . . [t]he land areas between high and low water mark and the surrounding waters within the three-mile limit are under Territorial jurisdiction . . . ." Letter from C.T. Bailey, Commissioner of Public Lands, Territory of Hawaii, to Governor Lawrence M. Judd, Territory of Hawaii (Sept. 5, 1930).

an Executive Order releasing Pearl and Hermes Reef from the Hawaiian Islands Rservation.[65] This proposal, however, was rejected by the Secretary of Agriculture and consequently was never submitted to the President by the Secretary of the Interior.[66] Nevertheless, the Secretary of Agriculture issued an order authorizing the Territorial Governor of Hawaii to issue revocable use and occupation permits as to Pearl and Hermes Reef.[67]

The Bureau of Fisheries, Department of Commerce, which found itself without authority over the waters of the refuge, nevertheless submitted resources management recommendations at the Territorial Government's request to assure the proper conservation and regulation of the pearl oyster bed.[68] After issuance of the permit to the Hawaiian Sea Products Company, the legislature of the Territory of Hawaii proceeded to appropriate funds for a cooperative resource survey and authorized the Board of Agriculture and Forestry to promulgate regulations on harvesting.[69] The territory's regulations, based upon those recommended by the Bureau of Fisheries, were ineffective in managing the oyster resource. In 1931, harvesting operations were discontinued due to depletion of the pearl oysters.[70]

D. Shared Administration of the Refuge

Management functions and jurisdiction over the refuge were transferred from the U.S. Department of Agriculture to the U.S. Department of the Interior by Reorganization Plan No. 2 of 1939[71] and Reorganization Plan No. 3 of 1940.[72] As a result of the change, administration of the

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[65] Letter from Governor W.R. Farrington, Territory of Hawaii, to the U.S. Secretary of the Interior (Nov. 16, 1928).

[66] Letter from John H. Edwards, Assistant Secretary of the Interior, to Governor W.R. Farrington, Territory of Hawaii (Dec. 21, 1928).

[67] Galtsoff, *supra* note 62, at 12. The order provided in part that:

> Any person holding a permit from the Governor of the Territory of Hawaii to use or occupy any part of the land or formation protruding above the normal water level at said Pearl and Hermes Reef is hereby permitted to occupy or use such area so long as the conditions of this order, the law protecting wild animals and birds on national refuges, and the above mentioned permit are faithfully observed.

[68] Letter from S.K. Houston, Territory of Hawaii Delegate to Congress, to Governor W.R. Farrington, Territory of Hawaii (Mar. 30, 1929).

[69] Act 209, 1929 Hawaii Sess. Laws 255.

[70] ENVIRONMENTAL STATEMENT, *supra* note 12, at 15. Recent biological surveys have failed to find any recovery of the pearl oyster population. *Id.*

[71] Reorg. Plan No. 2 of 1939, 4 Fed. Reg. 2731, 53 Stat. 813, *as amended by* Act of Aug. 13, 1946, ch. 947, Title XI, § 1131(65), 60 Stat. 1040, *and* Pub. L. No. 88-94, § 2(f), 77 Stat. 122, *reprinted in* 5 U.S.C. § 903 (1976).

[72] Reorg. Plan No. 3 of 1940, 5 Fed. Reg. 2107, 54 Stat. 231, *as amended by* Act of Oct. 15, 1949, ch. 695, § 5(a), 63 Stat. 880, *and* Pub. L. No. 85-726, § 1401(c), 72 Stat. 806, *reprinted in* 5 U.S.C. § 903 (1976).

refuge was placed in the hands of the U.S. Fish and Wildlife Service of the Department of the Interior. Also in 1940, Presidential Proclamation 2416 renamed the Hawaiian Islands Reservation the Hawaiian Islands National Wildlife Refuge.[73]

From 1928 to 1960, the construction given Executive Order 1019 by the Department of Agriculture, which acknowledged that Hawaii possessed jurisdiction over the internal waters of the refuge, controlled the activities of the territory, and later the State of Hawaii, with the U.S. Department of Agriculture and its successor U.S. Department of the Interior. Throughout this period it was recognized that the federal agencies responsible for administration of the refuge had difficulty in managing, administering and enforcing refuge policies. In response to this, an agreement was reached in 1951 between the Territory of Hawaii and the Fish and Wildlife Service, U.S. Department of the Interior, for joint administration of the refuge.[74]

The agreement specifically authorized the Territorial Board of Commissioners of Agriculture and Forestry to designate the islands and reefs of the federal refuge as a refuge under the laws and regulations of the Territory of Hawaii.[75] The Board agreed to manage, administer and patrol the lands to protect the wildlife. The Board was also authorized to issue permits for entry and economic uses in accordance with the laws and regulations governing National Wildlife Refuges.[76] Pursuant to its powers as elaborated in the agreement, the Board issued permits allowing commercial fishing, scientific research expeditions and even sightseeing in the refuge area.[77]

In 1960, a Memorandum of Understanding was executed between the State of Hawaii Division of Fish and Game and the Fish and Wildlife Service, U.S. Department of the Interior, for further cooperation in management of the refuge. The Memorandum of Understanding provided for federal funding of state field inspections, wildlife surveys and manage-

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[73] Pres. Proc. No. 2416 (July 25, 1940), *reprinted in* 54 Stat. 2717-19.

[74] AGREEMENT BETWEEN FISH AND WILDLIFE SERVICE AND BOARD OF COMMISSIONERS OF AGRICULTURE AND FORESTRY (Dec. 27, 1951), *reprinted in* Index to the Islands, *supra* note 6, at 34-35.

[75] The Territory of Hawaii Board of Commissioners of Agriculture and Forestry, Division of Fish and Game, thereafter adopted Resolution No. 7, *Declaring the Hawaiian Islands National Wildlife Refuge a State Wildlife Refuge* (Apr. 25, 1952), *reprinted in* Index to the Islands, supra note 6, at 35-36.

[76] *Id. See* 50 C.F.R. §§ 26.21-26.27 (1980).

[77] Commercial fishing permits were issued to Heisei Shinsato on May 2, 1952, and December 9, 1958. The first permit was issued for fishing at French Frigate Shoals; the second permit allowed fishing at all islands. On May 19, 1959, a permit for fishing was given to Louis Agard for fishing at French Frigate Shoals. All the permits issued allowed landings upon the islands, so it is unclear whether permits would have been required if no landings were sought. Eleven permits were issued for various scientific purposes and two permits were given for sight-seeing between May 2, 1952, and December 31, 1963. (Copies of permits located in Office of Marine Affairs Coordinator, State of Hawaii).

ment studies for the refuge.[78]

E. The State's Attempt to Reacquire the Refuge

On March 18, 1959, Congress granted the Territory of Hawaii admission to the Union as a state. The Admission Act giving Hawaii statehood specified that the State of Hawaii would consist of all the islands, together with the appurtenant reefs and territorial waters, included in the Territory of Hawaii on the enactment date.[79] Upon admission, the State of Hawaii regained title to the lands ceded to the United States at annexation. Transfer of title was not complete, however, as the federal government retained ownership of those lands which had been set aside for the uses of the United States by an act of Congress, executive order, presidential proclamation or proclamation by the Governor of Hawaii during territorial status.[80]

The Admission Act required the agency having control over lands retained by the United States to report to the President within five years after statehood as to the necessity of retaining such lands under federal jurisdiction.[81] The continuing need for such lands was to be evaluated in reference to the state's reasons why such lands should be deemed surplus and returned. Lands that were no longer found necessary for the federal uses which originally mandated their transfer were to be returned to the state.[82] The Fish and Wildlife Service reported at that time a continuing need for only 1,765 acres, comprising the emerged lands in the refuge.[83]

Hawaii's position as to the emerged lands of the refuge was that such lands should be returned to state possession and control to assure effective management of the refuge by a wildlife agency contiguous to it. The State's position was based on the inadequacy of federal administration and protection of the refuge, and Hawaii's logistical advantage due to its geographical proximity.[84] This was recognized by the Department of Agri-

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[78] In 1967 a second Memorandum of Understanding was executed. MEMORANDUM OF UNDERSTANDING BETWEEN THE FISH AND WILDLIFE SERVICE AND THE STATE OF HAWAII DIVISION OF FISH AND GAME FOR PARTICIPATION IN THE MANAGEMENT OF THE HAWAIIAN ISLANDS NATIONAL WILDLIFE REFUGE (July 1, 1967). This second Memorandum of Understanding was amended on May 31, 1968, to increase the funding for the program in order to provide additional inspection and management assistance.

[79] Admission Act of 1959, Pub. L. No. 86-3, § 2, 73 Stat. 4.

[80] *Id.*, § 5(c). For a comprehensive analysis of the status of Hawaii's ceded lands, see Comment, *Hawaii's Ceded Lands*, 3 U. HAWAII L. REV. 101 (1981).

[81] Admission Act of 1959, *supra* note 79, § 5(e). The Admission Act originally allowed for possible reversion of surplus lands only during the five-year review period, but through state lobbying efforts, Pub. L. No. 88-233, 77 Stat. 472 (1963) amended § 5(e) of the Act to allow an indefinite review period.

[82] *Id.*

[83] S. REP. No. 675, 88th Cong., 1st Sess. 13 (Dec. 3, 1963).

[84] GOV. JOHN A. BURNS, STATE OF HAWAII COMMENTS ON HAWAII PROPERTY REVIEW REPORT CONCERNING DEPARTMENT OF INTERIOR LANDS (July 28, 1961). The report at 2-3 stated:

culture in 1928 during the pearl oyster harvests at Pearl and Hermes Reef, and by the Fish and Wildlife Service in its 1951 and 1960 cooperative agreements with Hawaii.[85]

State arguments for the return of the emerged lands of the refuge were given serious consideration by the Director of the Bureau of the Budget, Kermit Gordon, and Secretary of the Interior, Stewart Udall.[86] But a growing conservation lobby,[87] concern over the state's lack of a conservation plan for the area[88] and an extension of the five-year limitation for possible reverter,[89] turned the tide against a return of the refuge islands to the state. The emerged lands comprising the refuge thus remained under the jurisdiction of the U.S. Department of the Interior.[90]

> Concerning the . . . 1,765 acres of ceded land comprising the Hawaiian Islands National Wildlife Refuge, the State urges that the islands be returned to State control . . . . [I]n the past, the State has had a close and amicable working relationship with the Department of the Interior concerning these islands. However in spite of this close relationship, the records have shown that the Federal government has not been able to manage the refuge and enforce the regulations necessary to protect the unique flora and fauna existing therein. The fact that the Bureau of Sport Fisheries and Wildlife has found it expedient and necessary to enlist the services of the State in carrying out the above responsibilities bears out the State's position. It is therefore felt that the islands . . . should be returned to the State to insure the type of management and control over the Wildlife Refuge that can only be achieved by wildlife agency which is contiguous to it.

[85] *See* notes 67-69 & 74-78 *supra* and accompanying text.

[86] Letter from Kermit Gordon, Director, U.S. Bureau of the Budget, to Stewart Udall, Secretary of the Interior (Aug. 22, 1963). From the content of the letter it was apparent that Budget Director Gordon was fearful of losing conservation organization support for a pending environmental bill if he allowed the refuge to revert back to state ownership. Furthermore, he stated that "the State has no special interest in acquiring this group of uninhabited islands." *Id.*

[87] *See, e.g.*, letter from Carl W. Buchheister, President of the National Audubon Society to the President of the United States (1963), *reprinted in* 4:17 AUDUBON SOCIETY CONSERVATION GUIDE 1 (Sept. 1, 1963). The letter stated:

> [O]ur Society feels strongly that this area must remain under the supervision and protection of the U.S. Fish and Wildlife Service. We urge respectfully that the Refuge not be included in any tranfer of lands to the State government.

[88] Letter from Stewart Udall, Secretary of the Interior, to John A. Burns, Governor of Hawaii (Oct. 7, 1963). The letter stated the Secretary's concerns that "unless the State of Hawaii puts forward a sound conservation plan for the area—supported by such state legislation and appropriations as might be fitting—such a transfer might be justifiably criticized . . . ." *Id.* At the time the state had no in-depth conservation plans for the area and its funding for administration of the refuge came from the federal government.

[89] *See* note 81 *supra.*

[90] Hawaii also attempted to assert that the lands which were set aside before statehood for use by the United States were subject to a trust duty in favor of the state. This trust duty arguably mandated eventual return of all set aside lands upon termination of federal need. However, in 1961, Attorney General Robert F. Kennedy rendered an opinion that the United States held absolute fee title in all set aside ceded lands, to which Hawaii had no right of reversion. 42 Op. Att'y Gen. 43 (1961). *See generally* C. Kurata, *supra* note 48, at 21-23.

F. The New Boundary Assertions

In 1960, there were indications that the federal government was going to claim greater jurisdiction over the refuge area. A 1960 memorandum from A.V. Tunison, Acting Director of the Fish and Wildlife Service, to Wayne Collins, State Director of Agriculture and Conservation, stated that "the lands and waters comprising the refuge were reserved and set apart by the President."[91] Acting Director Tunison further stated:

> The Federal Government also has jurisdiction to administer this area of publicly owned lands and waters set aside for governmental purposes. Except as properly authorized by the U.S., by agreement or otherwise, the State of Hawaii has no right to administer or manage the refuge or to interfere with activities being conducted thereon by the U.S.[92]

In 1967, the federal government took unilateral administrative action to expand its jurisdiction by designating 204,935 acres of the Northwestern Hawaiian Islands as Research Natural Areas.[93] The purpose of such designation is to prohibit disruptive uses, encroachment or development which would be inconsistent with natural development of the area. The area is thus primarily reserved for educational and scientific uses, although such designation does not necessarily preclude activities such as

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[91] Memorandum from A.V. Tunison, Acting Director of Fish and Wildlife Service, to Wayne Collins, Director, Dep't of Agriculture and Conservation, State of Hawaii (June 14, 1960). The memorandum was in response to a state inquiry in regard to the U.S. Coast Guard's use license for Kure Atoll. Solicitor Edwards had advised on Nov. 19, 1959 that Kure Atoll had been properly returned to the jurisdiction of the Territory of Hawaii through Executive Order 10413, *see* note 6 *supra*, and that all the remaining refuge islands were set aside ceded lands which were subject to federal surplus property review under the Admissions Act, *supra* note 79. Solicitor Edwards noted that "a decision will need to be made within the period specified in the statute [five years] as to whether there is a continued need for the retention of the lands and waters comprising the Hawaiian Islands Bird Reservation." C. Kurata, *supra* note 48, at 48.

[92] Memorandum from A.V. Tunison, Acting Director of U.S. Fish and Wildlife Service, to Wayne Collins, Director, Dep't of Agriculture and Conservation, State of Hawaii (June 14, 1960).

[93] The Director of the Bureau of Sport Fisheries and Wildlife made the designation on February 3, 1967, and the area was officially listed as such on February 25, 1975. 40 Fed. Reg. 8127-28 (1975). The designation included the following areas: French Frigate Shoals (107,772 acres); Pearl and Hermes Reef (95,582 acres); Laysan Island (913 acres); Lisianski Island (450 acres); Nihoa (120 acres); Necker Island (45 acres); and Gardner Pinnacles (3 acres). *Id.*

The designation was effected without prior consultation with the state, and apparently marked the end of prior federal policy of sharing management decisions and responsibilities over the refuge with the state. The inclusion of submerged lands and internal waters of the Northwestern Hawaiian Islands within the Research Natural Areas by the Dep't of the Interior may have been invalid if it is determined that such submerged lands and waters are not within the boundaries of the Hawaiian Islands National Wildlife Refuge, since such designation is only applicable to property already within federal jurisdiction.

commercial fishing pursuant to applicable federal and state regulations.[94]

In 1971, federal jurisdiction over the refuge waters was reiterated in an opinion of Regional Solicitor Carl Coad.[95] In a memorandum to State Division of Fish and Game Director Michio Takata, Coad argued that the addition of "appurtenant reefs" to the territory of the state in section 2 of the Admission Act[96] expanded the jurisdiction of the refuge accordingly. He justified his opinion with the statutory definition of coastline boundaries provided by the Submerged Lands Act[97] and the Convention on the Territorial Sea and Contiguous Zone.[98] Both references establish the low water mark as the baseline for submerged lands and the territorial sea, and the Convention designates the waters landward of this baseline as territorial inland waters.[99]

The state, however, contested the refuge boundary designations of the federal government. On February 23, 1973, Governor John A. Burns of Hawaii sent a letter to Secretary of the Interior, Rogers C.B. Morton, expressing the state's position that "only the fast lands, lying above the upper reaches of the wash of waves or the upper line of debris left by the wash of waves, are included in the Hawaiian Islands National Wildlife Refuge."[100] The letter was in response to a Department of the Interior inquiry as to the state's position on the exact boundaries of the refuge.[101] The inquiry was made pursuant to a Department of the Interior review of the National Wildlife Refuge System that was being conducted as required under the Wilderness Act of September 3, 1964.[102]

The Fish and Wildlife Service at that time was proposing that 303,936 acres of the Northwestern Hawaiian Islands be designated as wilderness.[103] This proposal included not only 1,765 acres making up the emerged lands of the chain, but also 302,171 acres of submerged lands.[104]

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[94] FEDERAL COMMITTEE ON ECOLOGICAL RESERVES, U.S. FOREST SERVICE, DEP'T OF AGRICULTURE, A DIRECTORY OF RESEARCH NATURAL AREAS ON THE FEDERAL LANDS OF THE UNITED STATES OF AMERICA 6-7 (1977).

[95] Memorandum from Carl Coad, U.S. Regional Solicitor, to Michio Takata, Director, State of Hawaii Division of Fish and Game (Nov. 30, 1971).

[96] Admission Act, *supra* note 79.

[97] 43 U.S.C. §§ 1301(c), 1331-43 (1976).

[98] Convention of the Territorial Sea and Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1607, T.I.A.S. No. 5639.

[99] *Id.*, art. 5. *See* note 131 *infra* and accompanying text.

[100] Letter from Governor John A. Burns to Rogers C.B. Morton, Secretary of the Interior (Feb. 23, 1973) [hereinafter cited as "Burns letter"].

[101] *Id.* The Governor answered the inquiry by stating:

> [The boundary] matter was researched by our State Attorney General, and on the basis of his findings, it is our opinion that only the fast lands . . . are included in the Hawaiian Islands National Wildlife Refuge and are therefore under the jurisdiction of the Federal Government. Accordingly, it is our position that all lands below this line, including submerged lands fall under the jurisdiction of the State of Hawaii.

[102] *See* note 13 *supra*.

[103] *See* note 12 *supra* and accompanying text.

[104] *Id.* The Governor responded to this proposal, by stating:

The wilderness proposal required clarification of the existent boundaries of the refuge.

At the state's suggestion, negotiations were commenced between representatives of the federal government and the State of Hawaii to resolve the differences in positions taken.[105] Initially, the Department of the Interior proposed a fifteen-fathom line in the waters surrounding Nihoa and a ten-fathom line in the waters surrounding Lisianski Island, Laysan Island, Maro Reef, Gardner Pinnacles and Necker Island as the refuge boundaries. This suggestion was rejected by the state, as it was admittedly arbitrary.[106]

On April 16, 1973, a tentative agreement was reached, as confirmed in a letter to Governor Burns from Assistant Secretary of the Interior Nathaniel P. Reed.[107] On October 31, 1973, the state sent a proposed Memorandum of Agreement to Assistant Secretary of the Interior Reed.[108] The

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> Recently we had an opportunity to review an advance copy of . . . the wilderness proposal for the Hawaiian Islands National Wildlife Refuge . . . . We note that the proposed wilderness includes about 1,800 acres of land above the line of mean high tide and 302,400 acres of submerged lands. We concur with the inclusion of the land masses rising above the ocean in the proposed wilderness but find that the inclusion of the submerged lands would be in direct conflict with the above stated position of the State.

Burns letter, *supra* note 100.

[105] A public hearing for the wilderness proposal was conducted on April 14, 1973 in Honolulu, pursuant to requirements set out in 16 U.S.C. § 1132(d)(1) (1963), at which the state opposed the inclusion of submerged lands. Meetings between the representatives of the State of Hawaii and the U.S. Department of the Interior followed on April 16, 1973.

[106] According to Bernard Meyer, Associate Solicitor, Dep't of the Interior, the line was drawn with "biological considerations" in mind. Memorandum to Files by Michio Takata, Fish and Game Administrator, Dep't of Land and Natural Resources, State of Hawaii (Apr. 18, 1973).

[107] Letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to Governor John A. Burns (May 13, 1973):

> We have been informed by Associate Solicitor Bernard R. Meyer of the meetings he . . . . had with . . . officials of the State with respect to the boundaries . . . . We are very pleased that your and our representatives have been able to reach agreement on this issue.
>
> It is our understanding that existing ambiguities in the refuge boundaries will be resolved by application of the following criteria:
>
> 1) Pearl and Hermes Reef and French Frigate Shoals—the boundary will follow the outer face of the barrier reef and where breaks occur on the barrier reef a line will be drawn from headland to headland.
>
> 2) Nihoa Island, Necker Island, Gardner Pinnacles and Lisianski Island—the boundary will be the low, low water mark.
>
> 3) Laysan Island—the boundary will follow the outer face of the fringing reef and, where breaks in the fringing reef occur, a line will be drawn from headland to headland.
>
> 4) Maro Reef—the boundary will follow lines drawn from headland to headland.

[108] MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF HAWAII FOR THE DESCRIPTION OF THE BOUNDARIES OF THE HAWAIIAN ISLANDS NATIONAL

proposed refuge boundaries in the Memorandum of Agreement were essentially identical to those agreed to in the April negotiations, but the description of those boundaries was changed to eliminate what the state considered ambiguous terms.[109] A provision reserving fishing and mineral rights to the state, and a clause providing for a cooperative agreement to manage the fishery resources of the area were also included.[110] On April 24, 1974, Assistant Secretary Reed objected to certain provisions in the Memorandum, but indicated that the federal government was willing to revise its wilderness proposal to include only the emerged lands in the refuge.[111] On June 1, 1974, Secretary of the Interior Morton formally rec-

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WILDLIFE REFUGE (1973) [hereinafter cited as "MEMORANDUM OF AGREEMENT"]. The Memorandum was conveyed through a letter from Acting Governor George R. Ariyoshi to Nathaniel P. Reed, Assistant Secretary of the Interior (Oct. 31, 1973).

Much of the impetus for the state's initial agreement to the proposed boundaries was the arguably mistaken assumption by federal representatives that the state's territorial waters were limited to three miles extending from the various emerged lands of the Northwestern Hawaiian Islands, which measurement strictly applied would leave much of the lagoon waters of Pearl and Hermes Reef and French Frigate Shoals outside state jurisdiction and in effect international waters. This assumption failed to consider that the lagoon waters could be construed as inland waters of the state or as historic bays belonging to the state pursuant to the Convention of the Territorial Sea and Contiguous Zone, *supra* note 98. *See* note 131 *infra*. As reported by Sunao Kido, the state's representative in the negotiations:

> The basis of this tentative agreement was that it would be to the mutual advantage of both the State and the Federal Government. [As pointed out by federal representatives], with respect to Pearl and Hermes Reef, the State's jurisdiction would extend three miles from each of the several tiny islands on the barrier reef, thus leaving the greater part of the lagoon outside of the State's jurisdiction and in effect as international waters. If, however, the outer face of the barrier reef is used as a refuge boundary, then the State's jurisdiction encompasses an area several times greater. The State's jurisdiction would then extend three miles seaward from the outer face of the barrier reef.

Letter from Sunao Kido, Chairman, State of Hawaii Board of Land and Natural Resources, to Governor George R. Ariyoshi (Apr. 24, 1973). It is interesting to note that the representations of the federal government at this time as to the extent of the state's territorial waters run contrary to the arguments put forth by Solicitor Coad in 1971. *See* text accompanying notes 96-99 *supra*.

[109] In delineating the boundaries on charts, the State Surveyor and the State Attorney General had difficulty in applying the ambiguous terms "headland" and "low, low water mark." In June 1973 these concerns were relayed to Associate Solicitor Meyer. Letter from Governor John A. Burns to Nathaniel P. Reed, Assistant Secretary of the Interior (June 12, 1973). After several exchanges of correspondence, amendments were made redescribing the boundaries. Letter from Bernard R. Meyer, Associate Solicitor, Dep't of the Interior, to Sunao Kido, Chairman, State of Hawaii Board of Land and Natural Resources (June 29, 1973).

[110] MEMORANDUM OF AGREEMENT, *supra* note 108.

[111] Letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to Governor John A. Burns (April 24, 1974). Assistant Secretary Reed noted in the letter:

> [We] are . . . quite concerned about the inclusion within the proposed agreement of both a reservation by the State of Hawaii of any fishing, mineral and other rights, and a one year condition subsequent provision with regard to a cooperative agreement concerning the management of the fishery resources. These reservations, in our

ommended to President Nixon that only the emerged lands be included within the National Wilderness Preservation System.[112]

Nevertheless, despite further negotiations between the state and the federal government, the dispute over the boundaries of the refuge was never resolved. The state clearly desires to utilize the fisheries and other natural resources found in the waters and submerged lands of the Northwestern Hawaiian Islands.[113] In 1976, the Fish and Wildlife Service indicated it would consider allowing commercial fishing within its claimed refuge waters only under two conditions: 1) That scientific studies prove that there are harvestable fishery resources within the refuge, and 2) that it is also established that commercial harvesting of fishery resources is compatible with the preservation of all other resources within the refuge.[114] The state's position apparently is that fishermen are free to operate in the waters of the Northwestern Hawaiian Islands as long as they comply with the applicable state and federal fishing regulations and conservation laws.[115]

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judgment, could essentially nullify any agreement that we may reach.

In the interim, we have prepared a wilderness proposal that would include 1,742 acres in wilderness, and would provide, through designation as potential wilderness, for the possible addition of other lands and waters into the wilderness system when so designated by the Secretary of the Interior.

[112] Letter from Rogers C.B. Morton, Secretary of the Interior, to President Richard M. Nixon (June 5, 1974). Secretary Morton recommended to President Nixon that "approximately 1,742 acres in the Hawaiian Islands National Wildlife Refuge" become part of the National Wilderness Preservation System. *Id.* Referring to the existent jurisdictional dispute over the islands' internal waters, the Secretary noted in his recommendation that:

[T]his issue is the subject of discussion among the Departments of Interior, State, and Justice and the State of Hawaii. We believe that the proper manner to proceed is to propose immediate wilderness designation of the undisputed emergent lands in the refuge and to revise this proposal if it should ultimately be determined that the United States has title to additional acreage.

[113] Letter from Sunao Kido, Chairman, State of Hawaii Board of Land and Natural Resources, to Charles R. Renda, U.S. Regional Solicitor (Aug. 21, 1974). This letter listed the fishing activities the State would want to consider and incorporate into any management agreement for the refuge. *See also* S. Res. 257, 8th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 274-75 (1978); S. Con. Res. 64, 8th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 274 (1978); S. STAND. COMM. REP. No. 821, 8th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 1230 (1978).

[114] Letter from Lynn A. Greenwalt, Director, U.S. Fish and Wildlife Service, to Seichi Hirai, Clerk, Hawaii State Senate (June 1976).

[115] The state has taken a position of issuing permits for fishing, but not actively encouraging fishing. In July 1977, commercial fisherman Leo Ohai informed the state that he intended to seign for *akule* in the lagoon waters of French Frigate Shoals. In a memorandum addressing Ohai's intentions, Deputy Attorney General Susan Y.M. Chock stated:

[We] should not encourage such fishing trip which will result in Federal prosecutions, [however] our non-participation may be construed as a waiver of the State's claim to jurisdiction. The better approach is to issue a fishing permit, subject to compliance with all Federal and State laws and regulations, with a hold harmless clause, inasmuch as jurisdiction between the State and Federal government has not been resolved.

G. Recent Developments

Despite the assurance of the Department of the Interior in 1974 that its wilderness proposal would include only 1,742 acres of emerged lands in the refuge, a bill appeared in the U.S. House of Representatives in 1977 which sought Congressional designation of approximately 303,936 acres in the Northwestern Hawaiian Islands as wilderness, as was originally proposed in 1973.[116] The state legislature reacted to this renewed attempt to extend the jurisdiction of the refuge by adopting various resolutions condemning the action as tantamount to a confiscation of state property and requesting Congress to oppose the legislation.[117] Whether or not the bill was a matter of legislative oversight is not clear, but the wilderness proposal was subsequently modified again by the Fish and Wildlife Service to include only 1,742 acres of emerged lands in the refuge.[118] Wilderness

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Memorandum from Susan Y.M. Chock, Deputy Attorney General, State of Hawaii, to William Thompson, Director, Dep't of Land and Natural Resources, State of Hawaii (Aug. 9, 1977).

The State Dep't of Land and Natural Resources has authority to regulate fishing within the waters of the Northwestern Hawaiian Islands pursuant to HAWAII REV. STAT. § 188-37 (Supp. 1981). For applicable federal laws, see note 189 *infra*.

[116] H.R. 1907, 95th Cong., 1st Sess. (1977), designating as wilderness "certain lands in the Hawaiian Islands National Wildlife Refuge, Hawaii, which comprise approximately three hundred and three thousand nine hundred and thirty-six acres (303,936), which are depicted on a map entitled 'Hawaiian Islands Wilderness Proposal,' dated February 1973; and which shall be known as the Hawaiian Islands Wilderness." *Id.*, § 1(a)(17).

[117] S. Res. 208, 9th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 616 (1978); S. Con. Res. 105, 9th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 568 (1978); H. Con. Res. 133, 9th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 559 (1978).

As to S. Con. Res. 105, the Senate Committee on Economic Development reported:

> The purpose of this concurrent resolution is to request the Senate to oppose legislation pending before the U.S. Congress that would place approximately 302,435 acres of the State of Hawaii into a National Wilderness Preservation System . . . . The State of Hawaii has never relinquished its valid prior existing right to the aforesaid islets and reefs in the Leeward Islands, despite the contentions of the U.S. Department of the Interior that the Department has jurisdiction over the aforesaid islets and reefs . . . . Your Committee finds that Section 1(a.)17 of the Congressional Bill No. H.R. 1907 is unacceptable because it transmits jurisdiction - without complete justification - of 302,435 acres of State submerged lands and appurtenant waters in the Northwestern Hawaiian Islands to the U.S. Department of Interior, and is tantamount to the federal government's confiscation of the Northwestern Hawaiian Island's natural resources and their uses that belong to the residents of this State. These resources and potential uses are crucial to future diversification of the State's economy and recreational and aesthetic pursuits.

S. STAND. COMM. REP. No. 899, 9th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 1154-55 (1978).

[118] *Additions to the National Wilderness Preservation System: Hearings on the Status of Pending Wilderness Proposals in the National Wildlife Refuge System Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 199 (July 26, 1979) (statement of Lynn A. Greenwalt, Director, U.S. Fish and Wildlife Service). Tern Island at French Frigate Shoals has been omitted from the wilderness

designation has not yet been made as to the refuge by Congress.

The Fish and Wildlife Service also attempted to expand its jurisdiction in the Northwestern Hawaiian Islands by submitting to the General Services Administration a "corrected" figure of its property inventory in 1979, unilaterally increasing the assumed total acreage of the Hawaiian Islands National Wildlife Refuge from 1,906.5 acres to 254,418.1 acres.[119] The state statistician, Robert C. Schmitt, characterized this sudden revision of federally controlled property as "statistical aggression."[120] The action seems suspect in light of the on-going jurisdictional dispute, and is contrary to the Fish and Wildlife Service's accounting of refuge property at the time of statehood as comprising 1,765 acres, which has been the supposedly accurate accounting of refuge property since at least 1963.[121]

The current position of the federal government as to the extent of the refuge boundaries is essentially the same as was nearly formalized in 1973.[122] The state continues to assert that the internal waters and submerged lands of the islands are not within the refuge boundaries. No efforts at resolving the jurisdictional dispute are currently in progress, yet it is clear that the issue will have to be resolved before the state can effect a fisheries program for the area. The viability of a fisheries program will depend to a large extent upon the results of the scientific studies being conducted under the Tripartite Cooperative Agreement.[123] Presumably both the state and the federal government are awaiting these results before resuming efforts to resolve the jurisdictional question.

III. Analysis of the Competing Claims

A. *State Rights in the Internal Waters and Submerged Lands of the Northwestern Hawaiian Islands*

The Submerged Lands Act of 1953[124] gives the state jurisdiction over territorial waters and submerged lands within certain boundaries as designated in the Act.[125] Specifically, the Act sets the seaward boundaries of

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proposal because of the various physical improvements constructed on the island and its habitation by man, *see* note 8 *supra*, which preclude its characterization as "wilderness." 16 U.S.C. § 1311(c) (1976).

[119] Zimmerman, *A Fight Over Lagoon Water*, Honolulu Star-Bulletin, Aug. 22, 1981, § A at 8, col. 2.

[120] *Id.*

[121] *See* note 83 *supra* and accompanying text.

[122] *See* note 107 *supra* and accompanying text.

[123] *See* note 18 *supra*.

[124] 43 U.S.C. §§ 1301-43 (1976).

[125] *Id.*, § 1311(a) vests each coastal state with:

> (1) [T]itle to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters, and

all coastal states at three nautical miles from the coastline.[126] The Act also gives state jurisdiction over "all lands within the boundaries of each of the respective States . . . seaward to the line three geographical miles distant from the coastline."[127] "Coastline" is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[128]

The "coastline" of the Northwestern Hawaiian Islands, as defined under the Submerged Lands Act, would lie at the outer edge of the fringing reefs of the islands and atolls, as that is the site of the ordinary low water mark in direct contact with the open sea. All waters and submerged lands extending three nautical miles from this "coastline" fall within the state's jurisdiction.[129] As to "inland waters," although the Act fails to specifically define this term, the internal lagoon waters within the various atolls of the Northwestern Hawaiian Islands fall within the definition of this term as provided under the Convention of the Territorial Sea and Contiguous Zone,[130] which has been adopted by the U.S. Supreme Court for purposes of determining inland waters within a state's territorial jurisdiction.[131] As such, essentially all of the disputed waters and submerged

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(2) the right and power to manage, administer, lease, develop, and use the said lands all in accordance with applicable state law . . . .

[126] *Id.*, § 1312.

[127] *Id.*, § 1301(a)(2).

[128] *Id.*, § 1301(c).

[129] This territorial boundary designation would apply to the waters and submerged lands directly surrounding Nihoa, Necker Island, Gardner Pinnacles and Lisianski Island, where the asserted federal refuge boundary follows the mean low, low water mark. *See* note 107 *supra*.

[130] Convention of the Territorial Sea and Contiguous Zone, *supra* note 98.

[131] The U.S. Supreme Court, noting the absence of a definition of "inland" waters in the Submerged Lands Act, concluded in United States v. California, 381 U.S. 139 (1965) that "Congress, in passing the Act, left the responsibility for defining inland waters to this Court." *Id.*, at 164. The Court thereupon adopted the definitions of inland waters set forth in the Convention of the Territorial Seas and Contiguous Zone, *supra* note 98, which was ratified by the United States in 1961 and became effective in 1964. 381 U.S. at 165.

The Convention established general rules for determining whether the waters adjacent to a littoral nation are inland, territorial or high seas. Under article 7 of the Convention, rules relating to the classifications of indentations or bays, and thus inland waters, are set forth. Section 2 of article 7 states that:

> [A] bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

The lagoon waters of Pearl and Hermes Reef comport with this definition of inland waters. However, the lagoon waters of French Frigate Shoals would not. Nevertheless, the internal waters of French Frigate Shoals and Pearl and Hermes Reef, and the waters within the fringing reef surrounding Laysan Island, may be classified as inland waters under the proposed definitions of such contained in the Draft Convention on the Law of the Sea (In-

lands lie within the territorial jurisdiction of the state.[132]

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formal Text) (1980) [hereinafter cited as "1980 LOS Draft Convention"], which is anticipated to replace the Convention on the Territorial Sea and Contiguous Zone as the operative international document controlling territorial sea boundaries. In Pt. II, § 2, art. 6 of the 1980 LOS Draft Convention, it is provided that:

> In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on official charts.

This provision must be read in conjunction with article 5 of the Convention on the Territorial Sea and Contiguous Zone, *supra* note 98 (Pt. II, § 2, art. 8(1) of the 1980 LOS Draft Convention), which provides that: "[W]aters on the landward side of the baseline of the territorial sea form part of the internal waters of the state." A construction of these provisions as applied to internal lagoon waters within fringing reefs allow the inclusion of such waters within the inland waters of the state.

[132] If some of the disputed internal waters of the Northwestern Hawaiian Islands are found to be outside the three-mile territorial sea boundaries of the state, or are found not to comport with the definition of inland waters under the Convention, *supra* note 98, the state could also assert that such waters are within a "historic bay" and thus part of the state's territorial sea. Historic bays as defined by the Supreme Court are "bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." United States v. California, 381 U.S. 139, 172 (1965).

In United States v. Louisiana, 394 U.S. 11 (1969), the Supreme Court recognized three factors which must be considered in determining whether or not an area of water constitutes a historic bay. These factors are: (1) The exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign states. *Id.* at 23-24 n.27. (citing Juridical Regime of Historic Waters, Including Historic Bays, 2 Y.B. Int'l. L. Comm'n. 1, 13, U.N. Doc. A/CN. 4/143 (1962)). The Supreme Court subsequently qualified this analysis in United States v. Alaska, 422 U.S. 184 (1975), with the following rules: (1) The claiming nation [state] must have asserted the power to exclude foreign vessels; (2) the routine enforcement of fish and wildlife regulations may be insufficient to establish historic title where the geographic scope of enforcement is determined by the needs of effective fish and game management rather than the intent to assert territorial sovereignty to exclude foreign vessels; and (3) the mere failure of other countries to protest an assertion of sovereignty is meaningless unless it is shown that the governments of those countries knew, or reasonably should have known, of the authority asserted. *Id.*, at 197-200.

As to these requirements, Hawaii has asserted sovereignty over the internal waters and submerged lands of the Northwestern Hawaiian Islands, as evidenced from initial annexation of the various islands, *see* notes 49-52 *supra* and accompanying text; by the leasing of islands in the 1890's, *see* note 52 *supra;* by the incorporation of the islands as part of the Territory of Hawaii under the Organic Act, *supra* note 53, as part of the State of Hawaii under the Admission Act, *supra* note 79; and through regulation of various fishing activities in the internal waters prior to 1967, *see* notes 66-69 & 74-78 *supra* and accompanying text.

There is also significant historical evidence of Hawaiian assertions of power to exclude foreign vessels in the waters of the Northwestern Hawaiian Islands. On March 16, 1854, and again on March 28, 1857, Robert C. Wyllie, Minister of Foreign Affairs of the Hawaiian Kingdom, issued public circulars to the resident representatives of Great Britain, France and the United States giving notice of the domain of the Kingdom as encompassing all the islands from Hawaii to Nihoa, together with "all Reefs, Banks and Rocks contiguous to either of the above, or within the compass of the whole." *Reprinted in* A. Taylor, *supra* note 1, at 5-7. Similarly, a neutrality proclamation issued by King Kamehameha III on May 16, 1854, gave notice of Hawaiian jurisdiction over the waters within one marine league of the Hawaiian Islands. *Reprinted in* W.R. CROCKER, EXTENT OF THE MARGINAL SEA 595-96 (1919

Nevertheless, state jurisdiction over the territorial waters of the Northwestern Hawaiian Islands pursuant to the Submerged Lands Act is subject to certain exceptions, including the following:

> [A]ll tracts or parcels of land together with accretions thereto, resources therein . . . title to which has been lawfully and expressly retained by or ceded to the United States . . . ; all lands acquired by the United States . . . .[133]

Thus, if Executive Order 1019 validly reserved the internal waters and submerged lands of the Northwestern Hawaiian Islands as a wildlife refuge, the state's territorial sea claim would be superseded by the federal claim under the Executive Order. The issue thus narrows to whether the United States rightfully reserved the Northwestern Hawaiian Islands as a wildlife refuge, and if so, whether Executive Order 1019 intended the wildlife refuge to encompass the internal waters and submerged lands of the islands.

B. Executive Order 1019

1. The Constitutional Validity of the Order

The necessary first question is whether Executive Order 1019 was a constitutionally valid exercise of executive power. Analysis of the relevant case and statutory law suggests the order was constitutionally valid. An executive order is an order issued by the President in which some directive is made. Properly promulgated, it has the effect of law.[134] Although there is no specific constitutional authorization for the issuance of an executive order, such authority may be implied from the aggregate of powers granted to the executive under article II of the Constitution.[135]

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ed.). There is also evidence of warnings and seizures of foreign fishing vessels, particularly Japanese vessels, in the Northwestern Hawaiian Island waters. *See* Ely & Clapp, *supra* note 56; Clapp & Wirtz, *supra* note 56. The Japanese government's agreements to halt bird depredation in the area, *see* notes 58-59 *supra* and accompanying text, also evidence foreign recognition of Hawaiian authority over the waters.

Thus, Hawaii has historically asserted authority over the waters of the Northwestern Hawaiian Islands with the knowledge and acquiescence of foreign nations and the United States from at least 1854 through 1967. The continuous exercise of authority for over 100 years would arguably be sufficient to sustain a Hawaiian claim to the internal waters of the islands as historic bays.

[133] 48 U.S.C. § 1313 (1976).

[134] Armstrong v. United States, 80 U.S. (13 Wall.) 614 (1871) (all courts of United States bound to take notice of, and give effect to, Presidential Proclamation pardoning participants in Civil War).

[135] U.S. CONST. art. II, § 2, cl. 1 & 2 provide for presidential power in the areas of national defense and foreign affairs. Art. II, § 3 gives the President authority to "take care that the laws be faithfully executed." *But see* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S.

One source of authority is the President's constitutional duty to faithfully execute the laws.[136] Presidential authority in the area of domestic affairs has been based on this executive duty. Presidential assertion of authority in the domestic arena has included the protection of federal judges,[137] the removal of presidential appointees that perform executive functions and duties,[138] and the removal of land from public entry.[139] In *United States v. Midwest Oil Co.*,[140] the United States Supreme Court upheld an executive proclamation which withdrew a large area of land from public entry, on the basis of historical acquiescence of Congress to the exercise of such authority.[141] The presidential action in Executive Order 1019 that set aside lands as a preserve for native birds, a form of removal of land from public entry, could possibly be justified in line with *United States v. Midwest Oil Co.*

Executive authority to issue executive orders may also derive from valid delegations of power to the President by Congress. The exercise of such power pursuant to express or implied congressional delegation has been given wide deference by the courts.[142] In his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*,[143] Justice Jackson recognized that when a President acts pursuant to express or implied authorization from Congress, his constitutional power is at its strongest point, as it includes both the President's own constitutional powers and all the power delegated by Congress.[144] However, congressional delegation of power to the executive cannot bestow unlimited authority upon the President. Congress must establish specific guidelines for the President to follow, and for the courts to apply in ascertaining whether the President has exceeded his authority.[145] Broad delegations of power lacking adequate standards or objective guidelines have been struck down by the Supreme Court.[146]

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579 (1952) (executive order directing seizure of steel mills to avert labor strike not sustained by aggregate of presidential powers under Constitution).

[136] U.S. CONST. art. II, § 3.

[137] Cunningham v. Neagle, 135 U.S. 1 (1890).

[138] Myers v. United States, 272 U.S. 52 (1926). *But see* Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[139] United States v. Midwest Oil Co., 236 U.S. 459 (1915).

[140] *Id.*

[141] *Id.*, at 475.

[142] *See, e.g.*, Feliciano v. United States, 297 F.Supp. 1356, 1359 (D.P.R. 1969) (quoting Bailey v. Holland, 126 F.2d 317, 322 (4th Cir. 1942)), where the court stated that an administration order that is legally delegated carries with it a presumption of the existence of facts necessary to justify the action taken. This decision suggests that courts will afford great deference to executive orders where a valid delegation of power has been made.

[143] 343 U.S. 579 (1952).

[144] *Id.*, at 635-36 (Jackson, J., concurring).

[145] Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935). *But see* United States v. Curtis-Wright Corp., 299 U.S. 304, 321-22 (1936).

[146] 295 U.S. 495 (1935); 293 U.S. 388 (1935).

Executive Order 1019 was challenged soon after its issuance on the ground that it was issued absent sufficient inherent or delegated authority.[147] In the 1910 case of *United States v. Schlemmer*,[148] the defendant was charged with unlawfully hunting birds within the Hawaiian Islands Reservation in violation of section 84 of the U.S. Criminal Code,[149] which implemented the prohibitions of the Refuge Trespass Act of 1906.[150] The court found that the Refuge Trespass Act did not adequately confer authority to the President to issue Executive Order 1019, and held the Order to be without effect.[151]

Nevertheless, presidential authority to issue Executive Order 1019 can be implied from the Organic Act of 1900,[152] which the court in *Schlemmer* for unknown reasons failed to consider. Section 91 of the Organic Act transferred possession, use and control of Hawaii's ceded lands to the Territory of Hawaii, to be "maintained, managed, and cared for" by the territory "until otherwise provided for by Congress, or taken for the uses and purposes of the United States by Direction of the President."[153] Section 91 thus impliedly delegated to the President sufficient authority to set aside the area comprising the Hawaiian Islands Reservation for the "uses and purposes of the United States."[154] It is conceivable that this delegation of authority to the President under the Organic Act could be challenged as lacking adequate standards and guidelines. However, the United States Supreme Court has not invalidated a congressional delegation of authority since 1935,[155] and has gone far to imply adequate standards to support broad and otherwise vague delegations.[156] Thus, despite *Schlemmer*, Executive Order 1019 should stand as a valid reservation of property for legitimate uses and purposes of the United States pursuant to executive power delegated by Congress in the Organic Act.

2. *The Language of the Order*

Analysis of the language of Executive Order 1019[157] leads to the conclu-

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[147] United States v. Schlemmer, 3 U.S. Dist. Ct. Hawaii 546 (1910).

[148] *Id.*

[149] Act of March 4, 1909, ch. 321, § 84, 35 Stat. 1104 (currently codified at 18 U.S.C. § 41 (1976)).

[150] Refuge Trespass Act, *supra* note 61.

[151] 3 U.S. Dist. Ct. Hawaii 546, 550 (1910).

[152] Organic Act, *supra* note 53.

[153] *Id.*, § 91.

[154] *Id.*

[155] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[156] *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963); Lichter v. United States, 334 U.S. 742 (1948); Fahey v. Mallonee, 332 U.S. 245 (1947); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[157] Exec. Order No. 1019, *supra* note 6.

sion that the Order is ambiguous as to whether the boundaries of the bird reservation established extended over the internal waters and submerged lands of the area. One source of ambiguity is that the Order specifically mentioned both areas of emerged lands and areas of completely submerged lands.[158] Thus the reservation was not limited to emerged land areas and encompassed certain submerged lands and waters. The question then is whether the submerged lands and waters included within the reservation should be limited to the specific area of the submerged reefs and shoals designated.

In designating areas such as Pearl and Hermes Reef and French Frigate Shoals, which are atolls of interconnected islets and reefs encompassing large lagoons, it is not clear whether the internal lagoon waters were to be included within the reservation. Arguably these internal waters are appurtenant to the emerged land areas of the atoll, and were therefore included within the reservation, since the atolls were designated as a whole rather than with reference to the specific islets and reefs of the atoll which have names of their own.[159] The enclosed lagoon waters within the fringing reef surrounding Laysan Island could similarly be considered reserved along with the emerged land area.[160]

On the other hand, there is no specific mention in the Order of any internal waters as being included within the reservation.[161] Since the Order fails to mention internal waters, it is arguable that the area of the reservation should be strictly construed as limited to the boundaries of the emerged and submerged lands specifically mentioned.[162] Generally, at common law, any disposition of land adjacent to the sea has a boundary set at the mean high tide line.[163] Arguably, the boundaries of the reserva-

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[158] *Id.* The Order included Maro Reef, Dowsetts Reef, Two Brothers Reef and Frost Shoal, areas of completely submerged reefs and shoals with the exception of a single rock in Maro Reef protruding two feet above high water. WILDERNESS PROPOSAL, *supra* note 12; Grace & Nishimoto, *supra* note 1, at 148-49.

[159] The islets of French Frigate Shoals, from north to south, include Trig Island, Whale-Skate Island, Tern Island, Shark Island, Round Island, Mullet Island, Near Island, Bare Island, East Island, Gin Island, Little Gin Island and Disappearing Island. The number of islets may actually vary since Whale-Skate Island sometimes separates to form two separate islets, and Disappearing Island at times becomes completely submerged. Grace & Nishimoto, *supra* note 1, at 153-55. Pearl and Hermes Reef includes seven coral islets, including from north to south North Island, Little North Island, Sand Island, Bird Island, Southeast Island, Grass Island and Seal-Kittery Island. Seal-Kittery Island at times separates to form two islets. *Id.*, at 151.

For federal arguments to this effect, *see* text accompanying notes 95-99 *supra*.

[160] *See* Grace & Nishimoto, *supra* note 1, at 149-50.

[161] Exec. Order No. 1019, *supra* note 6.

[162] *See generally* 23 AM.JUR. 2d *Deeds*, § 242 (1965) (presumption that property not specifically designated in land conveyance is excluded).

[163] Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 23 (1935). The actual boundary line may differ according to the jurisdiction of the area. The Hawaii Supreme Court has set the boundary at "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or the line of debris." *In re* Application of Sanborn, 57 Hawaii 585, 588, 562 P.2d

tion should accordingly be limited to the high water mark of the named atolls, islands and reefs, and cannot be construed as extending to the internal waters and submerged lands not specifically mentioned.

In any case, the boundaries of the refuge with respect to internal waters and submerged lands are not clearly defined in the language of Executive Order 1019. In addition to the question of the refuge's boundaries, there is remaining language in Executive Order 1019 that merits clarification. The Order states the various islets and reefs as "reserved and set apart, subject to valid existing rights, for the use of the Department of Agriculture as a preserve and breeding ground for native birds."[164] As to the interest of the federal government in the property thus "reserved and set apart," as a valid exercise of presidential power pursuant to section 91 of the Organic Act, the Order gave the United States absolute fee title to the property reserved.[165] Nevertheless, the Northwestern Hawaiian Islands remain as territory of the State of Hawaii.[166] As to "valid existing rights," this phrase presumably is a term of art applicable to any existing private interests in the islands at the time of the reservation.[167] Although there were leases granted by the government of Hawaii to a private company for various islands in the 1890's,[168] these leases were either relinquished prior to 1909 or nullified by the ceding of public lands to the United States under the Organic Act.[169] There were no other valid existing rights affecting the Order.[170]

3. *The Intent of the Order*

In light of the ambiguity of the language of Executive Order 1019, it is necessary to examine the intent behind the Order at the time it was is-

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771, 773 (1977); County of Hawaii v. Sotomura, 55 Hawaii 176, 181-82, 517 P.2d 57, 61-62 (1973), *rehearing denied*, 55 Hawaii 677 (1973); *In re* Application of Ashford, 50 Hawaii 314, 315, 440 P.2d 76, 77 (1968). Whichever boundary line is utilized, the lands which lie between the high water mark and the low water mark are public lands vested in trust to the State, Shively v. Bowlby, 152 U.S. 1, 40 (1893); *In re* Application of Sanborn, 57 Hawaii 585, 593-94, 562 P.2d 771, 776 (1977), as are the submerged lands and waters extending three miles from the lower baseline. *See* notes 127-28 *supra* and accompanying text.

[164] Exec. Order No. 1019, *supra* note 6.

[165] Organic Act, *supra* note 53. *See also* 42 Op. Att'y Gen. 43 (1961), *supra* note 90.

[166] HAWAII CONST. art. XV, § 1. *See also* Yellowstone Park Trans. Co. v. Gallatin City, 27 F.2d 410, 411 (D. Mont. 1928) (creation of Yellowstone Nat. Park did not segregate such land from the territory of Montana).

[167] *See, e.g.*, American Nuclear Corp. v. Andrus, 434 F.Supp. 1035, 1037 (D. Wyo. 1977) ("valid existing rights" clause in Federal Coal Leasing Amendments Act encompassed private prospecting permits outstanding at the time of enactment).

[168] *See* note 52 *supra*.

[169] C. Kurata, *supra* note 48, at 34-35. The rights under these leases were qualified as being valid only "so far as the Hawaiian Government holds the right of possession of said islands, reefs, and shoals." *Id.*

[170] *Id.*

sued to assist in determining the boundaries of the refuge. The Order indicates the bird reservation was created to protect native birds from persons attempting to "hunt, trap, capture, wilfully disturb, or kill any bird of any kind whatever, or take the eggs of such birds within the limits of this reservation . . . ."[171] The circumstances surrounding the issuance of the Order suggest it sought to protect native birds from the poaching which was rampant in preceding years.[172]

In asserting that the boundaries of the refuge extend over islands' internal waters and submerged lands, the Fish and Wildlife Service has suggested that "[t]here is a presumption that the Presidential Order which created the refuge also included within it sufficient area to make it possible to administer the area in the manner intended."[173] Since the inclusion of the internal waters as part of the bird reservation would place a buffer around the land areas where nesting and breeding activities occur, it is arguable they were intended to be included. Jurisdiction over the internal lagoon waters would enhance the federal government's ability to effectively enforce the Order, and reduce the accessibility of the islands to man's encroachment, thus limiting the "disturbance" of the birdlife. As there is arguably a presumption that the Order encompasses sufficient areas to fulfill its purpose,[174] the inclusion of internal waters may be inferred from the Order's intent.

As the waters provide the primary source of food for the birdlife,[175] their inclusion in the reservation is compatible with the general purpose of bird protection. The strength of this argument, however, is diluted by the fact that most of the seabirds of the refuge forage for food outside the internal waters in the open sea.[176] Typically, seabirds nest and breed in their particular niche on the islands and leave the land to scour the oceans to attain sufficient amounts of food for their demanding and hungry young.[177] The types and amounts of food needed require searches of vast areas of ocean and these searches do not, for the most part, occur in the lagoons or inshore waters of the islands. The other species of native land birds are in no way dependent upon the ocean for a living habitat or subsistence.[178] Protection of the sea and native land birds' food supplies, therefore, did not require the reservation of the internal waters.

A narrow reading of the Order's purpose of halting bird depredation also suggests that the reservation is limited to the specific emerged and submerged lands designated. Protecting the birdlife from unlawful hunting, trapping, capture, disturbance, killing and egg poaching does not nec-

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[171] Exec. Order No. 1019, *supra* note 6.

[172] *See* text accompanying notes 56-61 *supra*.

[173] *See* note 12 *supra*.

[174] *Id. See generally* 23 AM.JUR. 2d *Deeds*, § 256 (1965).

[175] Harrison & Hida, *supra* note 24, at 21-27.

[176] *Id.*

[177] *Id.*

[178] ENVIRONMENTAL STATEMENT, *supra* note 12.

essarily require the inclusion of waters surrounding the designated areas within the reservation. Nevertheless, the designated areas included submerged reefs,[179] where there would be no nesting and breeding activities to be protected. Their inclusion arguably suggests an intent to reserve more than just emerged land in French Frigate Shoals, Pearl and Hermes Reef, Laysan Island and Lisianski Island.[180]

It should be noted that subsequent federal legislation providing for the protection of various migratory birds,[181] and endangered and threatened species,[182] supplement the purposes of Executive Order 1019 and expand federal authority in the area. Protected wildlife include four endemic land birds,[183] the Hawaiian monk seal and the green sea turtle.[184] Unlike the seabirds of the islands, the monk seal and the green sea turtle are dependent on the internal waters of the islands for their food sources.[185] Many important aspects of their lives in addition to feeding, such as mating, also occur in the ocean.[186] This makes the waters part of their living habitat and increases the need for off-shore protection. The endangered land birds of the refuge, while not directly dependent upon the refuge waters for subsistence, are subject to dangers from intrusions upon their land environment. These birds, especially the Laysan duck, are particularly vulnerable to human disturbance.[187] Therefore, the importance of a land buffer zone created by the sea would directly contribute to their welfare and benefit.

The complex interdependencies of the birds, seals and turtles with the marine environment and organisms creates a very vulnerable ecosystem. Exploitation of the natural resources in the oceans of the refuge area may have deleterious effects upon the terrestrial environment and upon the wildlife of the islands.[188] These are important policy reasons for protecting the lands and waters together as a single entity. Such protection

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[179] *See* note 158 *supra* and accompanying text.

[180] *See* text accompanying notes 159-60 *supra*.

[181] Migratory Bird Hunting Stamp Act of 1934, 16 U.S.C. §§ 718-719h (1976); Migratory Bird Conservation Act of 1929, 16 U.S.C. § 715-715s (1976); Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 701-11 (1976).

[182] Endangered Species Conservation Act of 1973, 16 U.S.C. §§ 1531-43 (1976). *See* note 26 *supra* and accompanying text.

[183] *See* note 24 *supra*.

[184] *See* note 26 *supra*.

[185] The Hawaiian monk seal and the green sea turtle, like the seabirds, are dependent upon the surrounding waters for food. While it is still not known precisely where most monk seal feedings occur, it is known that the seals feed upon marine organisms in the inshore waters of the refuge. Such organisms include fish, octopus and lobster. BIOLOGICAL OPINION, *supra* note 8. The green sea turtle feeds primarily on various species of marine algae. Balazs, *supra* note 28, at 50. Such algae is found in the shallow inshore waters of the refuge, where most of the turtle's food foraging occurs. *Id.*, at 52.

[186] WILDERNESS PROPOSAL, *supra* note 12; Balazs, *supra* note 28, at 52.

[187] *See* WILDERNESS PROPOSAL, *supra* note 12.

[188] *Id.*

would give the refuge greater integrity as an ecological unit.

Nevertheless, the later laws expanding federal protection of various wildlife in the refuge have no bearing on the original intent of Executive Order 1019 and do not have the effect of expanding the original property boundaries of the refuge.[189] While later laws provide the Secretary of the Interior authority to acquire additional needed lands to effect their purposes,[190] no additional federal acquisition of land has occurred in the Northwestern Hawaiian Islands since Executive Order 1019. Thus the expansion of federal authority under the various subsequent conservation laws does not affect construction of the intent of Executive Order 1019, and does not alter the extent of the boundaries of the refuge as designated in the Order.

In summary, determination of the intended extent of the boundaries of the bird reservation created by Executive Order 1019 depends upon whether the purposes of the Order are given a broad or narrow reading. The broad purpose of protecting birdlife lends weight to federal arguments that the internal waters and submerged lands were intended to be included in the refuge. There is arguably a presumption the Order intended to include sufficient area to effect this general purpose. On the other hand, a narrow construction of the Order's purpose, that is, to prevent bird poaching and to protect the land-based breeding and nesting activities of the birdlife, would support state arguments that inclusion of internal waters was both unintended and unnecessary to effect such purposes. The latter, more narrow construction is in harmony with the historical circumstances surrounding the issuance of the Order. Nevertheless, the Order included areas of submerged reefs and shoals within the reservation, which suggests land-based activities were not the sole concern of the Order. Thus, analysis of the intent of Executive Order 1019 does not lead to a conclusive answer as to the extent of refuge boundaries.

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[189] The various federal laws protecting wildlife in the refuge include: Endangered Species Conservation Act, *supra* note 182 (16 U.S.C. § 1531 prohibits unauthorized taking of designated endangered and threatened species); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1976) (16 U.S.C. § 1372 prohibits unauthorized taking of marine mammals); Migratory Bird Hunting Stamp Act, *supra* note 181 (16 U.S.C. § 718 requires all waterfowl hunters 16 years of age or older to possess a valid "duck" stamp); Migratory Bird Treaty Act, *supra* note 181 (16 U.S.C. § 703 prohibits taking of certain designated migratory birds); and the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668aa-668ss (1976) (16 U.S.C. § 668dd(c) prohibits unauthorized taking of fish, birds or mammals within National Wildlife Refuge areas).

[190] Endangered Species Conservation Act, *supra* note 182 (16 U.S.C. § 1534(b) authorizes the Secretary of the Interior to acquire lands and waters necessary to effect the purposes of the Act); National Wildlife Refuge System Administration Act, *supra* note 189 (16 U.S.C. § 668dd(b)(3) authorizes the Secretary of the Interior to acquire lands by certain methods of exchange for inclusion in the National Wildlife Refuge System); Migratory Bird Conservation Act, *supra* note 181 (16 U.S.C. § 715d authorizes the Secretary of the Interior or Agriculture to acquire lands approved for purchase by the Migratory Bird Conservation Commission and by the State wherein located for use as migratory bird sanctuaries).

As with the language of the Order, the intent of the Order is susceptible to conflicting interpretation.

4. The Execution of the Order

In light of the ambiguity of both the language of Executive Order 1019 and the intent of the Order with respect to refuge boundaries, the construction given the document by the parties to it is especially relevant to solution of the boundary dispute.[191] It is ironic that the first and only judicial construction of Executive Order 1019 found the Order invalid.[192] However, this ruling has obviously not affected the continued federal administration of the refuge, and is of doubtful precedential value.[193] A more significant event involved the 1928 pearl oyster harvest operations in Pearl and Hermes Reef, which raised the first jurisdictional question as to refuge boundaries.[194] At that time it was determined by the U.S. Department of Agriculture that federal jurisdiction was limited to the emerged lands of the area, and that the Territory of Hawaii retained exclusive jurisdiction over the internal waters and submerged lands.[195] As such, the federal agencies responsible for refuge administration, the Department of Agriculture and later the Department of the Interior, limited their subsequent actions in the Northwestern Hawaiian Islands accordingly.

From the initial interpretation of the Order in 1928 until statehood in 1959, the territory exerted authority and uninterrupted control over the internal waters. Evidence of this control includes territorial regulation of pearl oyster harvesting in the lagoon at Pearl and Hermes Reef[196] and regulation of fishing in French Frigate Shoals during the 1940's and 1950's.[197] Fishing was also permitted at the other islands in the late 1950's.[198]

State jurisidiction over the internal waters after statehood is supported by the Admission Act of 1959, which transferred to the State of Hawaii "appurtenant reefs and territorial seas."[199] Section 5(e) of the Admission

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[191] *See generally* 26 C.J.S. *Deeds* § 93 (1956) (where the language of a conveyance is ambiguous, subsequent acts of parties showing the construction they put on the instrument, are entitled great weight in determining what the parties intended).

[192] United States v. Schlemmer, 3 U.S. Dist. Ct. Hawaii 546, 550 (1910).

[193] *See* text accompanying notes 152-56 *supra*.

[194] *See* notes 62-64 *supra* and accompanying text.

[195] *See* note 64 *supra* and accompanying text.

[196] *See* notes 67-70 *supra* and accompanying text.

[197] *See* note 77 *supra* and accompanying text. Various commercial fishing activities at French Frigate Shoals under informal agreement with the Territory of Hawaii occurred in the 1940's after title to Tern Island was transferred to the Territory by the U.S. Navy. C. Kurata, *supra* note 48, at 59-60. *See also* note 8 *supra*.

[198] *See* note 77 *supra*.

[199] Admission Act, *supra* note 79.

Act also set a five-year review period during which each federal agency in control of public lands at statehood was required to identify and report its continuing need for such land.[200] Significantly, at the time of its report, the Fish and Wildlife Service stated a continuing use and need for only 1,765 acres in the Northwestern Hawaiian Islands, which is the area of the emerged fastlands above mean high tide.[201]

After statehood, the State Division of Fish and Game not only continued to exert authority over the waters of the refuge, but adopted the responsibility of administering and protecting refuge emerged lands as well. In 1951, Hawaii established the identical federal refuge as a territorial wildlife refuge to promote cooperation between the two governments.[202] Recognition of the Department of the Interior's ineffectiveness in administration of the refuge also resulted in various formal cooperative agreements between the federal government and the state.[203] The agreements, in effect, transferred almost total responsibility for refuge management over to the State Division of Fish and Game, as the state's logistical proximity to the refuge allowed more effective administration of the refuge.[204]

It was not until the 1960's that the federal government altered its previous stance as to refuge boundaries, and began to assert that the boundaries extended over the internal waters and submerged lands of the islands.[205] This about-face by the federal government seems suspect in light of the thirty-year period of contrary construction given Executive Order 1019. Most significant are the 1928 determination of the U.S. Department of Agriculture that federal jurisdiction was limited to the emerged lands of the refuge, and the Fish and Wildlife Service's surplus property report of 1963 which listed only 1,765 acres of emerged lands as comprising the ceded lands held by the federal government in the Northwestern Hawaiian Islands. These two acts unquestionably indicate the original construction given by the federal government to Executive Order 1019 did not incorporate internal waters and submerged lands as within the refuge.[206]

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[200] *Id.*, § 5(e).

[201] *See* note 83 *supra* and accompanying text.

[202] *See* note 75 *supra* and accompanying text.

[203] *See* notes 74 & 78 *supra* and accompanying text.

[204] Concurrent state and federal regulation allowed on-site management of the refuge by the state prior to the establishment of National Wildlife Refuge offices in Hawaii.

[205] *See* notes 91-99, 103-04, 116 & 119 *supra* and accompanying text.

[206] In addition to the conflicting federal positions as to jurisdiction over the internal waters and submerged lands of the Northwestern Hawaiian Islands, there has been confusion as to jurisdiction over certain emerged lands within the refuge. As noted, the state and federal government are in dispute as to ownership of Tern Island in French Frigate Shoals. *See* note 8 *supra*.

East Island at French Frigate Shoals has also been the subject of conflicting federal action. In 1940 Territorial Governor Poindexter issued an Executive Order pursuant to § 73(q) of the Organic Act, *supra* note 53, setting aside East Island "for the uses and purposes of the United States of America." Terr. Exec. Order No. 893 (1940). This tranfer was requested by Dr. Emerson, Director of the U.S. Division of Territories and Island Possessions, for use

As noted, subsequent federal legislation increasing federal protection of the islands' wildlife did not expand the refuge's original boundaries.[307] Current federal assertions of jurisdiction over the internal waters and submerged lands approximate bad faith on the part of the federal government,[308] and may not be sufficient to overcome the history of contrary federal construction given Executive Order 1019.

IV. CONCLUSION

Jurisdiction over a significant portion of the submerged lands and internal waters of the Northwestern Hawaiian Islands remains a point of conflict between the federal government and the State of Hawaii. The federal government desires to preserve the various wildlife and the pristine character of the islands, and asserts jurisdiction over the submerged lands and internal waters pursuant to Executive Order 1019, which established a native bird refuge in the islands in 1909. The state also asserts jurisdiction over the internal waters and submerged lands of the islands, and seeks the controlled utilization of the resources, especially the fisheries resources, contained therein.

The competing arguments as to jurisdiction center on the extent of the

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of the island by the U.S. Dep't of Commerce as a radar communication base. C. Kurata, *supra* note 48, at 42-43. The validity of this Order is questionable, however, as East Island had previously been set aside as part of the bird reservation established under Executive Order 1019. Although the Governor had concurrent authority with the President to set aside ceded lands for the purposes of the United States under § 91 of the Organic Act, § 73 of the Organic Act expressly restricted the Governor's power to set aside public lands already set aside by Presidential Executive Order. Organic Act, *supra* note 53, §§ 73(q), 91.

The U.S. Fish and Wildlife Service may also challenge the validity of Executive Order 10413, *supra* note 3, which transferred Kure Atoll back to the Territory of Hawaii in 1952, since the Fish and Wildlife Service considers Kure Atoll to still be part of the wildlife refuge. While § 91 of the Organic Act, *as amended* by Act of May 27, 1910, ch. 258, 36 Stat. 447, allows the President to restore to the territory lands previously set aside for the uses and purposes of the United States upon termination of federal need, Organic Act *supra* note 53, § 91, arguably the need for the island as a bird reservation was never terminated.

[307] *See* note 189 *supra* and accompanying text.

[308] The designation of 204,935 acres in the Northwestern Hawaiian Islands as Research Natural Areas by the Dep't of the Interior in 1967, encompassing the internal waters and submerged lands of the islands, was made without consultation with the state and is of questionable validity as to the internal waters and submerged lands. *See* note 93 *supra* and accompanying text. The federal attempts to designate the internal waters and submerged lands as wilderness areas in 1973 and 1977 also evidence unilateral federal assumption of extended refuge boundaries, although the federal government subsequently modified its proposal to include only the emerged land areas of the refuge. *See* notes 12, 111-12 & 116-18 *supra* and accompanying text. The attempt to expand jurisdiction by altering the General Services Administration accounting of federal land holdings in the Northwestern Hawaiian Islands by the U.S. Fish and Wildlife Service in 1979, *see* notes 119-20 *supra* and accompanying text, also reflects unilateral federal assumption of expanded refuge boundaries despite the on-going jurisdictional dispute.

boundaries of the bird refuge established under Executive Order 1019. Both the language and the intent of Executive Order 1019 are susceptible to conflicting interpretation. Difficulties lie in the ambiguity and lack of preciseness of the language, as well as an absence of any recorded executive intent for the Order. As such, the construction given the Order by the federal government, the Territory of Hawaii and the State of Hawaii must be given great weight in determining the intended scope of the refuge boundaries.

A narrow reading of Executive Order 1019 was adopted by the federal government in its construction of the Order up until the 1960's. This narrow reading limited the refuge to the specific emerged and submerged lands designated in the Order, and presumed the Territory and later State of Hawaii retained exclusive jurisdiction over the surrounding internal waters and submerged lands. State and federal action was governed for approximately thirty years by this construction. Significantly, there exists a historical pattern of federal acquiescence to territorial and later state control and management of the islands' internal waters. The recent about-face of the federal government as to the boundaries of the refuge cannot erase this history. Nor do subsequent federal conservation laws work an expansion of the original refuge boundaries. The long period of federal acknowledgement of Hawaiian jurisdiction over the internal waters and submerged lands, coupled with a narrow reading of Executive Order 1019's language and intent, arguably gives the State of Hawaii a superior jurisdictional claim.

While Hawaii may have a stronger case as to jurisdiction over the disputed areas, any utilization of the resources must be carefully regulated pursuant to applicable federal and state conservation laws. Conservation measures and management decisions for utilizing the resources should take into account the results of the scientific studies resulting from the Tripartite Cooperative Agreement, and should allow resource utilization only to the extent that it will not endanger the unique flora and fauna or adversely affect the fragile ecosystems of the area. A careful balancing of the interests involved hopefully will assure that utilization of the resources will not be effected without protection and preservation of the wildlife and the unique environment of the Northwestern Hawaiian Islands.

Dennis K. Yamase

PALILA V. DEPARTMENT OF LAND AND NATURAL RESOURCES: "TAKING" UNDER SECTION NINE OF THE ENDANGERED SPECIES ACT OF 1973

I. INTRODUCTION

Palila v. Hawaii Department of Land & Natural Resources,[1] (*Palila* or *Palila v. DLNR*) demonstrates the potential significance of a hitherto neglected provision of the Endangered Species Act of 1973[2] (The Act). Section 9 of the Act forbids all persons—governmental or private—from

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[1] 471 F.Supp. 985 (D. Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

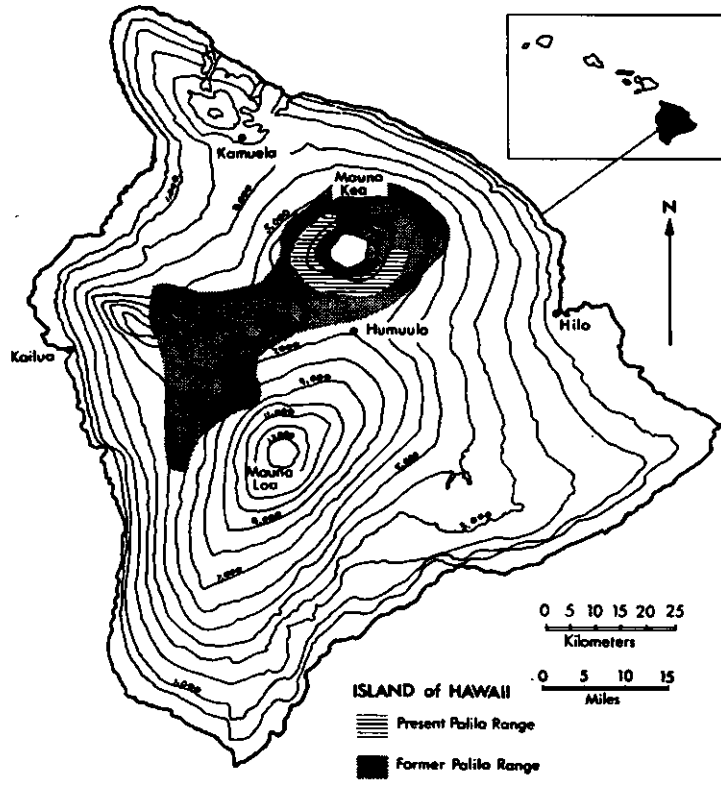
[2] 16 U.S.C. §§ 1531-43 (1976), *as amended by* Pub. L. No. 95-632, 92 Stat. 3751 (1978); Pub. L. No. 96-159, 93 Stat. 1225 (1979). References in the text and notes to §§ 7 and 9 are to section numbers in the original Act, Pub. L. No. 93-205 (1973). Sections 7 and 9 are codified as 16 U.S.C. § 1536 and 16 U.S.C. § 1538, respectively.

The Endangered Species Act of 1973 was promulgated in response to the rapid and irreversible loss of species due to extinction. The rate of extinction has been greatly increased by man's activities. For a general summary of the problem of extinction and endangered species, see P. EHRLICH & A. EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES (1981). The 1973 Act superseded two previous acts: the Endangered Species Act of 1966, 16 U.S.C. § 668 (Supp. 1970), and the Endangered Species Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969).

The Act empowers the Secretary of the Interior to prepare lists of plants and animals considered endangered—i.e. "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532. Once a creature has been listed as endangered, several protections are triggered, including the § 7 requirement that federal agencies consult with the Fish and Wildlife Service to ensure that their actions do not jeopardize endangered species, a provision for discretionary federal acquisition of land necessary to prevent the extinction of the species and the § 9 prohibition against "taking" the species. *See* text accompanying notes 48-89 *infra*.

The Act sanctions citizen suits to enjoin violations. 16 U.S.C. § 1540(g).

Most privately sponsored litigation under the Act has proceeded under § 7, challenging federal actions which jeopardize endangered species. The most famous and important endangered species case has been the "snail darter" case, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) (TVA v. Hill). In that case, the Supreme Court enjoined the completion of the Tellico Dam, upon which $100 million had been spent, because it would have exterminated a small fish, the snail darter. The Court held that § 7 of the Act gives endangered species an absolute priority. Congress subsequently amended the Act to allow federal projects to go forward if a seven-member Endangered Species Committee found that the benefits of the project substantially outweighed the harm to endangered species. Pub. L. No. 95-632, 92 Stat. 3751 (1978); Ganong, *Endangered Species Act Amendments of 1978: A Congressional Response to Tennessee Valley Authority v. Hill*, 5 COLUMBIA J. ENVT'L L. 283 (1979).



Courtesy of Cooperative Extension Service, College of Trop. Agr., University of Hawaii

"taking" endangered species.[3] Until recently, section 9 had been used by the federal government primarily to prosecute individuals who hunt or collect endangered species.[4] *Palila v. DLNR* is the first reported case holding that major environmental modifications which adversely affect an endangered species can be "takings" prohibited by section 9 of the Act.[5]

This holding has far-reaching implications throughout the United States, and especially Hawaii because the Hawaiian Islands contain the bulk of the listed endangered species of birds in the United States.[6] Issues involving endangered species have arisen frequently in Hawaii in the context of federally aided or instigated activities.[7]

II. Facts of the Case

The bird the Hawaiians named the *palila*[8] is a small, finch-beaked creature presently found only in a narrow band on the slopes of Mauna Kea on the island of Hawaii,[9] between 6,400 feet and 9,500 feet above sea level.[10] In the late 1800's the bird was extremely common on the island above the 4,000 foot level.[11] Biologists blame its decline on the activity of feral sheep[12] and goats[13] which have decimated the forest of *mamane*[14]

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[3] See text accompanying notes 48-89 *infra* for an extensive discussion of "taking" under § 9.

[4] *See, e.g.*, Delbay Pharmaceuticals v. Dep't of Commerce, 409 F.Supp. 637, (D.D.C. 1976) (sale of sperm whale products prohibited pursuant to § 9).

[5] In addition, TVA v. Hill contains strong language, though in dicta, that environmental modifications can constitute a "taking." 437 U.S. 153, 184 n.30. *See* note 66 *infra*.

[6] Thirty of the 52 species of birds found in the United States which are listed as endangered are found in the Hawaiian Islands. 50 C.F.R. § 17.11 (1980). Before the arrival of the Polynesian man around 500 A.D., the Hawaiian Islands had highly diverse flora and fauna that included at least 2,200 species of plants, 98 percent endemic, i.e. found only in Hawaii—5,000 species of insects, 99 percent endemic, and 69 species and subspecies of endemic land birds. The extinction of many of these unique creatures—due primarily to environmental modifications occurring since the arrival of Europeans in Hawaii 200 years ago—is a major biological tragedy. At least 24 species of birds have become extinct in Hawaii in the last two centuries. *See generally* S. Carlquist, Hawaii: A Natural History (1980); A. Berger, Hawaiian Birdlife (1972).

[7] *See, e.g.*, Aluli v. Brown, 437 F.Supp. 602, 604 (D. Hawaii 1977) (alleging, *inter alia*, that military bombardment of Kahoolawe affects endangered species).

[8] Pronounced pa-LEE-luh. The scientific name is *Psittacirostra bailleui*. The *palila* is one of the "Hawaiian honeycreepers," a family originally consisting of 23 species and subspecies of birds, celebrated in biology as the most spectacular example of adaptive radiation in island avifauna. S. Carlquist, Island Biology 158 (1974).

[9] Mauna Kea is a dormant volcano, 13,796 feet high.

[10] 471 F.Supp. at 988. See accompanying map. Map from Cooperative Extension Service, College of Trop. Agr., Univ. of Hawaii, Leaflet No. 215, The Palila.

[11] A. Berger, *supra* note 6, at 162.

[12] A feral sheep is simply a descendant of domestic sheep which have become wild. The scientific name is *Ovis aries*.

[13] *Capra hircus*.

[14] *Sophora chrysophylla*.

and *naio*[15] upon which the *palila* depends for its food and nesting sites.[16]

The *palila*'s current habitat lies almost entirely within state-owned land.[17] In the 1930's, more than 30,000 feral sheep roamed the upper slopes of Mauna Kea.[18] Alarmed by the near total destruction of the forest, territorial foresters hunted the sheep aggressively, virtually exterminating the entire herd.[19] At this point, sports hunting interests, desirous of retaining some sheep on the mountain, intervened to preserve the herd.[20] Until the *Palila* litigation, the state managed the area to maintain the sheep on the mountain, manipulating the size of the herd through permit quotas, bag limits and hunting seasons.[21]

The *palila* has been recognized as an endangered species since the United States first began to list wildlife threatened with extinction.[22] Due to the *palila*'s dangerously low population, the United States Fish and Wildlife Service decided in the mid-1970's to give its "highest priority."[23] This entailed a three-step procedure: (1) Commissioning of the Palila Recovery Team to study the species and determine the steps necessary to save it;[24] (2) official designation of the *palila's* critical habitat;[25] and (3) implementation of the recovery team's recommendations—the Palila Recovery Plan.[26] An important finding of the Palila Recovery Plan was that

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[15] *Myoporum sandwicense.*

[16] The *palila's* only food is the hard, bean-like seed of the *mamane*, a small (20'-40' high) tree commonly found in high areas on the island of Hawaii. The *palila* evolved a thick beak, unique among the honeycreepers, to crack these seeds. The *palila* also depends upon the *mamane*, and to a lesser extent, the *naio*, for nesting sites.

Before the arrival of Europeans in Hawaii in the late 1700's, no grazing mammals existed in the islands. Native trees such as the *mamane* evolved without thorns or unpalatable leaves, features which would have protected them from such grazing animals. As a result, they proved extremely vulnerable to grazing after the introduction of sheep in the late 1700's. *See generally* S. CARLQUIST, *supra* note 6; R. KRAMER, HAWAIIAN LAND MAMMALS (1971).

[17] 471 F.Supp. at 989.

[18] *Id.* n.9.

[19] *Id.*

[20] *Id.*

[21] *Id.* The herd size oscillated as the management authority, the Board of Land and Natural Resources of the State of Hawaii, was torn between varied interests. Its professional wildlife managers generally desired smaller herd sizes in order to limit destruction of the forest, while hunting interests wanted a larger herd size to improve hunting. At the time of the *Palila* litigation, the herd was at an ebb; about 550 feral sheep and 300 goats remained in the *palila* habitat. 471 F.Supp. at 989.

[22] The *palila* was initially listed under the Endangered Species Act of 1966, *supra* note 2, 32 Fed. Reg. 4,001 (1967).

[23] 40 Fed. Reg. 21,499, 21,501 (1975).

[24] 471 F. Supp. at 988.

[25] 50 C.F.R. § 17.95 (1980). The "critical habitat" is an area "the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species. . . ." 50 C.F.R. § 402.02 (1980). Although hundreds of species have been listed as endangered, critical habitats have been established formally for only a few species.

[26] 471 F. Supp. at 988 n.4.

the species would be unable to survive without regeneration of the *mamane-naio* forest.[27] The Plan called for complete removal of feral sheep from the mountain to accomplish this end.[28]

Meanwhile, the Department of Land and Natural Resources (DLNR) had proposed a different approach. After discussion with biologists, ecologists, hunters and other interested groups, the DLNR had approved the Mauna Kea Plan which would eliminate the sheep within a fenced area incorporating about twenty-five percent of the *palila* habitat but allow the sheep on the rest of the mountain.[29]

Dissatisfied with the DLNR's approach,[30] the Sierra Club, the Audubon Society and Dr. Alan Ziegler brought an action on behalf of the *palila* against the DLNR.[31] They sought a declaratory judgment that the state's maintenance of sheep in the *palila* habitat was a "taking" prohibited by section 9 of the Act, and asked the court to order the state to take steps necessary to remove the sheep and goats.[32]

III. The Decision

The district court found for plaintiffs and held that the acts and omissions of DLNR constituted a "taking" in violation of section 9 of the Act.[33] Before it could reach this conclusion, however, the court had to resolve the question of whether the federal government had the power to regulate the *palila*. The court also considered the issue of whether the defendants were immune from suit under the eleventh amendment. The court's treatment of each of these issues is discussed below with particular emphasis on the "taking" issue because it is the most significant in terms of future litigation under section 9.[34]

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[27] Plaintiff's Memorandum in Support of Motion for Summary Judgment at 28-29, 471 F. Supp. 985.

[28] *Id.*

[29] *Id.* at 46.

[30] The Palila Recovery Team had argued that fencing was insufficient to save the *palila* because the bird migrates to different parts of the mountain. 471 F.Supp. at 991 n.18. In addition, the DLNR had taken no steps to implement the fencing plan. *Id.* at 990.

[31] Any potential standing problem was averted by including the human and corporate plaintiffs. *See generally* Byram River v. Village of Port Chester, 394 F.Supp. 618, 621 (S.D.N.Y. 1975) (suit to enjoin pollution of river brought in name of river); Sierra Club v. Morton, 405 U.S. 727, 741-45 (1972) (Douglas, J., dissenting, plaintiffs should have standing to sue in name of Mineral King Valley).

[32] Complaint at 7-8, 471 F.Supp. at 985.

[33] 471 F. Supp. at 995.

[34] The "taking" issue was the sole issue appealed to the Ninth Circuit, which affirmed the district court's holding.

A. The Federal Power to Regulate

The first question facing the district court was the constitutionality of the Endangered Species Act as applied to the *palila*—whether the federal government had any power to regulate the *palila* at all. The *palila* is found only within Hawaii's borders. Wildlife regulation is traditionally a state concern;[35] decisions upholding the federal power to regulate wildlife had previously applied only to wildlife found in more than one state or which migrated from one state to another.[36]

The district court found the requisite federal power as a result of international treaties entered into by the United States in which the government had pledged to preserve endangered species, including the *palila*.[37] The court also suggested that the high national priority given endangered species had raised them to a "level of national concern" significant enough to invoke the congressional commerce power.[38] In a footnote the court hinted that the federal government might be able to assert a "federal property interest" in the *palila* superior to that of the state.[39]

B. Eleventh Amendment Immunity

Concerned that the eleventh amendment[40] might provide immunity from suit for the defendants, the district court requested that the parties

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[35] Geer v. Connecticut, 161 U.S. 519 (1896) (state "owns" wildlife within its borders). The specific holding of *Geer*—that a state might prohibit the export of wild game taken within its borders—was overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979) (state may not prohibit the transport of minnows out of the state). The "ownership" theory of Geer was subsequently disapproved. *See* Douglas v. Seacoast Prod., Inc., 431 U.S. 265 (1977) ("ownership" language a "19th century legal fiction"); Missouri v. Holland, 252 U.S. 416 (1920) (upholding the constitutionality of the Migratory Bird Treaty Act of 1918).

[36] *See, e.g.*, Missouri v. Holland, 252 U.S. 416 (1920).

[37] 471 F.Supp. at 993, citing the Convention for the Protection of Migratory and Endangered Birds, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990, and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, T.S. No. 981.

[38] 471 F.Supp. at 994-95.

[39] *Id.* at 995 n.40, citing Kleppe v. New Mexico, 426 U.S. 529, 537 (1976), in which the Court stated in dictum that the federal government might be able to assert a property interest in wild horses and burros found on public lands sufficient to uphold the Wild Free-Roaming Horses and Burros Act of 1971. The Supreme Court decided that the Act was constitutional on the ground that the Property Clause of the Constitution gave the federal government the power to regulate wildlife on its land. The *Palila* court's finding of federal power follows a trend of expanding federal power to regulate wildlife. *See generally* M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (1977); Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 WASH. L. REV. 295 (1980).

[40] The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

submit supplemental memoranda on this issue.[41] The court noted that "[u]nder general principles enunciated by the Supreme Court, a state may not be sued by its own citizens or citizens of another state without its consent, but state officials may be sued to enjoin them from violating the United States Constitution or federal laws."[42] With regard to injunctions against state officials, the court was careful to point out the distinction between prospective equitable relief, which is permissible, and retroactive monetary restitution, which is impermissible as being tantamount to an award of damages against the state. The court found that the affirmative equitable relief called for by the plaintiffs in this case—that is, the removal of goats and sheep from the *palila's* habitat—could properly be construed as "prospective compliance" rather than a "disguised form of damages" for past noncompliance.[43]

On the issue of a state's implied consent to be sued, the court noted that a state can be said to have waived immunity from suit if it participates in activities covered by congressional legislation, such as the Act, which expressly abrogates sovereign immunity.[44] Hawaii's participation in the Act was evidenced by the "cooperative agreement" it entered into with the United States Department of Interior as provided by the Endangered Species Act.[45] The court found that Hawaii had enacted state en-

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[41] By letter dated March 20, 1979, the U.S. District Court for the District of Hawaii requested further briefing by the parties on the issue of whether the eleventh amendment limits the court's power to grant injunctive relief against the Department of Land and Natural Resources and the Chairman of the Board of Land and Natural Resources. Defendant's Supplemental Memorandum at 1, 471 F.Supp. 985.

[42] 471 F.Supp. at 996. For the proposition that state officials may be sued to enjoin them from violating the United States Constitution the court cited: Milliken v. Bradley, 433 U.S. 267 (1977) (prospective equitable relief for school segregation not barred by eleventh amendment); Edelman v. Jordan, 415 U.S. 651 (1974) (retroactive payment of benefits by state barred by eleventh amendment); Ex Parte Young, 209 U.S. 123 (1908) (suit to enjoin state official from enforcing unconstitutional railroad tariffs not barred by eleventh amendment). For the proposition that state officials may be sued to enjoin them from non-constitutional violations of federal law the court cited: Lewis v. Shulimson, 400 F.Supp. 807 (E.D. Mo. 1975), *aff'd*, 534 F.2d 794 (8th Cir. 1976) (Social Security Act); Tullock v. State Highway Comm'n, 507 F.2d 712 (8th Cir. 1974) (Uniform Relocation Assistance Act); Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974) (Social Security Act).

[43] 471 F.Supp. at 996. The court cited *Milliken v. Bradley* for the proposition that prospective equitable relief might be affirmative as well as negative even if it had a "direct and substantial impact on the state treasury." Thus an injunction compelling the Chairman of the Board of Land and Natural Resources to expend state funds in the institution of a removal program was constitutionally permissible as affirmative prospective equitable relief.

[44] 471 F.Supp. at 997, citing Parden v. Terminal R. Co., 377 U.S. 184 (1964) (state had subjected itself to commerce power by owning and operating an interstate railroad).

[45] The Endangered Species Act, 16 U.S.C. § 1535 (1976), states in pertinent part:

> Cooperative Agreements
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> (c) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species . . . . Unless he determines, pursuant to

dangered species legislation in order "to qualify Hawaii for a cooperative agreement with the U. S. Department of the Interior, making the state eligible for federal grant-in-aid funds and preclude federal preemption of Hawaii's authority in regulating endangered species."[46] These acts by the State of Hawaii amounted to an implied consent to be sued under the Act.

C. Did the State "Take" the Palila?

The Endangered Species Act defines "take" as follows: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[47] Section 9 of the Act provides civil and criminal penalties for any "taking," and allows citizen suits to enjoin violations of the Act.[48]

The Interior Department regulations implementing the Act further define the term "harm" as used in definition of "take":

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to breeding, feeding or sheltering; significant environmental modifications or degradation which has such effects is included

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this subsection, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(1) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(2) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and date requested to the Secretary;

(3) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(4) the State agency is authorized to establish programs including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered species or threatened species; and

(5) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened.

[46] 471 F.Supp. at 998, citing H. STAND. COMM. REP. No. 757, 8th Hawaii Leg., 2d Sess., *reprinted in* SENATE JOURNAL 1324 (1975). The Hawaii Endangered Species Act is codified at HAWAII REV. STAT. §§ 195D-1-10 (1976).

[47] 16 U.S.C. § 1532(14) (1976).

[48] *Id.* § 1540(g).

within the meaning of "harm."[49]

The regulations define "harass" as follows:

> "Harass" in the definition of "take" in the Act means an intentional or negligent act or ommission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.[50]

The plaintiffs' arguments for summary judgment in the *Palila* case closely following these definitions. By actively maintaining the sheep and goat populations on Mauna Kea with knowledge[51] that the animals were destroying the *palila's* remaining habitat, the DLNR, plaintiffs argued, was " 'harassing' and 'harming' the Palila in the most obvious sense of those words."[52]

The DLNR, in opposing the motion for summary judgment, essentially tried to show that the sheep were not threatening the *palila*. It attempted to show that the birds were increasing in number,[53] and that the forest had shown some improvement since the 1930's, when there had been more than 30,000 sheep on the mountain.[54] Furthermore, the state argued, *complete* removal of the sheep was unnecessary because *some* level of sheep—albeit perhaps a smaller number—was probably compatible with a healthy forest.[55]

None of the arguments by the defendants impressed the district court, which granted summary judgment for the plaintiffs.[56] The court was undoubtedly influenced by the testimony of professional biologists, who unanimously agreed that the sheep and goats had a detrimental effect on the birds.[57] The court held that complete removal of the herd was essen-

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[49] 50 C.F.R. § 17.3 (1980).

[50] *Id.*

[51] Under the Act, civil and criminal penalties can be imposed only for "knowing" takings, except in the case of importers of wildlife products. 16 U.S.C. § 1540(a)-(b) (1976). The 1978 amendments changed the intent standard for criminal violations from "willful" to "knowing", 92 Stat. 3761.

[52] Plaintiff's Motion in Support of Motion for Summary Judgment at 67, 471 F.Supp. 985.

[53] Defendant's Memorandum in Opposition to Motion for Summary Judgment at 1-3, 471 F.Supp. 985. The state pointed out that the Fish and Wildlife Service had estimated the *palila* population in the low hundreds in the early 1970's, while the Palila Recovery Plan put the population at 1,400-1,600 birds. In fact, the earlier estimate had been impressionistic. Only one thorough census—by the Recovery Plan—had been done.

The court of appeals held that the population trend of the *palila* is immaterial, unless it shows that the defendants' activities are not harmful to the *palila*. 639 F.2d at 497.

[54] Defendant's Memorandum in Opposition to Motion for Summary Judgment at 7, 471 F.Supp. 985.

[55] *Id.* at 9.

[56] 471 F.Supp. at 999.

[57] *See generally* 471 F. Supp. at 988-91.

tial because the State would otherwise succumb to pressure from the hunting lobby to increase its size.[58]

On the taking issue, the district court said:

> "Take" is defined in the Act to include "harm" which in turn is defined in regulations propounded by the Secretary of the Interior to include "significant environmental modification or degradation" which actually injures or kills wildlife. 50 C.F.R. § 17.3. The undisputed facts bring the acts and omissions of defendants clearly within these definitions. I conclude that there is an unlawful "taking" of the Palila.[59]

The Circuit Court of Appeals for the Ninth Circuit affirmed the decision of the district court praising Judge King's "insightful and thorough discussion."[60] With regard to the "taking" issue, the appellate court repeated the definition in the Act and the regulations and held "[t]he defendants' action in maintaining feral sheep and goats in the critical habitat is a violation of the Act since it was shown that the Palila was endangered by the activity."[61]

To comply with the decision, the state completely opened Mauna Kea to hunting, resulting in the virtual elimination of the sheep and goats.[62]

IV. The Future of Litigation Under Section Nine

Following the Ninth Circuit's decision in the *Palila* case, the Interior Department issued a revised definition of "harm" in the Endangered Species Act.[63] The new definition provides:

> "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.[64]

The new definition of "harm" differs from the earlier definition in that it contains an explicit requirement that "actual" killing or injury to wildlife be shown in order to establish "harm." According to the Interior De-

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[58] *Id.* at 990.

[59] *Id.* at 995.

[60] *Id.*

[61] *Id.*

[62] McCoy, *Palila Bird is King of the Mountain*, Honolulu Star-Bulletin, Feb. 10, 1981, § A at 8, col. 1.

[63] 46 Fed. Reg. 54,748 (1981) (to be codified in 50 C.F.R. § 17.3). The Interior Department had earlier proposed, then withdrawn, another redefinition of "harm". 46 Fed. Reg. 29,490 (1981).

[64] 46 Fed. Reg. 54,750 (1981).

partment, "actual killing or injury" means that the killing or injury of *individual* wildlife must be shown — a requirement the Department apparently believes was not met in the *Palila* litigation.[65]

Three main arguments have been raised against the revised definition of harm. First, the legislative history of the Act, although ambiguous, provides some reason to doubt that environmental modifications alone were meant to constitute harm.[66] Second, the section 7 consultative procedure for federal agencies would lose much of its significance if habitat modifications that triggered the section's requirements were already prohibited under section 9.[67] Third, because the Act's definition of "take"—to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct"[68]—consists, with the possible exception of "harm," of acts "directed against and likely to injury or kill *individual* wildlife"[69] the principle of *ejusdem generis* would imply that harm, as well, be limited to activities which would injury or kill individual wildlife.[70]

The arguments against the present definition of harm, while plausible, are not entirely persuasive. The legislative history of the Act also states that "take" was intended "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."[71]

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[65] Prior to the *Palila* litigation and TVA v. Hill, several commentators criticized the administrative definition of "harm," claiming it went beyond the Act itself. M. BEAN, *supra* note 39, at 395-97; Lachenmeier, *Endangered Species Act of 1973: Preservation or Pandemonium?* 5 ENVT'L L. 29, 39-41 (1974); Note, *Endangered Species Act: Constitutional Tensions and Regulatory Discord*, 4 COLUM. J. ENVT'L L. 97, 100 n.19; Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 STAN. L. REV. 1247, 1251 n.31 (1976).

[66] An early version of the Act contained a provision that specifically included "destruction, modification, or curtailment of habitat or range" within the meaning of "take." S1983, 93d Cong., 1st Sess. § 3(6)(A) (1973). This specific provision was not included in the final Act (but the term "harm" was interjected in its place).

[67] *See* note 2 *supra;* 16 U.S.C. § 1535 (1976).

[68] 16 U.S.C. § 1532(14) (1976).

[69] 46 Fed. Reg. 29,490-91 (1981).

[70] *Id.*

[71] *Id.* at 54,748-50. The Interior Department memorandum accompanying the redefinition of "harm" does not state precisely what kinds of evidence will be necessary to show death or injury to individual wildlife—whether, for example, the *palila* plaintiffs would be required to produce carcasses of starved birds in order to establish "actual" harm. If injury to the species is enough to establish "harm," it should be possible to prove such injury through the testimony of expert scientists—the procedure used in *Palila*.

In TVA v. Hill, the Supreme Court stated that the Tellico Dam would harm the snail darter by smothering its eggs and causing the extermination of the darter's primary food, snails. 437 U.S. at 165, n.16. The Court stated, "[W]e do not understand how the TVA intends to operate Tellico Dam without 'harming' the snail darter." *Id.* at 184-85, n.30. The Interior Department concurred in the Supreme Court's interpretation of "harm" as applied in TVA v. Hill. 46 Fed. Reg. 29,492 (1981). It would seem strained to make a legal distinction between the snail darter case, in which environmental modification would quickly cause

The broad definition of harm in section 9 does not make the section 7 procedure a more efficient means of preventing damage to endangered species, even if the proposed federal activity could ultimately be enjoined under section 9. The consultation requirement could help prevent interagency suits and confrontations.

If the new definition is followed by courts in the future, its primary effect will be to make it more difficult to establish a section 9 taking in situations in which the environmental degradation is slow, gradual and incremental.[72] In such situations, as in *Palila,* it might prove difficult to find *individual* creatures that are being killed or physically injured.

Defendants in future litigation under section 9 may mount a more basic challenge to the enforcement of the Act, arguing that the regulations which include modification within "takings" prohibited by section 9 are invalid because they go beyond the intent of Congress in the Act.[73] However, the fact that Congress has had ample opportunity to clarify its definitions in the time since the present administrative definition of "harm" was issued in September, 1975, indicates that the broad definition of "harm" does not circumvent Congressional intent.[74] Congress has amended the Act twice since then, including amendments in response to *TVA v. Hill.*[75] The far-reaching implications of the definition of "harm" were plain after the Supreme Court's decision in that case.[76] However, Congress did not modify the definition of "take" or "harm."

In other cases, wildlife protection laws with similar "taking" prohibitions have been held to forbid environmental modifications that indirectly harm protected wildlife. For example, the Migratory Bird Treaty Act of 1918[77] (MBTA) makes it a criminal violation to "kill" migratory birds. Several courts have interpreted the MBTA to make the accidental killing of birds by environmental degradation, such as pesticide spills, a criminal violation under its provisions.[78] The Endangered Species Act's legislative history contains more justification for arguing that it was intended to forbid environmental modifications that kill protected wildlife

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extinction, and the *Palila* case, in which environmental modification would just as surely result in extinction, although the latter would require a longer period of time.

[72] *Palila*-type situations, in which environmental modifications cause the slow decline of a species are not uncommon. *See generally* P. EHRLICH & A. EHRLICH, *supra* note 2.

[73] S. REP. No. 307, 93d Cong., 1st Sess. 7 (1973).

[74] *See* note 2 *supra.*

[75] *Id.*

[76] 437 U.S. 153, 208-09 n.16 (Powell, J. dissenting): "[T]he reach of this regulation [defining "harm"]—which the Court accepts as authorized by the Act—is virtually limitless."

[77] 16 U.S.C. § 703-11 (1976).

[78] United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (strict liability standard for imposition of criminal liabilities under MBTA); United States v. Corbin Farm Servs., 444 F.Supp. 510 (E.D. Cal. 1978), *aff'd on other grounds,* 578 F.2d 259 (9th Cir. 1978) (deaths of birds feeding on field sprayed with insecticide is a criminal violation under MBTA); *see generally* Margolin, *Liability under the Migratory Bird Treaty Act,* 7 ECOLOGY L. Q. 989 (1979).

that does the legislative history of the MBTA.[79]

Finally, the prohibition of environmental modification which threatens the survival of species effectively implements the overall purpose of the Act. Its declared purposes are: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species. . . ."[80] The legislative history of the Act indicates that Congress was well-informed of the effects of habitat modifications on endangered species, and wanted to remedy the problem.[81]

From the standpoint of national policy, there can be no question that the *Palila* court effectuated the purpose of the Act by requiring removal of the herds. The survival of the *palila* which is held, with other endangered species, to be of the highest priority,[82] was threatened by a herd of 550 sheep maintained to satisfy a locally influential group of sports hunters.[83]

Regardless of the merit of the above arguments for and against the broad definition of "harm," *Palila v. DLNR* will be strong precedent in the Ninth Circuit for the principle that environmental modifications can be prohibited as "takings" under section 9.[84] Other jurisdictions are likely to follow the lead of the Ninth Circuit, the United States Supreme Court in *TVA v. Hill* and the administrative definition of "harm," and find that certain environmental modifications can be prohibited under section 9—at least when protected wildlife are killed or injured.

The *amount* and *degree* of environmental modification necessary to make out a violation of the Act remains an unsettled question. The present regulations require that the modifications be "significant"[85] and that they "significantly impair"[86] essential behavior patterns. In both the

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[79] The MBTA was primarily concerned with hunting; the Endangered Species Act embodies a more comprehensive approach to the ecosystem. *See* text accompanying note 80 *infra*.

[80] 16 U.S.C. § 1531(b) (1976).

[81] *See, e.g.*, S. REP. No. 307, *supra* note 73.

[82] See TVA v. Hill, 437 U.S. at 176-89, for an extended discusson of the extremely high priority Congress placed on endangered species preservation.

[83] The importance of removing the sheep and goats goes beyond the *palila*. As a result of the decision, the quality of the forest as a whole can be expected to improve; once the forest begins to regenerate, it is possible that other rare and endangered creatures will recolonize the area.

[84] The Interior Department memorandum argued that the *Palila* decision should not be considered precedent on the "taking" question because the "issue whether the [Fish and Wildlife] Service's definition of 'harm' exceeds statutory authority was neither briefed by the parties nor addressed by the court in *Palila*." 46 Fed. Reg. 29,492 n.4 (1981). In fact, the *Palila* plaintiffs argued for the validity of the definition of "harm," noting some of the arguments that had been made against it. Plaintiff's Supplemental Memorandum of Points and Authorities at 21 n.13, 471 F.Supp. 985.

[85] 50 C.F.R. § 17.3 (1980).

[86] 46 Fed. Reg. 54,750 (1981).

Palila case and *TVA v. Hill* there was strong evidence that modifications would threaten *entire* species.[87] It is an open question whether modifications which "significantly impair" an endangered species on a *small part* of its range can be enjoined under section 9.[88]

Section 9 is likely to prove an extremely powerful tool for ecosystem preservation and endangered species protection. At the same time, the requirements in the present regulations that the modifications be significant and that they threaten species in some substantial way will prevent section 9 from being used in situations where endangered species concerns are merely tangential.[89]

Jonathan Durrett
Christopher Yuen

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[87] *See* text accompanying notes 47-61 & 66 *supra*.

[88] In TVA v. Hill, it was undisputed that the dam would cause the extinction of the entire species. In the *Palila* case, the Ninth Circuit held that there was a violation of the Act because "it was shown that the Palila was endangered by the activity." 639 F.2d at 497.

However, even if a substantial threat to the species as a whole is required to constitute a "taking," the formal administrative finding of a "critical habitat" pursuant to 16 U.S.C. § 1536 (1976) should not be necessary to establish a "taking." This finding—while present in both the snail darter and *palila* cases—is only one possible way of proving that an environmental disruption is significant and poses a threat to a species as a whole.

[89] An example of "tangential" litigation would be litigation to enjoin activities that allegedly have an effect on endangered species, but which are in fact being opposed for other reasons.

In other cases alleging § 9 "takings" due to environmental modifications, courts have refused to find a "taking" where harm to the species has not been adequately demonstrated. *See, e.g.*, Barcelo v. Brown, 478 F.Supp. 646, 691 (D. Puerto Rico 1979) (no prohibited impact shown on endangered species from U.S. military bombing, hence no § 9 "taking"); Village of Kaktovik v. Corps of Eng'rs, 9 ENVT'L L. REP. 20,117 (D. Alaska 1978) (no likelihood of harm to endangered bowhead whales from oil drilling).

ISLAND TOBACCO CO., LTD. V. R. J. REYNOLDS TOBACCO CO.: FEDERAL AND STATE VIEWS OF HAWAII'S ANTITRUST LAWS

I. INTRODUCTION

Island Tobacco Co., Ltd. v. R. J. Reynolds Tobacco Co., decided by the Hawaii Supreme Court,[1] and a companion case filed in federal district court,[2] together provide an important interpretation of Hawaii's antitrust laws.[3] The two cases presented both courts with similar facts and three major questions:[4] (1) Whether a cigarette manufacturer and its wholly-owned corporate subsidiary should be treated as two separate entities for antitrust purposes; (2) whether the conduct of the parent company and its corporate subsidiary in wholesaling only one brand of cigarettes was a monopoly or an attempt to effect a monopoly; and (3) whether the parent company and its corporate subsidiary were engaged in predatory, below-cost sales.

On the first issue, both courts held that the parent company and its completely controlled corporate subsidiary were not to be treated as separate entities for conspiracy purposes and could not be held in restraint of trade.[5] On the second issue, the Hawaii Supreme Court found the corporate subsidiary not guilty of monopolization or attempted monopolization.[6] While the federal district court concurred with the state court on the matter of monopoly power, it withheld its decision on the question of attempted monopolization pending resolution of the third issue of predatory, below-cost pricing.[7] On this final issue, the Hawaii Supreme Court

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[1] 63 Hawaii 289, 627 P.2d 260 (1981).

[2] Island Tobacco Co., Ltd. v. R. J. Reynolds Indus. Inc., 513 F. Supp. 726 (D. Hawaii 1981).

[3] HAWAII REV. STAT. chs. 480-481 (1976 & Supp. 1981).

[4] In the state case, the questions raised on appeal before the Hawaii Supreme Court resulted from an interlocutory review of orders entered by the circuit court. 63 Hawaii at 296, 627 P.2d at 266. In the federal case, the questions raised in the new forum were based primarily on the state court claims, and in addition, a new Robinson-Patman Act claim based upon alleged events arising subsequent to the circuit court judgment. 513 F. Supp. at 736.

[5] 63 Hawaii at 308, 627 P.2d at 274; 513 F. Supp. at 740.

[6] 63 Hawaii at 311, 627 P.2d at 275.

[7] 513 F. Supp. at 744.

ruled that the evidence of the defendants' engagement in predatory, below-cost sales was insufficient to affirm the trial court's grant of summary judgment in favor of the plaintiff.[8] However, the federal district court held that plaintiff's case raised sufficient questions concerning defendants' pricing policies to sustain a cause of action on the issue of predatory conduct.[9]

This note examines the approaches used by the two courts in their analyses of these issues, focusing especially on the courts' diverging views on the critical issue of predatory pricing.

II. Facts of the Case

Island Tobacco Company, Ltd. (Island Tobacco) is a service jobber,[10] wholesaling major brands of cigarettes and other tobacco products to retailers on Oahu. Prior to January 1975, R. J. Reynolds Tobacco Company (Reynolds Tobacco) had been selling its products to Island Tobacco through an unincorporated division of the company. Due to perceived distribution problems with Island Tobacco,[11] Reynolds Tobacco incorporated its Hawaii division to provide for direct distribution of its products to retail outlets through a wholly-owned subsidiary, R. J. Reynolds Tobacco Company (Hawaii) (Reynolds Hawaii).[12] Reynolds Hawaii bought cigarettes from Reynolds Tobacco and sold them to retailers with a markup of approximately one percent per carton.[13] This low markup was made possible through a rebate agreement between the parent company and its subsidiary whereby the former agreed to reimburse the latter for

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[8] 63 Hawaii at 312, 627 P.2d at 276.

[9] 513 F. Supp. at 742.

[10] "A service jobber is distinguished from other types of tobacco wholesaler by the fact that it makes store-door deliveries to independent retailers." 513 F. Supp. at 729; 63 Hawaii at 292, 627 P.2d at 264.

[11] In 1973, Reynolds Tobacco became aware of the fact that Island Tobacco was experiencing financial difficulties. This was evidenced by a dishonored check, a late payment and a financial statement that indicated an increased principal officer-stockholder indebtedness to the company, lack of working capital and a large sum in unpaid taxes. In the meantime, Reynolds Tobacco also observed a decline in its share of the Oahu market of cigarettes. It ascribed the noticeable decline to Island Tobacco's neglect to fully stock and promote cigarettes and other products of Reynolds Tobacco. 63 Hawaii at 293, 627 P.2d at 264; 513 F. Supp. at 742.

[12] Reynolds Hawaii was incorporated on January 9, 1975, and commenced operations on January 20, 1975. 63 Hawaii at 293, 627 P.2d at 265; 513 F. Supp. at 730.

[13] Prior to the incorporation of Reynolds Hawaii in January, 1975, Reynolds Tobacco sold cigarettes to Island Tobacco and other "direct" accounts for approximately $2.33 per carton. Reynolds Tobacco maintained this same price in its sales to Reynolds Hawaii. On January 20, 1975, Reynolds Hawaii began selling the Reynolds products to over 500 retail accounts for three cents per carton over the amount it was being charged by Reynolds Tobacco, about $2.36 per carton. Findings of Fact and Conclusions of Law at 4-5, Island Tobacco Co., Ltd. v. R. J. Reynolds Tobacco Co., Civil No. 45386 (1st Cir. Ct. Hawaii, June 28, 1977).

operational expenses.[14]

In 1977, plaintiff Island Tobacco sued defendants in circuit court[15] alleging violations of Hawaii antitrust laws and fair trade regulations[16] injurious to Island Tobacco's business. The circuit court rejected plaintiff's claims of monopolization and attempted monopolization[17] and price-fixing[18] and awarded summary judgment to defendants on those causes of action. However, by the same order the court found the defendants in violation of the state's proscription against "sales below cost" and granted plaintiff a partial summary judgment on that cause of action.[19] Both parties were granted interlocutory review of the orders entered by the circuit court and appealed to the Hawaii Supreme Court.

In 1978, while the state case was still pending on appeal, plaintiff filed a new antitrust action in the United States District Court for the District of Hawaii.[20] The plaintiff generally realleged the same claims first raised in the state case, and in addition, raised a new Robinson-Patman Act claim based upon alleged events arising subsequent to the circuit court judgment.[21]

On April 20, 1981, the Hawaii Supreme Court rendered its opinion just one day before the federal district court decided the companion case.

III. ANALYSIS

The primary questions presented by the parties in the *Island Tobacco* cases involve three issues: (1) Intra-enterprise conspiracy; (2) monopolization; and (3) predatory, below-cost pricing. These issues are examined as they were applied to the facts presented before the Hawaii Supreme

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[14] The agreement was memorialized on July 15, 1975. 63 Hawaii at 294, 627 P.2d at 265; 513 F. Supp. at 731.

[15] Island Tobacco Co., Ltd. v. R. J. Reynolds Tobacco Co., Civil No. 45386 (1st Cir. Ct. Hawaii, June 28, 1977).

[16] HAWAII REV. STAT. chs. 480-481 (1976 & Supp. 1980).

[17] On the monopolization claims under Hawaii Revised Statutes, § 480-9, defendants were granted summary judgment in a pre-trial ruling. Findings of Fact and Conclusions of Law at 8, Island Tobacco Co., Ltd. v. R. J. Reynolds Tobacco Co., Civil No. 45386 (1st Cir. Ct. Hawaii, June 28, 1977).

[18] *Id.*

[19] In addition to finding Reynolds Hawaii guilty of engaging in below-cost sales in violation of Hawaii Revised Statutes, § 481-3, the circuit court also ordered that paragraph 4 of the July 15, 1975 contract, relating to the rebate, be struck from the agreement as null and void pursuant to Hawaii Revised Statutes, § 481-9. *Id.* at 7.

[20] Island Tobacco Co., Ltd. v. R. J. Reynolds Indus., Inc., 513 F. Supp. 726 (D. Hawaii 1981).

[21] Plaintiff's Robinson-Patman Act claim was based upon defendants' alleged circumvention of the circuit court's invalidation of the cost compensation arrangement between Reynolds Tobacco and Reynolds Hawaii. *Id.* at 736. In lieu of reimbursing Reynolds Hawaii for operational expenses, Reynolds Tobacco apparently lowered its prices to Reynolds Hawaii to a level sufficient to compensate for the termination of the previous subsidy. *Id.*

Court and the federal district court during their respective summary proceedings.

A. *Intra-Enterprise Conspiracy*

Island Tobacco's allegations of price-fixing, in violation of Hawaii Revised Statutes, section 480-4,[22] and conspiracy to monopolize, under Hawaii Revised Statutes, section 480-9,[23] both required proof of concerted activity on the part of the defendants. Concerted activity, by definition, involves an agreement between at least two independent parties. Therefore, before the plaintiff's substantive claims could be reached, the state and federal courts were faced with the preliminary question of whether Reynolds Tobacco and its wholly-owned subsidiary should be considered a single business entity for purposes of the pertinent antitrust laws.[24]

The Hawaii Supreme Court, in dealing with this question for the first time,[25] acknowledged that sections 480-4 and 480-9 were based on the Sherman Act[26] and looked to federal law for guidance.[27] Citing several United States Supreme Court decisions,[28] the Hawaii Supreme Court noted that the plurality of participants necessary for a conspiracy could be found within a vertically integrated enterprise[29] like that of the defen-

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[22] Section 480-4 states in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal." HAWAII REV. STAT. § 480-4 (1976).

[23] "No person shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State." HAWAII REV. STAT. § 480-9 (1976).

[24] 63 Hawaii at 304, 627 P.2d at 271; 513 F. Supp. at 739.

[25] 63 Hawaii at 296-97, 627 P.2d at 266.

[26] *Id.* at 297, 627 P.2d at 267. The Sherman Act, 15 U.S.C. §§ 1-2 (1976) prohibits combinations in restraint of trade and combinations with intent to monopolize. *Id.* at 297 nn.3 & 4, 627 P.2d at 267 nn.3 & 4.

[27] Violations under Hawaii Revised Statutes chapter 480 "should be judged consistently with the precepts developed in the enforcement of pertinent federal law." *Id.* at 299, 627 P.2d at 268.

[28] *See* Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) (common law ownership does not relieve separate corporate entities of obligations that antitrust laws impose); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (common ownership or control does not liberate corporations from impact of antitrust laws); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (fact that corporations are under common ownership and control does not relieve them from liability under antitrust laws, especially where they hold themselves out as competitors); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (fact that corporate defendants, by virtue of affiliation and common ownership, constitute a "vertically integrated enterprise, does not necessarily render inapplicable the prohibitions of the Sherman Act").

[29] A vertically integrated firm is one which is involved in more than one stage of development of a product from the time the product is manufactured until it is sold to the ultimate consumer. Such a firm may be distinguished from a horizontally integrated one which makes or sells more than one product. 513 F. Supp. at 737 n.15.

dants' in the *Island Tobacco* case. The capability of divisions to conspire within a single organization depends on the independence of each division. The federal courts, in making a judicial determination of such independence, commonly consider the following factors: separate managerial control,[30] separate incorporation,[31] competition or the appearance of competition between the related entities[32] and any previous independence of a division within the enterprise.[33]

The Hawaii Supreme Court, in adopting and applying the above federal considerations, held that the defendant corporations were not independent and could not conspire with each other.[34] The court pointed out that the subsidiary, Reynolds Hawaii, was wholly owned and completely controlled by its parent, Reynolds Tobacco; the two entities never held themselves out as competitors and never competed and Reynolds' expansion was not by merger or acquisition but by internal incorporation.[35] The only factor tending to show that the two firms were in any way independent was the separate incorporation of Reynolds Hawaii.[36] Although the Hawaii Supreme Court did not state how many of the federal factors must exist before a capability to conspire would be found, the court ruled that separate incorporation alone was not enough.[37] The circuit court's summary judgment for the defendants,[38] as far as it was based on the ruling that the two corporations be treated as one entity, was therefore affirmed.[39]

The federal court's treatment of the single entity issue is very similar to the approach taken by the Hawaii Supreme Court. Consistent with precedent in the Ninth Circuit,[40] the court ruled that the capacity of related

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[30] *See, e.g.*, Island Tobacco Co., Ltd. v. R. J. Reynolds Indus., Inc., 513 F. Supp. 726, 740 (D. Hawaii 1981).

[31] 63 Hawaii at 308, 627 P.2d at 273.

[32] *Id.* at 306, 627 P.2d at 272.

[33] *Id.* at 309, 627 P.2d at 274.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 307-08, 627 P.2d at 273.

[37] *Id.*

[38] *See* text accompanying notes 17 & 18 *supra*.

[39] 63 Hawaii at 309, 627 P.2d at 274.

[40] *See* Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980) (in antitrust action, evidence supported court's determination that six hotel-casino resorts, owned and controlled by one individual, neither competed with each other nor represented themselves as competitors in violation of Sherman Act or Clayton Act); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979) (evidence in suit against corporations for alleged violations of Sherman Act showing that a single person was sole stockholder, officer and director of all defendant corporations, established as a matter of law that no conspiracy occurred); Knutson v. Dailey Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (where parent and sudsidiary corporations formed single unified structure separated only by the technicality of separate incorporation, and where the corporations did not compete or hold themselves out as competitors, evidence supported court's findings of no conspiracy within meaning of § 1 of Sherman Act).

corporations to conspire is a question of fact to be answered under the circumstances in each case.[41] The federal court applied what it termed a "control" test under which "[t]he degree of control the parent exercises over its subsidiary is a determining factor in deciding whether the necessary plurality of factors "exists" for conspiracy purposes.[42] The court reasoned that where the parent controls in large part the managerial decisions of a wholly-owned subsidiary there is in effect only one competitive force operating in the market.[43]

In applying its "control" test to the circumstances of the present case, the court found that the defendants were incapable of conspiring. The federal court, like the Hawaii Supreme Court noted that the subsidiary was set up and run completely by the parent company, and the degree of control over defendants' division did not decrease after its incorporation.[44] Both courts in interpreting relevant federal law adopted similar tests looking essentially at factors of ownership, management and control.

B. Monopolization

Next, the Hawaii Supreme Court and the federal district court considered plaintiff's claims of monopolization. Section 480-9[45] of the Hawaii Revised Statutes and section 2 of the Sherman Act[46] establish three separate offenses: (1) Monopolization; (2) attempt to monopolize; and (3) combination or conspiracy to monopolize.[47] Considering the first offense, both the state[48] and federal[49] courts disposed of plaintiff's claim of unlawful monopolization based on a two-part test set forth in *United States v. Grinnell Corp.*[50] Under the *Grinnel* test, "the offense of monopoly under

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[41] 513 F. Supp. at 740.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See* note 23 *supra.*

[46] 15 U.S.C. § 2 (1976) states in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

[47] Apparently the third defense of conspiracy to monopolize was not raised on appeal to the Hawaii Supreme Court. In federal district court, the plaintiff's conspiracy to monopolize claim was found to be vague and illusive. 513 F. Supp. at 744.

[48] In the state case, the circuit court's award of summary judgment to defendants on allegations of monopoly was based on § 480-9 (1976). However, the Hawaii Supreme Court acknowledged that the application of the state statute "should be consonant with legal principles developed in the enforcement of § 2 of the Sherman Act." 63 Hawaii at 299, 627 P.2d at 268.

[49] Plaintiff's complaint in federal court was based on both § 2 of the Sherman Act and § 480-9 (1976). 513 F. Supp. at 742.

[50] 384 U.S. 563 (1966) (existence of monopoly power may be inferred from an 87 percent

§ 2 of the Sherman Act has two elements: (1) The possession of monopoly power in the relevant market; and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[51]

In determining the presence of the first element, monopoly power, the Hawaii Supreme Court had to first identify the relevant market.[52] The court rejected plaintiff's characterization of the service jobber market as the relevant market noting that if the court deemed the jobber market relevant, Island Tobacco would be the dominant figure.[53] Instead, the court identified the relevant market to be the entire wholesale market for cigarettes on Oahu, and found that within this market, Reynolds' share fluctuated between eighteen and twenty-three percent.[54] The court's conclusion that Reynolds Hawaii lacked the necessary share of the relevant cigarette market to be guilty of monopolization rendered a discussion of "wilful intent," the second element of the *Grinnell* test, unnecessary.[55]

In the federal *Island Tobacco* case, the court's analysis of the first offense paralleled that of the state court with a minor variation in the identification of the relevant cigarette market.[56] The federal court cited additional factors, such as relative size and strength of competitors and freedom of entry, that could also be taken into consideration when determining monopoly power. However, the court found it unnecessary to consider these additional factors in this case since the size of the defendants' market share precluded any finding of monopoly power.[57] Like the state court, the federal court did not apply the second element of the *Grinnell* test to the facts of the case.[58]

On the second offense of attempted monopolization, the Hawaii Supreme Court did not provide a separate analysis from its discussion of

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share in the national market for central-station burglar alarm systems).

[51] *Id.* at 570-71.

[52] With regard to determination of the relevant market the court stated that "the relevant market is the area in a line of commerce where effective competition exists and where monopoly power might be exercised. Its definition in a given situation entails the determination of a geographic market and a product market." 63 Hawaii at 309-10, 627 P.2d at 274. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (defining the relevant lines of commerce and geographic markets to be used analyzing a merger between two shoe manufacturing corporations); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (defining the relevant market for the manufacturer of 75 percent of the cellophane used in the United States as the market for all flexible packaging materials).

[53] 63 Hawaii at 311, 627 P.2d at 275.

[54] *Id.*

[55] *Id.* at 311 n.23, 627 P.2d at 275 n.23.

[56] The federal court identifies the relevant geographic market as "clearly limited by the physical boundaries of the State of Hawaii." 513 F. Supp. at 743. The court also noted that Reynolds Hawaii's share of the statewide market for cigarettes ranged between 19.8 percent and 22 percent. *Id.* at 744.

[57] *Id.*

[58] *Id.* at 743-44.

monopoly power. Finding that there was no possibility or probability of defendants attaining monopoly power, the state court sustained the circuit court's award of summary judgment to defendants on the allegation of attempted monopolization.[59]

In the federal district court, defendants' motion for summary judgment on a similar attempt-to-monopolize claim was denied on the ground that factual issues existed as to the predatory effect of defendants' pricing policies.[60] The federal court adopted a three-part test from *Janich Bros., Inc. v. American Distilling Co.*,[61] under which the three elements that a plaintiff must prove to establish a prima facie case of attempted monopolization are: "(1) a specific intent to control prices or destroy competition with respect to a part of commerce; (2) predatory conduct directed toward accomplishing the unlawful purpose; and (3) a dangerous probability of success".[62] The court noted that "[p]roof of the second element, predatory or anticompetitive conduct, may in some instances permit an inference of the first element, specific intent, and the third element, dangerous probability."[63] Due to the interrelationship between this second element and the unresolved issue of predatory below-cost pricing, the federal court in the *Island Tobacco* case deemed it inappropriate to grant defendant's motion for summary judgment on plaintiff's allegation of attempted monopolization.[64]

C. *Predatory Below-Cost Pricing*

Island Tobacco's suits, in both federal and state court, were primarily concerned with the defendants' ability to sell cigarettes at reduced prices.[65] In both courts, Island Tobacco claimed that the defendants' pricing conduct was predatory[66] and violated Hawaii Revised Statutes section 481-3,[67] which specifically prohibits sales of goods at less than cost,

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[59] 63 Hawaii at 311, 627 P.2d at 275.

[60] 513 F. Supp. at 745.

[61] 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) (suit by a California rectifier of alcoholic beverages against a nationwide distiller alleging attempted monopolization of private label gin and vodka sales in California through predatory pricing policies).

[62] 513 F. Supp. at 744.

[63] *Id.*, citing *Janich Bros.*, 570 F.2d at 854.

[64] 513 F. Supp. at 744.

[65] *See* Opening Brief of Plaintiff-Appellee, Cross-Appellant at 12, Island Tobacco Co., Ltd. v. R. J. Reynolds Tobacco Co., 63 Hawaii at 289, 627 P.2d 260; 513 F. Supp. at 730-31.

[66] Generally, pricing is predatory when a firm reduces its prices in an attempt to destroy its rivals or to deter new entry into the market. *See, e.g.*, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

[67] Section 481-3 states in pertinent part:

> No person, partnership, firm, corporation, joint stock company, or other association engaged in business within the State shall sell, offer for sale, or advertise for sale any article, or product, or service or output of a service trade, at less than the cost thereof

and Hawaii Revised Statutes section 480-2[68] which encompasses predatory pricing as an unfair method of competition.[69] Both courts denied summary judgment to either the plaintiff or defendant on Island Tobacco's below cost sales claim under section 481-3.[70] However, Island Tobacco's section 480-2 allegation met with very different outcomes in the two courts.

The Hawaii Supreme Court affirmed a lower court ruling disposing of Island Tobacco's section 480-2 claim of predatory pricing as duplicative of its "sales at less than cost" claim under section 481-3.[71]

In the companion case, the federal court was presented with additional facts important to the plaintiff's section 480-2 claim that were not before the Hawaii Supreme Court. The additional facts indicated that the defendants had continued an unlawful predatory pricing program, in defiance of a state circuit court order.[72] The federal court held that the defendants' continued illegal pricing conduct was an unfair method of competition and granted partial summary judgment to the plaintiff under section 480-2.[73]

The plaintiff's success in federal court under section 480-2 is not only attributable to the additional facts presented to the court in that case. The Hawaii Supreme Court, with its affirmance of the circuit court's duplicative ruling, and the federal court, with its partial summary judgment, appear to have adopted different standards of proof necessary to state a claim under section 480-2. This divergence can best be understood by comparing the courts' application of the single business entity theory to their respective predatory pricing analyses.

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to such vendor . . . with the intent to destroy competition.

HAWAII REV. STAT. § 481-3 (1976).

[68] The section reads: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." HAWAII REV. STAT. § 480-2 (1976).

[69] 63 Hawaii at 312-13, 627 P.2d at 276.

[70] The Hawaii Supreme Court reversed the circuit court's award of summary judgment to plaintiff on the § 481-3 claim and cited insufficient evidence in the record as the basis for its decision. *Id.* The federal district court denied defendants' motion for summary judgment under § 481-3. 513 F. Supp. at 744-45.

[71] 63 Hawaii at 313, 627 P.2d at 276.

[72] By order dated June 28, 1977, the state circuit court ruled that Reynolds Hawaii had set its prices below its fully allocated costs. The state court also ordered defendants to terminate their cost compensation agreement of July 15, 1975.

In response to this order Reynolds Hawaii refused to adjust its prices upward to fully meet the allocated costs; instead defendants attempted to circumvent the state court order by discontinuing the cost compensation subsidy but then dropping prices down to a level sufficient to compensate for the termination of the subsidy. 513 F. Supp. at 736.

[73] *Id.*

1. The State Analysis

In dealing with Island Tobacco's claim under section 481-3, the Hawaii Supreme Court stated that the circuit court had erred in treating the subsidiary, Reynolds Hawaii, as a separate entity for cost determination purposes.[74] The supreme court reasoned that since it had treated the defendant corporation as a single business entity for price-fixing and conspiracy under Hawaii Revised Statutes chapter 480, it should also treat them as one entity for determining cost under chapter 481.[75] Therefore, evidence of Reynolds Hawaii's costs alone was insufficient to sustain the circuit court's award of summary judgment to the plaintiff.[76] On remand, Island Tobacco would have to produce the cost figures of both the parent company and its subsidiary.[77]

Island Tobacco had also alleged that the defendants' conduct of selling below cost was an unfair method of competition under section 480-2.[78] The circuit court found this claim to be duplicative of Island Tobacco's allegation that the defendants were selling below cost in violation of section 481-3.[79] The supreme court affirmed this duplicative ruling, noting that the only allegation made by the plaintiff relevant to the two separate pricing claims was "sales at less than cost." The court reasoned that the conduct of the defendants complained of under section 480-2 was already condemned under the section 481-3 claim.[80]

The Hawaii Supreme Court's affirmance of the circuit court's duplicative holding was essentially an extension of the single business entity theory into the section 480-2 area, with the practical effect that Reynolds Hawaii and Reynolds Tobacco together would have to be selling below cost before such pricing activity would be considered an unfair method of competition under section 480-2.[81]

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[74] 63 Hawaii at 312, 627 P.2d at 276.

[75] *Id.*

[76] *Id.*

[77] Producing the cost figures of R. J. Reynolds Tobacco Co. may be difficult and time-consuming due to the size of the company. R. J. Reynolds is the largest cigarette manufacturer in the country.

[78] 63 Hawaii at 312, 627 P.2d at 276.

[79] Findings of Fact and Conclusions of Law at 8, Island Tobacco Co., Ltd. v. R. J. Reynolds Tobacco Co., Civil No. 45386 (1st Cir. Ct. Hawaii, June 28, 1977).

[80] 63 Hawaii at 313, 627 P.2d at 276.

[81] It should be noted that the Hawaii Supreme Court did not directly address the issue of whether the defendants' status as a single business entity for § 481-3 purposes should also be applied in evaluating the plaintiff's § 481-2 claim. However, affirmance of the duplicative holding may be read to indicate the court's intention of treating the defendants as a single business entity under § 480-2. The significance of the duplicative holding in this case is that it precluded the possibility of finding that the subsidiary's conduct alone was an unfair method of competition within the meaning of § 480-2. Island Tobacco, in showing that the subsidiary, Reynolds Hawaii, sold below its costs, may not have met its burden of proving below-cost sales under § 481-3, but the fact that Reynolds Hawaii was selling below its cost subsequent to a rebate agreement with its parent company should have been enough to

2. The Federal Analysis

In contrast, the federal district court did not accept the defendants' arguments that for cost determination purposes the subsidiary and parent corporations should be treated as one entity.[82] The defendants unsuccessfully tried to convince the federal court that they had not circumvented a state circuit court order which forced Reynolds Hawaii to adjust its prices upward to meet fully allocated costs. The defendants argued that reducing the transfer price of cigarettes between a parent and its subsidiary was not an improper method of complying with the state circuit order because the defendants should be treated as one economic entity incapable of making sales to itself.[83]

Although the federal court had ruled that for some purposes the defendant corporations would be treated as a single business entity,[84] the court refused to permit the defendants to use the single business entity theory as a "technical defense" to plaintiff's predatory pricing claim under section 480-2.[85] To do so, the court stated, would be to allow vertically integrated monopolists to "charge predatory prices with impunity so long as the 'sales' are between totally controlled subsidiaries."[86] The federal court held that the continuance of a pricing program between Reynolds Tobacco and its subsidiary, Reynolds Hawaii, previously found to be unlawful under section 481-3 by a state circuit court, was, as a matter of law, an unfair method of competition under section 480-2.[87] The court granted a partial summary judgment to the plaintiff on the section 480-2 claim and denied defendants' motion for summary judgment under section 481-3 because of material questions of fact as to the predatory effect of defendants' pricing policies.[88] By treating the defendant corporations as sepa-

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state a separate claim under § 480-2.

[82] 513 F. Supp. at 737.

[83] *Id.*

[84] *Id.* at 735 (price discrimination), 740 (conspiracy).

[85] *Id.* at 737.

[86] *Id.* In dicta, the federal court also discussed the problem of formulating a workable formula for determining predatory pricing. *Id.* at 737-38. The court indicated that cost alone may not be an appropriate standard for finding predatory pricing. *Id.* at 738. Other factors that may raise additional indicia of predatory motive and intent include the timing of price cuts, growth cycles of the business and the circumstances and duration of the price cuts involved. *Id.* The court found that the defendants' low prices were timed to coincide with entry into the market and that the parent corporation's transfer prices to its subsidiary were lower than anywhere else in the United States, notwithstanding generally higher transportation and warehousing costs in Hawaii. *Id.* Discussion of differing predatory pricing standards by the court reflects the national debate among legal scholars and economists about the relative merits of a strictly economic-based cost approach to the determination of predatory intent as opposed to a broader, multiple factor approach that draws predatory intention from the totality of circumstances. *See, e.g.*, Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L. J. 284 (1977).

[87] 513 F. Supp. at 736.

[88] *Id.* at 744-45.

rate entities for section 480-2 purposes, the federal court preserved a viable cause of action for the plaintiff, separate and distinct from the more specific section 481-3 claim.

IV. Conclusion

The *Island Tobacco* cases not only present an interesting view of how certain sections of Hawaii's antitrust laws will be interpreted, they also cast some light upon the potential problems facing future antitrust litigants when two courts, state and federal, interpret the law in slightly different ways. The Hawaii Supreme Court went to considerable lengths in discussing the origins of and legislative intent behind the state antitrust statutes to explain the interpretive stance the court would adopt[89] and underlying policies it would consider[90] in applying those seldom-used statutes to this and future antitrust actions. The court indicated through its analysis of the issues in *Island Tobacco* that the development of state antitrust law in Hawaii would closely follow the "federal paradigm."[91] As if to reinforce this effort, the Hawaii State Legislature amended section 480-3 in 1981 to insure that state courts construe Hawaii's antitrust laws in accordance with federal judicial interpretations of similar statutes.[92]

Clearly, where potential for differing statutory interpretations by federal and state courts exist, a practitioner is left with considerable uncertainty as to which interpretation will be given final effect in either court. While the holdings regarding predatory pricing in the *Island Tobacco* cases are not inconsistent on their face, there are indications that the state and federal courts may not interpret Hawaii's antitrust laws in precisely the same manner in the future. The difficulty in predicting the position of the Hawaii Supreme Court on antitrust matters stems in part from the small number of decisions from that court dealing with this topic.[93] Future litigation should help clarify apparent and potential inconsistencies between the state and federal courts.

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[89] The court emphasized that federal antitrust legislation and judicial decisions would serve only as interpretive guides and would be applied in light of business and economic conditions in Hawaii. 63 Hawaii at 299, 627 P.2d at 268.

[90] *See, e.g.*, 63 Hawaii at 302-03, 627 P.2d at 269-71. The state court adopted an expansive view of §§ 480-2 and 481-3, finding as common objectives the protection of individual competitors and private interests as well as competition and the public interest. This policy of the Hawaii Supreme Court differs from the federal approach to similar antitrust laws. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (antitrust laws were enacted for the protection of competition, not competitors).

[91] 63 Hawaii at 297, 627 P.2d at 267.

[92] Act 91, 1981 Hawaii Sess. Laws 181.

[93] 63 Hawaii at 296-97, 627 P.2d at 266.

CAMPBELL V. ANIMAL QUARANTINE STATION: NEGLIGENT INFLICTION OF MENTAL DISTRESS

I. INTRODUCTION

In *Campbell v. Animal Quarantine Station*,[1] the principal issue before the Hawaii Supreme Court was whether plaintiffs could recover damages for mental distress resulting from the negligently caused death of a family pet. Other issues considered by the court revolved around the requirements for recovery under such a claim: whether plaintiffs must actually witness the tortious event and whether medical testimony was required to substantiate the claim of serious mental distress.

The court held that plaintiffs could recover damages for negligent infliction of serious mental distress resulting from the destruction of plaintiffs' property without showing physical manifestations of harm and without having witnessed the tortious event or having been at the scene at its immediate aftermath. The court also held that the absence of medical testimony would not act as a bar to recovery.

II. FACTS

The plaintiffs, Mr. and Mrs. Campbell and their four children, had owned Princess, a nine year old female boxer dog, since she was a few weeks old.[2] When the Campbells moved to Hawaii they brought Princess. Upon her arrival, on June 6, 1975,[3] Princess was transported to the Animal Quarantine Station as required by state law.[4]

Three days later, Princess and six other animals were loaded by Quarantine personnel into a van for transportation to the Kapalama Pet Hospital.[5] There were no ventilation devices in the section of the van contain-

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[1] 63 Hawaii 557, 632 P.2d 1066 (1981).

[2] *Id.* at 558, 632 P.2d at 1067.

[3] *Id.*

[4] Hawaii Revised Statutes, chapter 142, and Regulation 10 of the Division of Animal Industry, Dep't of Agriculture, provide that cats and dogs entering Hawaii, except those from specified locations, are required to be quarantined at the Animal Quarantine Station of the State of Hawaii for a minimum of 120 days at the expense of the owners.

[5] Upon arrival at the quarantine station, Princess was given a medical examination and found to be in good health with the exception of a growth on her gums which did not require emergency treatment. The quarantine station notified Mr. Campbell of the growth

ing the animals, and Princess was in the hot van which was exposed directly to the sun for at least an hour.[6] She died of heat prostration fifteen to twenty minutes after her arrival at the Kapalama Pet Hospital.[7]

The Campbells heard the news of Princess' death on the following morning, June 10, 1975.[8] Suit was brought in Circuit Court against the Animal Quarantine Station of the State of Hawaii.[9] The trial judge found that, except for the youngest child, the entire family was preoccupied with Princess' death for two to three weeks after hearing the news and suffered serious mental distress.[10] The trial court awarded attorneys' fees and costs, and damages of one hundred dollars for the loss of the dog and one thousand dollars for the varying degrees of serious mental distress suffered by each of the plaintiffs.[11] The Hawaii Supreme Court affirmed.[12]

III. Historical Developments

There has been a reluctance in many U.S. courts to recognize a legal right to mental tranquility.[13] Some notable exceptions have been cases where emotional distress was intentionally inflicted,[14] where there was negligence in the delivery of a death message[15] or where there was negli-

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and Mr. Campbell arranged to have a doctor at the Kapalama Pet Hospital to remove it. 63 Hawaii at 558, 532 P.2d at 1067.

[6] *Id.*

[7] *Id.*

[8] *Id.* Mr. Campbell called the veterinary hospital on the morning of June 10 to see if the family could visit Princess. Apparently it was during this conversation that he was first informed of Princess' death. Defendant's Answering Brief, Campbell v. Animal Quarantine Station, Civ. No. 45699 (1st Cir. Mar. 17, 1977).

[9] Campbell v. Animal Quarantine Station, Civ. No. 45699 (1st Cir. Mar. 17, 1977).

[10] The trial court found that all plaintiffs with the exception of Kelley Campbell (the youngest child) suffered severe mental distress. Findings of Fact and Conclusions of Law, *id.*

[11] The trial court awarded the following amounts: Rex Campbell (father $150; Faye Campbell (mother) $275; Pamela Campbell $275; Craig Campbell $150; Tamara Campbell $150; Kelley Campbell $0. *Id.*

[12] 63 Hawaii at 558, 632 P.2d at 1067.

[13] *See* McNiece, *Psychic Injury and Tort Liability in New York*, 24 St. John's L. Rev. 1, 9 (1949); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035 (1936); W. Prosser, Handbook of the Law of Torts § 54, at 327-29 (4th ed. 1971). *But see* Comment, *Negligently Inflicted Mental Distress: The Case for An Independent Tort*, 59 Geo. L. J. 1237 (1971).

[14] The Restatement (Second) of Torts states that, "[o]ne who by extreme and outrageous conduct *intentionally* or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement (Second) of Torts § 46(1) (1965) (emphasis added). *See also* State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 337, 240 P.2d 282, 285 (1952); Fraser v. Blue Cross Animal Hospital, 39 Hawaii 370 (1952); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939).

[15] *See* W. Union Co. v. Cleveland, 160 Ala. 131, 53 So. 80 (1910) (recovery for mental pain suffered by addressee of telegram summoning him to mother's deathbed due to delay in delivery); Mentzer v. W. Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895) (recovery for mental

gent mishandling of a corpse.[16]

The traditional reasons given for denying recovery for emotional distress[17] have been the potential for fraudulent claims due to the inherent difficulty in proving mental distress, the fear of unlimited and indefinite liability, the imposition of burdensome and disproportionate liability on the tortfeasor in relation to his culpability and the possibility of a deluge of suits.[18]

Different jurisdictions have adopted various "rules" designed to limit liability or weed out fraudulent claims. These "rules" can be classified as follows: physical manifestation of injury, physical impact, zone of danger and foreseeability.

A. Physical Manifestation of Injury

The purpose of this rule is to assure the authenticity of a claim by allowing recovery only when there has been some type of physical manifestation of the mental or emotional harm sustained.[19] Recovery for emo-

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anguish caused by negligent delay in delivery of telegram announcing death of plaintiff's mother); Johnson v. State, 37 N.Y.2d 378, 372 N.Y.S.2d 638 (1975) (recovery for emotional harm where state hospital negligently misinformed plaintiff of her mother's death).

[16] *See* Baumann v. White, 234 N.Y.S.2d 272 (Sup. Ct. 1962) (recovery for mental anguish and shock as result of defendant undertaker's negligent preparation of body for burial); Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949) (damages for mental anguish proper for breach of contract to conduct funeral for plaintiff's deceased husband). *See also* Muniz v. United Hosps. Medical Center Presbyterian Hosp., 153 N.J.Super. 79, 379 A.2d 57 (App. Div. 1977) (possibility of claim for emotional distress for hospital's method of informing plaintiffs as to death of their baby and its failure to locate the body or confirm death for three weeks).

[17] "Emotional distress" is a broad term which has been defined as including "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea." RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

[18] *See* Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAWAII L. REV. 1 (1979); Connolly & McCall, *Negligent Infliction of Emotional Distress: Liability to the Bystander—Recent Developments*, 30 MERCER L. REV. 735 (1979); Burley, *Negligent Infliction of Emotional Distress: Liability to the Bystander*, 11 GONZAGA L. REV. 203, 204 (1975). *See also* Spade v. Lynn & Boston R.R. Co., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897) (recovery would open the door for unjust claims); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896) (injuries may be easily feigned); Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935) (liability for emotional harm would be wholly out of proportion to defendant's culpability). *But see* Orlo v. Conn. Co., 128 Conn. 231, 236, 21 A.2d 402, 404 (1941) (advance in medical knowledge allows tracing resulting injury to negligent conduct); Neiderman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970) (improved techniques and equipment require us to give greater credit to medical evidence).

[19] *See* Keck v. Jackson, 122 Ariz. 114, 593 F.2d 668 (1979) (requiring manifestation of shock or mental anguish as a physical injury); D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. 1973) (confining ruling of recovery to case which resulted in physical injury); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978)

tional distress under this rule has been allowed for a wide variety of physical manifestations, ranging from nervousness and sleeplessness to heart failure.[20]

B. *Physical Impact*

The physical impact rule requires that there be some impact or contact with the plaintiff in order to recover damages.[21] Perhaps in recognition of the arbitrariness of this limitation,[22] courts have stretched to find the requisite "impact" in circumstances where the impact actually has little correlation to the accompanying claims for emotional distress.[23] A minor-

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(requiring substantial physical injury as well as proof of a causal connection between that injury and defendant's negligent act); Aragon v. Speelman, 83 N.M. 285, 491 P.2d 173 (1971) (refusing to permit bystander recovery without allegation of physical injury); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975) (mother who suffered no physical impact but sustained mental and emotional harm accompanied by physical symptoms from witnessing death of child); RESTATEMENT (SECOND) OF TORTS § 436A (1965). *But see* Molien v. Kaiser Foundation Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (requirement of physical injury encourages extravagant pleading and distorted testimony).

[20] *See* Brott, *Negligent Infliction of Emotional Harm*, 7 HAWAII B. J. 148 (1971). Many jurisdictions still require accompanying physical harm. *See, e.g.*, Madeiros v. Coca-Cola Bottling Co., 57 Cal. App. 2d 707, 135 P.2d 676 (1943) (nausea and vomiting); Kelly v. Lowney, 113 Mont. 385, 126 P.2d 486 (1942) (heart failure); Colsher v. Tenn. Elec. Power Co., 19 Tenn. App. 166, 84 S.W.2d 117 (1935) (nervousness and sleeplessness). *But see* Molien v. Kaiser Foundation Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (eliminating the physical injury requirement); Montinieri v. S. New England Travel, 174 Conn. 337, 398 A.2d 1180 (1978) (*dictum* indicating the court would be willing to eliminate the physical manifestation of injury rule); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) (the absence of resulting physical injury should not bar recovery), citing Leong v. Takasaki, 55 Hawaii 398, 403, 520 P.2d 758, 762 (1974).

[21] *See* Newberg v. Michael Reese Hosp. & Medical Center, 60 Ill. App. 3d 679, 377 N.E.2d 215 (1978) (plaintiff may not recover for emotional distress unless plaintiff himself was also physically injured by defendant's conduct); Spade v. Lynn & Boston R.R. Co., 168 Mass. 285, 47 N.E. 99 (1897) (denying recovery to a bystander who allegedly suffered mental distress from witnessing an altercation between a train conductor and a passenger); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896) (denying recovery to plaintiff who suffered a miscarriage from defendant's negligent operation of a buggy because there was no impact).

[22] Justice Holmes considered the impact rule "an arbitrary exception, based upon the notion of what is practicable." Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 457, 62 N.E. 737, 738 (1902). The Pennsylvania Supreme Court has stated:

> It appears completely inconsistent to argue that the medical profession is absolutely unable to establish a causal connection in the case where there is no impact at all, but that the slightest impact . . . suddenly bestows upon our medical colleagues the knowledge and facility to diagnose the causal connection between emotional states and physical injuries.

Niederman v. Brodsky, 436 Pa. 401, _, 261 A.2d 84, 87 (1970) (footnote omitted).

[23] *See, e.g.*, Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (evacuation of horse's bowels onto plaintiff's lap); Philadelphia, B. & W. R. R. v. Mitchell, 107 Md. 600, 69 A. 422 (1908) (impact against plaintiff's clothing); Porter v. Del. L. & W. R. R., 73

ity of jurisdictions still adhere to this requirement.[24]

C. *Zone of Danger*

Most of the jurisdictions which have eliminated the impact requirement have substituted the so-called "zone of danger" test, which allows the plaintiff to recover if he or she was within the geographical area of possible physical impact,[25] regardless of whether an impact in fact occurred.[26]

There is a split of authority among those jurisdictions using the zone of danger approach; some require that the plaintiff must have been in fear for his or her own safety,[27] while others allow recovery for emotional distress where the plaintiff, although within the zone of danger, experienced

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N.J.L. 405, 63 A. 860 (1906) (dust in eyes); Morton v. Stack, 122 Ohio 115, 170 N.E. 869 (1930) (inhalation of smoke); Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wis. 2d 468, 374 P.2d 549 (1962) (percussion effect of an explosion).

[24] *See, e.g.*, Garber v. United States, 578 F.2d 414 (D.C. Cir. 1978) (plaintiffs who were taken hostage by prisoners in cell block not entitled to recovery for emotional stress as District of Columbia precludes recovery in absence of physical impact); Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688, 697 (W.D. Ark. 1959) (applying Arkansas law) (denying recovery for negligently inflicted emotional anguish, fright, shock or grief unless produced by a physical injury); Pretsky v. Southwestern Bell Tel. Co., 396 S.W.2d 568 (Mo. 1965) (no recovery for fright, terror, anxiety or mental distress unless accompanied by some physical injury).

[25] The Restatement (Second) of Torts adopts the zone of danger test, stating that there is no liability for "illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an *unreasonable risk of bodily harm* to the other." RESTATEMENT (SECOND) OF TORTS § 313(2) (1965) (emphasis added).

[26] *See, e.g.*, Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963) (liability may be predicated upon fright and consequent illness induced by plaintiff's reasonable fear for her own safety), *overruled by* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Robb v. Pa. R. R. Co., 58 Del. 454, 210 A.2d 709 (1965) (recovery should be permitted to one in the immediate zone of physical risk); Whetham v. Bismark, 197 N.W.2d 678 (N.D. 1972) (denying recovery to mother of newborn baby for emotional and mental shock suffered after seeing her baby dropped by hospital employee as she was not herself threatened with harm nor placed within the zone of danger); Guilmette v. Alexander, 128 Vt. 196, 259 A.2d 12 (1969) (denying recovery to mother who witnessed her daughter being struck by defendant's automobile as she was outside the zone of danger).

[27] *See, e.g.*, Maury v. United States, 139 F. Supp. 532 (N.D. Cal. 1956) (denying recovery to plaintiffs who were not in fear of physical impact themselves but feared physical impact to their child); Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959) (plaintiff entitled to damages for fright and shock caused by fear of injury to herself but not for injuries occasioned by fear of harm to another); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (denying recovery to plaintiff-witness who suffered mental and physical injuries caused by shock and fear for her child who was in an auto accident, although plaintiff was only a few feet away); Waube v. Warrington, 216 Wis. 603, 258 N.W.2d 497 (1935) (if a plaintiff is actually put in peril of physical impact, it is immaterial that the impact did not in fact occur). *See also* Annot., 64 A.L.R.2d 100, 143 (1959).

fear only for another's safety.[28]

D. *Foreseeability*

In 1968, the California Supreme Court rendered the landmark decision of *Dillon v. Legg*,[29] which held that the zone of danger requirement was too arbitrary to be an effective guideline with which to determine liability.[30] The court adopted the position that liability for the negligent infliction of emotional distress should be imposed where such injury was reasonably foreseeable to the defendant.[31] It laid out factors to consider in making this determination and also in deciding whether the defendant owed the plaintiff a duty of due care.

Most jurisdictions have refused to adopt the foreseeability test, fearing that such a rule would subject a negligent defendant to infinite liability.[32]

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[28] *See, e.g.*, Bowman v. Williams, 164 Md. 397, 402, 165 A.2d 182, 184 (1933) (no reason to deny recovery when injury arises from fear for safety of plaintiff's children rather than fear for his own safety). *Accord*, RESTATEMENT (SECOND) OF TORTS § 436(3), Comment f (1965).

[29] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[30] In *Dillon*, Mrs. Dillon and her daughter, Cheryl, witnessed the automobile accident in which Mrs. Dillon's infant daughter, Erin, was killed. The zone-of-danger requirement may have allowed Cheryl to recover, but would have denied recovery to Mrs. Dillon for emotional distress as she was not within the zone of danger. The court noted that it could "hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident." *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

[31] "Since the chief element in determining whether defendant owes a duty or obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case." *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The *Dillon* court limited its holding to the case where there were resulting physical manifestations of the injury, but a recent California case eliminated this bar to recovery. *See* Molien v. Kaiser Foundation Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). The court in *Dillon* stated:

> In determining . . . whether defendant should reasonably foresee the injury to plaintiff, or . . . whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Dillon v. Legg, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

Although the *Dillon* factors were given as guidelines to be used in determining foreseeability, subsequent California cases have applied them more in the nature of *requirements* of foreseeability. *See* Miller, *supra* note 18, at 5 n.34. Professor Miller states that "[i]n effect, the California courts have imposed a new 'impact' requirement by turning the second listed factor, 'direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident,' into a requirement of recovery rather than an element to be considered."

[32] *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). The New York court in *Tobin* denied recovery to a mother whose son was seriously injured

Other courts have adopted this test with modifications, adding different factors to be considered in determining foreseeability.[33] Still others have adopted the *Dillon* standard *in toto*.[34]

IV. DEVELOPMENTS IN HAWAII

Two years after *Dillon*, the Hawaii Supreme Court followed with *Rodrigues v. State*.[35] In *Rodrigues*, the plaintiffs were owners of a just-completed home in a subdivision on the west coast of the Island of Maui. The State's negligence in failing to clear drainage culverts caused storm waters to flood the Rodrigues' home to a height of six inches and caused extensive damage to the house and furnishings.[36] The court held that a duty exists to refrain from the negligent infliction of serious mental distress. Rather than making it "parasitic" to another actionable claim, the court found that an individual's interest in freedom from negligent infliction of serious mental distress was entitled to independent legal protection.[37]

The *Rodrigues* case established that, in Hawaii, recovery for serious mental harm can be obtained for damage to or loss of property.[38] How-

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in a traffic accident, and refused to abandon the zone of danger rule:

> The problem of unlimited liability is suggested by the unforeseeable consequence of extending recovery for harm to others than those directly involved in the accident. If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined. It would extend to older children, father, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders.

Id. at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559. *See also* Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969) (no legal duty existed to plaintiff outside zone of danger who had witnessed her young daughter being struck by an automobile).

[33] *See* D'Ambra v. United States, 354 F. Supp. 810 (D.R.I. 1973) (applying Rhode Island law) (adding that the presence of the parent must also be foreseeable). *See also* Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248, 1256 (1974); Simmons, *Psychic Injury and the Bystander: The Transcontinental Dispute between California and New York*, 51 ST. JOHN'S L. REV. 1, 21, 39 (1976).

[34] *See* D'Amicol v. Alvarez Shipping Co., Inc., 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. 1973) (allowing recovery to parents who saw their child killed in an auto accident as their shock was reasonably foreseeable and the direct consequence of tortious act); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) (adopting the foreseeability rule).

[35] 52 Hawaii 156, 472 P.2d 509 (1970).

[36] *Id.* at 159, 472 P.2d at 513. A loan was required to pay for repairs and, in addition, the Rodrigueses spent approximately six weeks scraping damaged rubber carpets off the floor with razor blades. "Mr. Rodrigues reported that he was 'heartbroken' and 'couldn't stand to look at it' and Mrs. Rodrigues testified that she was 'shocked' and cried because they had waited fifteen years to build their own home." *Id.* The trial court awarded $5,535.04 for repairs, labor and loss of occupancy for four months and $2,307.69 for interest charges on the loan. *Id.*

[37] *Id.* at 174, 472 P.2d at 520.

[38] The trial court awarded $2,500 for "mental anguish and suffering, inconvenience, disruption of home and family life, past and future, etc." *Id.* at 160, 472 P.2d at 514. The court

ever, the plaintiffs in *Rodrigues* had not actually witnessed the negligent conduct.[39] There also was no showing of physically manifested harm. The court left this part of the question of recovery for mental distress open and remanded the case with instructions to the trial court to decide whether serious mental distress was a reasonably foreseeable consequence of the defendant's failure to act.[40]

In line with *Dillon*, the court in *Rodrigues* found that one owes a duty to those who are foreseeably endangered by one's conduct but "only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous."[41] Once the duty is established, recovery for *serious* mental distress is allowed "where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[42]

The next important Hawaii decision in the area of emotional distress liability was *Leong v. Takasaki*.[43] The plaintiff, who was ten years old at the time, was about to cross Kalanianaole Highway with his *hanai*-grandmother.[44] He saw defendant's car approaching and stopped, but his *hanai*-grandmother continued across the street and was struck and killed instantly. Plaintiff claimed to have suffered serious mental distress without physical impact or injuries.[45]

In accordance with its holding in *Rodrigues*, the court reversed the trial court's grant of summary judgment for the defendant, holding that mental distress damages are recoverable without physical impact or physical injuries. The court remanded the case for proof of the nature and extent of the plaintiff's emotional damages.[46] With regard to proximate cause, the court held that "when it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with

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remanded for designation of award for each category of damages rather than a lump sum, rejecting the award for "future" disruption of home and family life and the inclusion of "etc." The total award would then be reduced by the amounts designated under these categories.

[39] *Id.* at 159, 472 P.2d at 513. During the period in question, Mr. and Mrs. Rodrigues were living in Wailuku, located in central Maui, and had planned to move into their new home on the day of the flooding.

[40] *Id.* at 174, 472 P.2d at 521.

[41] *See* HARPER & JAMES, 2 THE LAW OF TORTS 1018 (1956).

[42] 52 Hawaii at 173, 472 P.2d at 520. It is interesting to note that in the *Rodrigues* case the court placed a clear emphasis on the idea that recovery should be allowed only for *serious* mental distress, as determined by the jury in applying the reasonable man standard.

[43] 55 Hawaii 398, 520 P.2d 758 (1974).

[44] *Hanai* generally refers to the Hawaiian concept of adoption. The custom of giving children to grandparents, near relatives or friends to raise is common. Thus, strong ties may be established where no blood relation exists. In this case, the victim was plaintiff's stepfather's mother.

[45] Plaintiff stated that his grades in school had dropped immediately after the accident but had subsequently risen to their previous level and he thought about the accident at times. 55 Hawaii at 401, 520 P.2d at 761.

[46] *Id.* at 413, 520 P.2d at 767.

the mental stress engendered by such circumstances, the trial court should conclude that defendant's conduct is the proximate cause of plaintiff's injury."[47]

A year later in *Kelley v. Kokua Sales and Supply, Inc.*,[48] the court limited recovery in the mental distress area by imposing a requirement that plaintiffs be located within a reasonable distance from the scene of the accident.[49] In that case, the plaintiff was in California when he was notified by telephone from Honolulu that his daughter and one of his granddaughters had been killed in a traffic accident.[50] A short time later he died of a heart attack. The court justified its holding by noting that without reasonable and proper limitations, a defendant "would be confronted with an unmanageable, unbearable and totally unpredictable liability."[51]

V. ANALYSIS

In *Campbell*, the State appealed three issues to the Hawaii Supreme Court: (1) Whether plaintiffs must have witnessed the tortious event in order to recover damages for serious mental distress; (2) whether medical proof or expert testimony was required to substantiate plaintiffs' claims of serious mental distress; and (3) whether the case was controlled by *Rodrigues v. State*, which allowed recovery for serious mental distress resulting from the negligent destruction of plaintiff's property.[52]

A. The "Witnessing" Requirement

The Hawaii Supreme Court addressed two points with regard to the "witnessing" issue: whether there was a requirement that the plaintiffs be eyewitnesses, and whether recovery was barred by the plaintiffs' distance from the event.[53]

The court pointed out that in *Rodrigues*, the only other Hawaii case dealing specifically with property damage, the plaintiffs had "witnessed

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[47] *Id.* at 410, 520 P.2d at 765.

[48] 56 Hawaii 204, 532 P.2d 673 (1975).

[49] *Id.* at 209, 532 P.2d at 676.

[50] Defendant's truck lost its brakes and collided into the automobile driven by Mr. Kelley's daughter. The daughter and a granddaughter were killed and Mr. Kelley's other granddaughter sustained critical injuries. *Id.* at 205, 532 P.2d at 674.

[51] *Id.* at 209, 532 P.2d at 676. Mr. Kelley clearly met the serious mental distress standard set forth in *Rodrigues* and *Leong*, but his location was too remote from the scene of the accident to allow recovery.

[52] 63 Hawaii 559, 632 P.2d at 1067-68.

[53] The defendant argued that no duty was owed to the plaintiffs because they were "neither eyewitnesses to the dog's death nor located within a reasonable distance of the accident [and] that it was therefore not foreseeable that severe emotional distress would be incurred . . . ." *Id.* at 561, 632 P.2d at 1069.

the consequences but not the accident and were not located any further from the scene of the accident than were [the Campbells] in the current case."[54] Thus, the court apparently attached no significance to the fact that the Campbells never viewed the "consequences" of the accident.[55] This represents a clear rejection by the Hawaii Supreme Court of the "contemporaneous impact on the senses" requirement of the California cases,[56] in favor of a more liberal approach.

It also appears that the court may be having second thoughts about its own "reasonable distance from the accident" rule, developed in *Kelley*. The court pointed out that the policy considerations which prompted it to lay down the proximity limitation on the scope of the duty owed—the need to prevent unmanageable and unpredictable liability—did not exist in the case at bar since these plaintiffs and their dog were all located in Honolulu.[57] Although *Kelley's* proximity requirement must still be met to recover in mental distress cases, the court has apparently created an out for cases where unpredictable liability is not a concern.[58] However, adherence to the requirement may still prove unfortunate in some situations. If the Campbells had been vacationing on Maui, instead of Honolulu, or even if one of the plaintiff-children had been on the Mainland on that particular day, recovery might have been precluded since not all the parties would have been in Honolulu. Limitations on the scope of duty and liability already exist as general tort principles. The requirements that the plaintiff be foreseeable and that the defendant's acts be the proximate cause of the plaintiff's harm should be sufficient limitations on liability.

B. Medical Testimony

Proof of the Campbells' distress was offered through testimony by the plaintiffs "relating to the background of their relationship with Princess, the role Princess played in their daily routine, and their respective feelings and the type of loss which each felt upon hearing the news of the dog's sudden death."[59]

Citing *Rodrigues, Dold v. Outrigger Hotel*[60] and *Leong*, the court held

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[54] *Id.*

[55] "None of the plaintiffs saw the dog die, nor did any of them see the deceased body of Princess." *Id.* at 558, 632 P.2d at 1067.

[56] *See* note 31 *supra.*

[57] 63 Hawaii at 561-62, 632 P.2d at 1067.

[58] "Confining liability to a specific sphere of contemporaneity, as proposed, is all too inflexible. In effect the majority reinstates a scheme of arbitrary distinctions as to where liability ends that we expressly rejected in *Rodrigues*. The artificiality of the majority's position is too readily apparent." Kelley v. Kokua Sales, Inc., 56 Hawaii 204, 213, 532 P.2d 673, 678 (Richardson, C.J., dissenting).

[59] 63 Hawaii at 562, 632 P.2d at 1069.

[60] 54 Hawaii 18, 501 P.2d 368 (1972).

that medical proof, or expert medical testimony, "should not be a requirement allowing or barring the cause of action," but could be "offered to assist in proving the 'seriousness' of the claim and the extent of recovery."[61]

The holding in *Campbell* is significant because the role of expert medical testimony had previously been unclear. In *Rodrigues,* there was no medical testimony and although the court indicated that the trial judge had discretionary power to judge the genuineness of a claim, the issue of medical proof was not specifically addressed.

In *Leong,* the picture became even more cloudy.[62] The court discussed two types of mental reactions to trauma: primary and secondary responses.[63] Primary responses, which do not result in physical injury, make determination of "precise levels of suffering and disability" difficult, as "this reaction is subjective in nature."[64] The court in *Leong* pointed out that "[t]he *physician or psychiatrist* must rely on the plaintiff's testimony . . . and even the framework of human experience and common sense" to determine the extent of harm.[65] The court then remanded the case, stating that "plaintiff should be permitted to prove medically the damages occasioned . . . ."[66] The procedural posture of the case made it difficult to tell if the court believed medical testimony was necessary.

In *Campbell,* the court pointed out that "the proof of mental distress was not of a medically significant nature,"[67] at least for the purpose of assessing a defendant's liability. This approach opens the way for jurors,

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[61] 63 Hawaii at 564, 632 P.2d at 1071. The court also stated, "[r]ather than making medical testimony a prerequisite for recovery for emotional distress, it . . . should be used as [an] indicator of the *degree* of the mental distress, not as a bar to recovery." *Id.*, 632 P.2d at 1070 (emphasis in the original).

[62] In *Leong,* the court noted that the plaintiff never consulted a doctor for treatment of his alleged shock or psychic injuries, but that plaintiff had stated that his school grades had temporarily dropped, and that he thought about the accident at times. 55 Hawaii at 401, 520 P.2d at 761.

[63] The court in *Leong* stated:

> Traumatic stimulus may cause two types of mental reaction, primary and secondary. The primary response, an immediate, automatic and instinctive response designed to protect an individual from harm, unpleasantness and stress aroused by witnessing the painful death of a loved one, is exemplified by emotional responses such as fear, anger, grief, and shock . . . .
>
> Secondary responses, which may be termed traumatic neuroses, are longer-lasting reactions caused by an individual's continued inability to cope adequately with a traumatic event.

55 Hawaii at 411-12, 520 P.2d at 766-67.

[64] *Id.* at 412, 520 P.2d at 767.

[65] *Id.*

[66] The court in *Leong* stated, "the absence of a secondary response and its resulting physical injury should not foreclose relief . . . . [T]he plaintiff should be permitted to *prove medically* the damages occasioned by his mental responses to defendant's negligent act . . . ." *Id.* (emphasis added).

[67] 63 Hawaii at 563, 632 P.2d at 1070.

in light of common knowledge and their own experiences, to assess whether a defendant's act would reasonably result in the mental distress claimed by plaintiff.[68] The court did note, however, that medical testimony should be used as an indicator of the *degree* of mental distress.[69] Therefore, medical testimony may still be relevant to the issue of damages.[70] Such testimony may be especially appropriate in cases where mental distress in the form of secondary responses, or "traumatic neuroses"[71] is alleged, especially since potential damages in these cases will most likely be greater than those involving primary responses, as in *Campbell*.[72]

C. *Recovery for Destruction of Property*

The court in *Campbell* reaffirmed Hawaii's unique approach to the area of recovery for medical distress as laid out in *Rodrigues*. The court pointed out that "there has been no 'plethora of similar cases'; the fears of unlimited liability have not proved true," and that "other states have begun to allow damages for mental distress suffered under similar circumstances."[73] The court held that damages for mental distress suffered by loss of a family pet was a proper item of recovery.

VI. IMPACT

In the aftermath of *Campbell*, serious consideration must be given to the extent of liability of someone who negligently inflicts mental distress. *Campbell* directly addresses the witnessing requirement and the need for medical proof or expert testimony.[74]

Other jurisdictions have required medical testimony to verify injury, especially where the injury involves emotional distress. The Hawaii Supreme Court noted in both *Rodrigues* and *Campbell* that the proof of

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[68] This approach seems to make sense, for use of expert testimony has been criticized on the grounds that for every plaintiff's witness there exists a defendant's witness prepared to reach the opposite conclusion. *See, e.g.*, Peck, *Impartial Medical Testimony—A Way to Better and Quicker Justice*, 22 F.R.D. 21, 23 (1959).

[69] 63 Hawaii at 564, 632 P.2d at 1070.

[70] The court has indicated, however, that medical testimony is not necessary to establish damages. *See* text accompanying notes 76-78 *infra*.

[71] *See* note 63 *supra*.

[72] Although one might infer from the court's differentiation between primary and secondary responses that requirements of proof might also differ, the court did not explicitly limit its holding to cases involving only primary responses. *Compare* this approach *with* Molien v. Kaiser Foundation Hosps., 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (there will be circumstances in which alleged emotional injury is susceptible of objective ascertainment by expert medical testimony).

[73] 63 Hawaii at 565, 632 P.2d at 1071.

[74] *See* note 52 *supra* and accompanying text.

mental distress was not of a medically significant nature. Since in the absence of expert testimony proof of the existence of mental distress would be dependent on the plaintiff's testimony, the Hawaii Supreme Court places the discretionary power to evaluate that testimony on the trial court. In such cases, medical proof and expert testimony are useful in determining the extent of damages but its absence will not bar a claim for recovery.

In *Campbell,* the seriousness of the distress was a factor in establishing the amount of the award. The Campbells were awarded one thousand dollars for the loss of Princess; the Hawaii Supreme Court remarked that this indicated the "awareness of the limited duration and severity of the distress suffered by the plaintiffs."[75] The *Campbell* case is interesting, however, in that it actually sets a very low threshold for "serious" mental distress.

There are several questions which *Campbell* appears to leave open: (1) Will courts be able to fairly assess mental distress without a showing of medical proof? (2) Will recovery be possible where there is serious mental distress but no property damage? (3) Will ownership of the property be a prerequisite to recovery? (4) Should the geographic requirement in *Kelley* be subject to challenge in the future?

A. Mental Distress without Medical Proof

The task of assessing the genuineness of a claim rests with the trial court. Since the "seriousness" of the emotional distress is a threshold requirement, it will be necessary for the plaintiff to prove that the harm alleged it justifiable under the "reasonable man" standard before recovery for mental distress is allowed. Without a requirement of medical proof or expert testimony, recovery will vary based on the trial court's ability to consistently apply the reasonable man standard. The Hawaii Supreme Court has set a low threshold to allow a cause of action, but once that threshold is met, the amount of recovery will still depend on the degree of proof offered to show "the duration and symptoms of the distress."[76] However, the court has previously indicated that expert medical testimony is not required to establish the amount to be awarded for mental distress. In the case of *Dold v. Outrigger Hotel,*[77] the court affirmed a jury instruction which stated in part that "[t]here is no precise standard by which to place a monetary value on emotional distress and disappointment, nor is the opinon of any witness required to fix a reasonable amount."[78]

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[75] 63 Hawaii at 564, 632 P.2d at 1071.
[76] *Id.*
[77] 54 Hawaii 18, 501 P.2d 368 (1972).
[78] *Id.* at 21, 501 P.2d at 371.

The court's rejection of any requirement of medical evidence, either to establish a prima facie case or to fix the amount recoverable, coupled with a low threshold for finding "serious" mental distress, obviously places a heavy burden on trial courts which must assess the wide variety of cases possible under such standards. Whether Hawaii courts will be able to successfully meet this burden remains to be seen.

2. *Recovery without Property Damage*

In *Rodrigues*, the court had said that "freedom from negligent infliction of serious mental distress is entitled to *independent* legal protection."[79] However, it is unclear how truly "independent" this tort is, and whether recovery would be allowed without a simultaneous tort of negligent injury to property.[80] For example, if a family suffers serious mental distress because they *thought* the conduct of the quarantine station had killed their dog, but, in fact, it was a different dog, would they be entitled to damages? It could be argued that a "reasonable man" would have no serious distress after realizing the mistake, but would a child be able to cope as readily, or at all, with such a traumatic event?[81] The suffering may be as intense and lasting whether or not property damage has, in fact, occurred.

3. *Significance of Property Ownership*

The court has not squarely addressed the issue of whether ownership of the damaged property might be a prerequisite to recovery, or whether it would serve only as a factor in determining whether the plaintiff's distress was reasonably foreseeable.[82]

In *Rodrigues*, the court spoke generally about the "duty to refrain from the negligent infliction of emotional distress."[83] In the instant case, however, the court spoke of "mental distress suffered as a consequence . . . [of] the destruction of *one's own property*," and "plaintiffs' property." [84]

Logically, ownership should only be a factor in determining whether

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[79] 52 Hawaii at 173, 472 P.2d at 520 (emphasis added).

[80] *Cf.* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1980) (witnessing automobile/pedestrian accident); Kelley v. Kokua Sales and Supply, Inc., 56 Hawaii 204, 532 P.2d 673 (1975) (notification by telephone of an automobile accident); Dold v. Outrigger Hotel, 54 Hawaii 18, 501 P.2d 368 (1972) (breach of contract and duty by cancelling hotel reservations).

[81] The court has focused on the extent of emotional distress brought about by a negligent act. Thus, if the plaintiff can show a resulting harm, with or without property damage, the court must evaluate whether the defendant's conduct was a cause-in-fact of the harm. *See generally* Koshiba, *The Negligent Infliction of Mental Distress II or "How Far Is Too Far?," 14* HAWAII B. J. 151 (1979).

[82] *See* note 2 *supra*.

[83] 52 Hawaii at 173, 472 P.2d at 520.

[84] 63 Hawaii at 559, 560, 632 P.2d at 1068 (emphasis added).

the plaintiff's distress was reasonably foreseeable and whether the defendant owed a duty to that plaintiff.

4. *"Reasonable Distance" Limitation*

After *Kelley*, a duty of care applies to plaintiffs who have met the standard enunciated in *Rodrigues* and *Leong*, and "who were located within a *reasonable* distance from the scene of the accident."[85]

In examining this limitation, one commentator has reasoned that:

> If 2,500 miles is unreasonable, will one, two or ten miles be reasonable? All other factors being equal, a person who witnesses an accident may suffer greater emotional distress than one who does not, but for those who do not witness the accident or its immediate aftermath, there seems to be no significant difference between 2,500 miles and 250 feet.[86]

It appears that the distance limitation will need to be reassessed if trial courts are to arrive at consistent recoveries.[87] Each new case will likely redefine what is "reasonable" until the distance requirement shrinks into impracticability.

VII. CONCLUSION

In *Rodrigues*, Justice Levinson's concurring and dissenting opinion suggested that the question of recovery for emotional distress resulting from the loss of or damage to property is still subject to great uncertainty.[88]

Campbell has largely reduced that uncertainty. This case permits recovery for serious mental distress resulting from negligently inflicted property loss. The plaintiffs are not required to actually witness the negligent act or suffer injury from physical impact. Medical proof and expert testimony may be offered, but they are not requirements allowing or barring recovery. The determination of the existence and severity of the mental distress will rest with the trier of fact applying the "reasonable man" standard and the foreseeability analysis.

Whether this decision is viewed as encouraging emotional ties to material objects,[89] or as acknowledging the reality of mental distress resulting from property loss or damage, it is clear that Hawaii has ventured beyond most jurisdictions with the result that the problems of avoiding fraudu-

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[85] 56 Hawaii at 209, 532 P.2d at 676 (emphasis added).

[86] Miller, *supra* note 18, at 11.

[87] Consistent recoveries based on a standard of reasonableness are impossible without a clear reference point. After *Rodrigues* and *Kelley*, the distance across the island is reasonable, but the distance to California is not. A large undefined area remains. *See id.*

[88] 52 Hawaii at 180, 472 P.2d at 523.

[89] *Id.* at 178, 472 P.2d at 522.

lent claims and guarding against unlimited liability must now be dealt with on a case-by-case basis.

Alan T. Kido
Elizabeth Quintal

BOOK REVIEW

PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT*
Donald G. Hagman. West Publishing Co., St. Paul, Minnesota (2d ed.). 1980. Pp. 301. $23.95.

This book is an organized *potpourri* of what every planner-lawyer ought to know about land use planning in a legal context. Wondering about the fate of federal flood hazard regulation? Turn to Chapter XIII. The latest in the consistency debate? Try Chapter VIII. Vested rights? Chapter XII. How about some useful British comparisons? Chapter XXIII, *inter alia*. In twenty-three widely divergent chapters, Hagman touches upon, jabs at, demythologizes and analyzes everything from national planning to new towns. There is a place for the mundane (the zoning forms of action, building and housing codes), the esoteric (British new towns), the trendy (windfalls for wipeouts, land banking), the tried (local planning, public participation) and even the tired (nuisance). Indeed, there is something here for everyone.

For the planner there are chapters on national, state, regional and local planning, the uses and effects of plans and the forced marriage of planning and law. These chapters in particular contain the bare minimum of case and statute material. They are long on snippets and the odd extensive excerpt from published commentaries on planning and law. For the lawyer, there is the usual stuff on zoning, subdivision, housing and building codes. There is also a fine summary of the law on taking vs. regulation in the regulatory context, a useful review of recent developments in plans as laws, and a superb, if a trifle dated, review of land use controls through pollution and environmental laws. Although these chapters tend to rely more upon cases and statutes, nevertheless there is more than enough commentary (mainly quoted from others, and this is unfortunate since the author's own incisive, often barbed comments are usually better and always more to the point) to provide the non-lawyer with enough signposts to wend through the legal maze. Indeed, compared to Hagman's first edition, the "secondary source" material has been strengthened considerably, with the result that the entire book should be of considerably

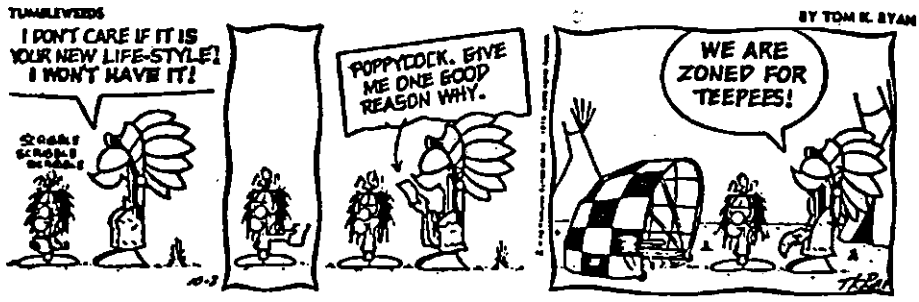
* This review was initially prepared in substantially the same form for PLANNING, which has kindly consented to its modification for reproduction here.

more use to non-lawyers, and particularly the planning community, than the first edition.

Worth signaling out in particular are the chapters on the "Uses and Effects of Plans" (VIII) and the "Zoning Classics" (XI). The former sets out a framework for discussion the debate over consistency and the emergence of plans as laws. It should be read in conjunction with the aforementioned chapter on state and regional plans, concerning which a parochial but defensible criticism: Hawaii, the set piece for many a study on statewide land use controls and plans, with the only (three-year-old) state plan enshrined *tout ensemble* in its statutes, is wholly omitted.

The zoning classics chapter commences with a commentary that is vintage Hagman. An excerpt: "Zoning itself is not so much an instrument of stability as a regulation that is imposed so that the landowner must come to the government for permission to develop." Again, Hagman on the United States Supreme Court's April Fool's Day joke that raises the protection of suburbia to the status of a fundamental right:

> Since Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) was the first zoning case the U.S. Supreme Court decided in 46 years, some might think it is a classic. It decided that a small community has the right to define a family as one related by blood or marriage and ban a group of students from living together in the area zoned single family residential.
>
> The only good thing I can say about *Belle Terre* is that it may have inspired the following cartoon:



> Another reason for not giving *Belle Terre* a place in this book, in addition to arbitrary decision-making power by the casebook author, was that once its silence on conventional land use matters was broken, review of such matters by the Supreme Court became almost routine. U.S. Supreme Court cases on land use no longer automatically qualify as classics.

Here will be found most of the recent landmark cases in the area of land use controls as well.

Such flaws as there are in Hagman's *opus* will probably trouble the

lawyer and the law professor rather than the rest of Hagman's avowed audience—students and planners. First, in order to cover so much ground in a single book, and to add the wealth of new material one would expect to find in a second edition, Hagman has done a lot of editing of previous *and* new material to the point that many critical cases are reduced to a brief paragraph or two. Second, the amount of secondary material—excerpts from articles, books and so forth—is tedious, especially when contrasted with Hagman's able commentary. Third, the devotion of entire chapters to subjects merely tangential to planning and control of development—reorganization and reform of local government, for example—is of questionable value since these subjects are usually treated in separate courses and separate books.

Nevertheless, these critical comments should not detract from the scope and sweep of the book as a whole. It is a planning and land use classic. Now if Hagman will only get about another edition of his decade-old single-volume treatise on land use—the only one in existence—we would have an unparalleled two-volume set!

David L. Callies†

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LAWS AFFECTING THE DEVELOPMENT OF OCEAN RESOURCES IN HAWAII

by Kent M. Keith*

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I. INTRODUCTION

While the ancient Hawaiians relied heavily upon the sea for their sustenance, Hawaii's industries in this century have largely been land oriented.[1] The major pillars of Hawaii's economy are presently tourism, fed-

[1] Hawaii's four major industries are tourism, defense expenditures by the federal govern-

eral defense expenditures and sugar and pineapple production. In the next two decades, this situation is likely to change. The sugar and pineapple industries face stiff foreign competition, and both have experienced recent setbacks.[2] Defense expenditures in Hawaii have grown steadily in recent years,[3] but are subject to technological change and shifts in national policy. Tourism has grown rapidly,[4] but this growth can result in crowding and overbuilding, which detract from the natural beauty which tourists come to see.

Hawaii's preferred economic growth thus depends on new industries. Aquaculture, diversified agriculture, specialty products and high technology offer important opportunities for land-based industry. To a great extent, however, the economic future of the state may depend upon the development of its ocean resources. The greatest opportunities include ocean thermal energy conversion (OTEC), manganese nodule processing and expanded fisheries. It has been estimated that these industries could provide an additional annual state economic output of $1 billion by the year 2000.[5]

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ment, sugar and pineapple. The total direct income from these four industries in 1980 was $5.1 billion. Tourism accounted for $3 billion; defense expenditures accounted for $1.3 billion; sugar and molasses accounted for $594 million; and fresh and processed pineapple accounted for $223 million. STATE OF HAWAII DEP'T OF PLAN. AND ECON. DEV. [hereinafter cited as "DPED"], STATE OF HAWAII DATA BOOK 1981, 281 (1981) [hereinafter cited as "DATA BOOK"].

[2] As of writing, both the sugar and pineapple industries are experiencing financial difficulties. On January 1, 1982, Castle and Cooke, Inc., announced that the Dole pineapple cannery would be shutting down operations for three months because of an oversupply of pineapple on the world market. Hastings, *Dole Pineapple Plant Closing For Three Months*, Honolulu Advertiser, Jan. 1, 1982, § A at 1, col. 3. On January 7, 1982, Amfac, Inc., announced the phased closing of the Puna Sugar Company on the Island of Hawaii, due to losses resulting from low sugar prices on the world sugar market. Burris, *Phaseout Of Puna Sugar Is Expected*, Honolulu Advertiser, Jan. 7, 1982, § A at 1, col. 4; Lynch, *Puna Sugar To Be Shut Down by '84*, Honolulu Star-Bulletin, Jan. 7, 1982, § A at 1, col. 1.

[3] Defense expenditures grew from $639 million in 1970 to $1.3 billion in 1980. DATA BOOK, *supra* note 1, at 281.

[4] Visitor expenditures have grown from $595 million in 1970 to $3 billion in 1980. *Id.*

[5] It is estimated that a manganese nodule processing plant on the Island of Hawaii would increase the state's total economic output by $572 to $880 million per year. R. JENKINS, K. JUGEL, K. KEITH & M. MEYLAN, THE FEASIBILITY AND POTENTIAL IMPACT OF MANGANESE NODULE PROCESSING IN THE PUNA AND KOHALA DISTRICTS OF THE ISLAND OF HAWAII 159 (1981) [hereinafter cited as "PUNA/KOHALA REPORT"]. With substantial investments in piers and fishing vessels, it is estimated that the value of the state's fisheries catch, after processing, could increase by $107 million by the year 2000. STATE OF HAWAII DEP'T OF LAND AND NATURAL RESOURCES, HAWAII FISHERIES DEVELOPMENT PLAN 28 (1979) [hereinafter cited as "FISHERIES PLAN"]. If a 40-megawatt and then a 100-megawatt OTEC plant were installed and operating by the year 2000, they would displace 1.35 million barrels of oil per year and save $58 million in oil imports to Hawaii, using the 1980 price of $43.06 as the price per barrel of oil saved. The income generated by these two OTEC plants will depend upon the sale price of electricity, which is expected to be equal to or lower than the price of electricity generated by oil. Alternate energy plants of up to 80 megawatts are guaranteed the "avoided cost of oil" pursuant to the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-

The intent of this article is to present an overview of the major planning, jurisdictional and regulatory laws affecting ocean resource development in Hawaii. A large body of law is in effect on the international, national, state and local levels. However, this body of law does not resolve a number of fundamental issues which will affect the development of Hawaii's ocean resources. For example, a major issue in planning ocean resource development is whether the state may lease the vertical water column and ocean surface within its boundaries. The state's boundaries themselves are in dispute between the state and federal governments, a dispute which is tied to the question of whether Hawaii has archipelagic status.

In regard to OTEC, the construction of land-based OTEC plants may invoke questions of the propriety of federal government regulation. The operation of OTEC facilities on the high seas may test the applicability of federal maritime law. In addition, the extent of a coastal state's regulatory powers over both near-shore and land-based OTEC plants under the Submerged Lands Act and the Coastal Zone Management Act will become important considerations.

Due to the domestic scarcity of certain primary metals, currently necessitating a dependence on foreign imports, the recovery or mining of manganese nodules from the ocean seabed may provide the United States and other nations with a new stable source of these essential metals at competitive prices. Current issues in the development of this industry center around the ownership of the nodules and proposed limitations on their production. Finally, the regulation of fisheries presents the problem of conflicting state-federal jurisdiction over Hawaii's waters, both in the channels between the major islands, and the Northwestern Hawaiian Islands.[6]

This article will provide the backdrop for resolution of these issues. Specifically, the article will focus on the following areas: (1) Planning laws, which serve as the bases for development; (2) the extent of Hawaii's ocean jurisdiction; (3) the regulation of OTEC plants; (4) the regulation of manganese nodule mining and processing; and (5) the regulation of fisheries.

II. PLANNING LAWS

A. *The Hawaii State Plan*

In order to obtain the benefits of ocean resource development, the state

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617, 92 Stat. 3117 (1978).

[6] For an analysis of the federal-state jurisdictional conflict, *see* Comment, *State-Federal Jurisdictional Conflict Over the Internal Waters and Submerged Lands of the Northwestern Hawaiian Islands*, 4 U. HAWAII L. REV. 139 (1982).

government has taken important steps to include ocean development in its planning activities. These planning activities affect the type and location of ocean resource development within Hawaii's waters.

The potential for ocean development is recognized by the Hawaii State Planning Act (State Plan),[7] signed into law in 1978 as the only legislatively adopted state plan in the nation. It is an objective of the State Plan to pursue potential growth activities "to increase and diversify Hawaii's economic base."[8] The state policy to reach that objective includes accelerated "research and development of new energy-related industries" such as ocean energy,[9] and the generation of "new ocean-related economic activities in mining, food production, and scientific research."[10] The contents of the State Plan are based upon thorough surveys of public opinion in the islands, distilled in workshops, seminars and in the legislature itself.[11]

The Hawaii State Plan will be implemented by twelve Functional Plans in the areas of energy, transportation, water resources development, historic preservation, recreation, health, conservation lands, education, housing, higher education, agriculture and tourism.[12] There is as yet no functional plan for ocean resources. During the 1981 Session of the Hawaii State Legislature, however, two resolutions were introduced and heard before the House Committee on Ocean and Marine Resources and the House Committee on State General Planning requesting the development of an ocean resources functional plan which would serve as a tool in implementing the objectives of the State Plan relating to the ocean.[13] Although these resolutions were not formally acted upon, the State Department of Planning and Economic Development (DPED) has begun drafting an Ocean Resource Development Plan[14] as a working document to coordinate and guide state activities.

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[7] HAWAII REV. STAT. § 226 (Supp. 1981).

[8] *Id.* § 226-10(a).

[9] *Id.* § 226-10(b)(4).

[10] *Id.* § 226-10(b)(9).

[11] *See, e.g.*, STATE OF HAWAII DPED, THE HAWAII STATE PLAN SURVEY (1977); STATE OF HAWAII DPED, THE HAWAII STATE PLAN SURVEY JULY 1981 (1981).

[12] HAWAII REV. STAT. §§ 226-52(a)(3), -57, -58, -59 (Supp. 1981).

[13] H. Res. 80 and H. Con. Res. 22, 11th Hawaii Leg. 1st Sess. (1981) (referred jointly to the Committees on Ocean and Marine Resources and State General Planning, then to the Committee on Finance, HOUSE JOURNAL 63, 64 (1981)).

[14] Ocean Resource Development Plan (1982) (unpublished manuscript, State of Hawaii DPED) [hereinafter cited as "Ocean Resource Development Plan"]. This working draft is based upon the FISHERIES PLAN, *supra* note 5; the Master Plan for Marine and Aquatic Education (1980) (unpublished manuscript, State of Hawaii Marine Affairs Coordinator); STATE OF HAWAII DPED, THE STATE OF HAWAII MANGANESE NODULE PROGRAM 1980-1985 (1981); and STATE OF HAWAII DPED, THE STATE OF HAWAII PUBLIC SECTOR OCEAN THERMAL ENERGY CONVERSION PROGRAM 1980-1985 (1980) [hereinafter cited as "HAWAII PUBLIC SECTOR OTEC PROGRAM"]. These plans include goals, objectives and proposed actions for implementation.

B. Coastal Zone Management

Ocean management planning is an activity of Hawaii's Coastal Zone Management Program in the DPED.[15] Hawaii's coastlines total 750 statute miles.[16] The coastal areas of the state are of crucial importance as business, residential and recreational areas, as well as being the focal point of tourist services, boat building, ship repair, warehousing and commercial diving. Over ninety-five percent of all the products moved to and from Hawaii and between the islands of Hawaii are moved through maritime activities.[17] Coastal waters are also actively used for surfing, diving, boating and fishing, and are the site of coral and marine mineral deposits. The activities and resources of the coastal zone are thus of great importance.

The U.S. Congress, concerned about inadequate planning by the various states in response to coastal zone deterioration, passed the Coastal Zone Management Act of 1972 (CZMA).[18] Congress stated in its findings that:

> (c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecologic systems, decreasing open space for public use, and shoreline erosion;
>
> . . . .
>
> (h) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal

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[15] The activities of the Hawaii Coastal Zone Management Program include the administration of state and federal program funds; the review of federal programs, permits, licenses and development proposals for consistency with the coastal zone management program; the review of program administration with the compliance of state and county agencies; and the facilitation of public participation in the coastal zone management program. Special projects have included the Hawaii Permit and Application Support System, the Inter-Agency Task Force for State Permit Simplification, Coastal Energy Impact Program, Kawainui Marsh and Ocean Management. Interview with Richard G. Poirier, Chief of the Long Range Plans Branch, State of Hawaii DPED, in Honolulu (Dec. 14, 1981).

[16] The general coastline is 750 statute miles, while the tidal coastline is 1,052 statute miles. Among all the states and territories, Hawaii ranks fourth in general coastline and seventeenth in tidal shoreline. DATA BOOK, *supra* note 1, at 109-10.

[17] Gopalakrishnan & Rutka, *Some Institutional Constraints to Coastal Zone Management: A Case Study of Hawaii*, 33 AM. J. ECON. & SOC. 225 (July 1974).

[18] Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1976) [hereinafter cited as "Coastal Zone Management Act"].

zone. . . .[19]

The CZMA therefore provides grants for states to develop and then administer coastal zone management programs.[20] The Hawaii State Legislature, responding with Act 164 in 1973, authorized the DPED to prepare state plans for coastal zone management which would comply with the requirements of the CZMA.[21]

A "coastal zone" is broadly defined in the CZMA as the coastal waters and adjacent shorelines which are "strongly influenced by each other," including transitional and intertidal areas, salt marshes, wetlands and beaches. Specifically, the zone extends "seaward to the outer limit of the United States territorial sea," and "inland from the shoreline only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters."[22] The definition was designed to be broad to suit the diverse needs of all thirty-four coastal states and territories.[23]

The CZMA requires that a management program developed by a state to govern these coastal areas include "a definition of what shall constitute permissible land and water uses within the coastal zone which have a direct and significant impact on the coastal waters."[24] In addition, a state management program must include "broad guidelines on priority of uses in particular areas, including specifically those uses of lowest priority. . . ."[25]

In compliance with the latter requirement, the DPED has set coastal zone management objectives for the state. These include:

> (3) Scenic and open space resources;
>
> (A) Protect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources.

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[19] *Id.* § 1451(c), -(h).

[20] *Id.* §§ 1454, 1455.

[21] HAWAII REV. STAT. § 205A (1976 & Supp. 1980). This was followed by Act 176 in 1975, which provided interim shoreline controls while the coastal zone management program was being prepared. Act 176, 1975 Hawaii Sess. Laws 385 (codified in HAWAII REV. STAT. §§ 205A-21 to -32 (1976)). The Hawaii Coastal Zone Management Program was approved by the U.S. Department of Commerce in September, 1978. In 1979, the Hawaii State Legislature enacted Act 200, which recognized the coastal zone management area designated by the program, and streamlined the special management area permit procedures. Act 200, 1979 Hawaii Sess. Laws 416 (codified in HAWAII REV. STAT. §§ 205A-1, -3 to -6, -22, -23, -26 to -30, -31, -33 (Supp. 1981)).

[22] Coastal Zone Management Act, *supra* note 18, § 1453(1).

[23] Comment, *The Environmental Protection Agency and Coastal Zone Management: Striking a Federal-State Balance of Power in Land Use Management*, 11 HOUSTON L. REV. 1152, 1180 (1974).

[24] Coastal Zone Management Act, *supra* note 18, § 1454(b)(2).

[25] *Id.* § 1454(b)(5).

(4) Coastal ecosystems;
(A) Protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems.

(5) Economic uses;
(A) Provide public or private facilities and improvements important to the State's economy in suitable locations.[26]

The Hawaii Coastal Zone Management Program initially focused on studies and plans for coastal lands. In 1980, the Ocean Management Program was initiated by the Hawaii Coastal Zone Management Program to study ocean uses, potential conflicts and community attitudes. This program has researched issues such as ocean dumping, harbor development, ocean mining, OTEC, fisheries, mariculture, marine research, marine sanctuaries, nearshore recreation and coastal energy development. The program's analysis of these issues provides a backdrop for the DPED's Ocean Resource Development Plan.[27]

C. Ocean Leasing Proposals

As the state administration has formulated economic development plans and analyzed ocean issues, the State Constitutional Convention and State Legislature have shown interest in the allocation of portions of Hawaii's waters for exclusive uses. In 1978, a state constitutional amendment provided for exclusive use of the ocean for mariculture purposes. The Hawaii Constitution now provides:

> [A]ll fisheries in the sea waters of the State not included in any fishpond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the reefs. The State may condemn such vested rights for public use.[28]

In 1979 and 1980, the State Legislature passed resolutions asking the Department of Land and Natural Resources (DLNR) to perform a study and develop guidelines for mariculture activities.[29] In response to those resolutions, DPED and DLNR commissioned a study of legal issues relating to ocean leasing. This study, *Ocean Leasing for Hawaii*,[30] was pub-

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[26] HAWAII REV. STAT. § 205A-2(b)(3)—(b)(5) (Supp. 1981).

[27] Ocean Resource Development Plan, *supra* note 14.

[28] HAWAII CONST. art. XI, § 6 (amended 1978).

[29] H. Res. 474, 10th Hawaii Leg., 1st Sess.(1979); H. Res. 376, 10th Hawaii Leg., 2d Sess.(1980).

[30] STATE OF HAWAII DPED, OCEAN LEASING FOR HAWAII (1981) [hereinafter cited as

lished in January, 1981. In the following months, the Ocean and Marine Resources Committee of the State House of Representatives considered H.B. No. 77, "A Bill for an Act Relating to the Leasing of Ocean and Marine Resources," known by its short title as the "Ocean Leasing Act." This bill remained in Committee during the 1981 Session, but as of this writing, has emerged as House Draft 2 in the 1982 session.[31]

The issuance of ocean leases is considered a critical step in establishing mariculture, OTEC, marine mining and other ocean industries.[32] As stated in the findings section of H.B. 77, the management and development of ocean resources may require defined rights of property in state marine waters and submerged lands.[33] The purpose of the Ocean Leasing Act would be to authorize and establish guidelines and general procedures for the grant of leases for marine activities within state marine waters and submerged lands.[34]

The impetus for the bill was the perceived need for rights of tenure and private property for major ocean developments.[35] As reflected in its various provisions, it was not proposed that all of Hawaii's offshore waters be divided and leased; only that certain areas of the ocean be leased for specific purposes.[36] Passage of the Ocean Leasing Act would establish the leasing procedure; these would be similar to the procedures now used for leasing public lands.[37] Since Hawaii's offshore waters are held as a public trust by the state government, the state would have to meet the requirements of the public trust doctrine[38] in leasing public waters to private

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"OCEAN LEASING"].

[31] H.B. 77, H.D.2, 11th Hawaii Leg., 2d Sess. (1982).

[32] Statement of Hideto Kono, Director of DPED, State of Hawaii, before the House Committee on Ocean and Marine Resources in consideration of H.B.77, *supra* note 31, on Feb. 10, 1981 [hereinafter cited as "Statement of Hideto Kono"]; Oshiro, *State Warned to Move Cautiously If It Wishes To Lease Ocean Spaces*, Honolulu Advertiser, Feb. 11, 1981, § A at 4, col. 3.

[33] H.B. 77, *supra* note 31, § 2.

[34] *Id.*

[35] Statement of Hideto Kono, *supra* note 32; Altonn, *Legislators Moving with Caution on Ocean Activity Leasing Laws*, Honolulu Star-Bulletin, Feb. 11, 1981, § A at 2, col. 1.

[36] For example, before the leasing could take place, the Board of Land and Natural Resources would propose the designation of specific state marine waters or submerged lands for leasing and would give public notice and conduct a hearing on its designation. H.B. 77, *supra* note 31, § 11(a). An environmental assessment would be required to determine whether the designation of a specific area would have a significant environmental effect. *Id.* § 11(b). In designating an area, the Board would specify which marine activities are appropriate there. *Id.* § 11(c). For example, one area could be designated for mariculture, another could be designated for OTEC and a third could be designated for both. After designation, any person wishing to obtain a lease for activities in the designated area would submit to the Board a conservation district use application along with a request for a lease. *Id.* § 12.

[37] HAWAII REV. STAT. §§ 171-13, -35 (1976).

[38] HAWAII CONST. art. XII, § 4; Admission Act of Mar. 18, 1959, Pub. L. No. 186-3, § 5(b), 73 Stat. 4. *See generally* W. RODGERS, JR., ENVIRONMENTAL LAW 170-86 (1977).

individuals.[39]

In order for the state to lease its offshore waters, it must, of course, have jurisdiction over them. Although it is clear that the State of Hawaii has legal jurisdiction over the submerged lands within its ocean boundaries, it is not clear that it has jurisdiction over the vertical water column. Under the federal Submerged Lands Act (SLA), the state was granted title to the lands beneath navigable waters to the extent of state jurisdiction.[40] There is, however, no mention of state control or ownership of the vertical water column or ocean surface. However, the authors of *Ocean Leasing for Hawaii* have advanced four arguments in the state's favor.

First, it is argued that the broad definition of natural resources in the SLA would seem to include all living and non-living resources on, beneath or above the ocean floor. It is inferred that the states have proprietary rights for all purposes not excluded under the SLA.[41]

Second, it is argued that the intent of Congress in passing the SLA was to restore to the states the proprietary rights which they had prior to the U.S. Supreme Court's 1947 decision in *United States v. California*.[42] Those rights had included rights to the water column overlying tidelands.[43]

Third, it is argued that the definition of "land" has traditionally included all that is above and below it.[44] Thus, the states ought to have the right to use the ocean space above the submerged lands, at least to the extent that such use does not create a safety hazard for surface or subsurface craft.[45]

Fourth, it is argued that many states are now leasing adjacent waters, and have enacted laws which authorize the leasing of the water column. No one has yet successfully challenged any state's exercise of this power.[46]

Notwithstanding the above arguments, the authors of *Ocean Leasing for Hawaii* agree that "no definitive statement can be made in answer to the question of whether the SLA extends a state's proprietary authority to the ocean water column itself."[47] It may therefore be wise for coastal states to join together and sponsor an amendment to the SLA to specifically grant them rights to resource management in the water column and surface waters. Since control over navigation presumably will remain largely in the hands of the federal government, state leasing of ocean surface waters will accordingly have to be consonant with federal regulation.

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[39] OCEAN LEASING, *supra* note 30, at V-84 to -125.

[40] Submerged Lands Act, 43 U.S.C. §§ 1301-1343 (1976) [hereinafter cited as "Submerged Lands Act"].

[41] OCEAN LEASING, *supra* note 30, at V-15.

[42] United States v. California, 332 U.S. 19 (1947).

[43] OCEAN LEASING, *supra* note 30, at V-16.

[44] *Id.* at V-17.

[45] *Id.* at V-18.

[46] *Id.*

[47] *Id.* at V-15.

D. Comment

Planning laws such as the Hawaii State Plan, Coastal Zone Management Act and prospective ocean leasing legislation will enable Hawaii to fare better in the allocation of its ocean resources than it has with its land resources. For example, the individual entrepreneur with a plot of land will ordinarily try to maximize its economic return, rather than dedicate the land to its most suitable natural use. This principle is illustrated by the fact that a large percentage of the best agricultural land on Oahu is now under concrete, while other areas suitable for buildings remain unused. Similarly, an individual entrepreneur with a plot of land is not likely to set his lot aside for conservation or parkland purposes which would benefit the community, but would provide no economic benefit to himself. This results in high density uses such as those found in Waikiki. With appropriate planning, ocean areas can be identified and reserved in advance for their most suitable uses. Areas determined to be too sensitive ecologically for development can be reserved for conservation purposes.

Marine resource inventories and ocean mapping can provide decision-makers with the necessary information to avoid the misallocation of ocean resources. When plans are drawn to allocate areas of the ocean for their best uses, it is important to focus on the unique characteristics of each area. The best site for an OTEC plant may also be good for fishing, mariculture and recreational boating. It may also be an important area for shipping transit and military activities. Ocean resource data will allow the state to sort out potential conflicting uses of the ocean. Indeed, it is this potential for conflict which is expected to be the largest problem in ocean resource development in Hawaii.

III. The Extent of Hawaii's Ocean Jurisdiction

A. The Hawaiian Archipelago

A basic question regarding ocean resource development in Hawaii is that of the extent of Hawaii's ocean jurisdiction. With the state administration planning for ocean resource development and the state legislature examining ocean leasing to support major ocean industries, it is essential to know how much ocean space Hawaii can include in its plans and its leases.

Hawaii is the only state in the Union that is an archipelago or group of islands. Islands may be considered a group in terms of geographical proximity, or political, social and economic unity.[48] The archipelago concept is

[48] The Draft Convention on the Law of the Sea currently under discussion at the United Nations defines an archipelago as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands,

important to Hawaii because it could give the state control over the channels between Hawaii's major islands. Control over the Kauai, Kaiwi and Alenuihaha Channels is important so that Hawaii's ocean resources can be carefully planned and managed.[49]

The rationale of the archipelagic theory is that the life of an archipelago is closely connected with the sea.[50] The ocean is a pathway for interisland shipping and travel, a source of food and a place of recreation. The waters between islands are not only crucial for economic activities but also for security.[51] In daily life, the ocean is as much a part of the archipelago as the islands.

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waters and other natural features, form an intrinsic geographical, economic and political entity, or which historically have been regarded as such." Draft Convention on the Law of the Sea (Formal Text), U.N. Doc. A/CONF. 62/L.78 (1981) [hereinafter cited as "Draft Convention"] art. 46(b). An archipelago has also been defined as "a formation of two or more islands (islets or rocks) which geographically, socially, politically and economically may be considered as a whole." Comment, *The Problems of Delimitations of Base Lines for Outlying Archipelagos*, 9 SAN DIEGO L. REV. 733 (1972). The term originally meant a broad sea, such as the Aegean Sea, interspersed with islands. The meaning shifted and now refers to the islands rather than the sea in which they are located. Comment, *The Third United Nations Conference on the Law of the Sea and an Archipelagic Regime*, 13 SAN DIEGO L. REV. 742 (1976). A narrow definition is "a formation of two or more islands which geographically may be considered as a whole." *Id.*

[49] The importance of state control over these channels stems largely from the scarcity of land within the Hawaiian Islands. The eight major islands and 124 minor islands of the state encompass only 6,425 square miles. DATA BOOK, *supra* note 1, at 117. Hawaii is fourth smallest of the states, after Rhode Island (1,214 square miles), Delaware (2,057 square miles) and Conneticut (5,009 square miles). Hawaii is smaller than Fiji (7,055 square miles) but larger than the Bahamas (5,380 square miles). GOODE'S WORLD ATLAS 230 (E. Espenshade, Jr. & J. Morrison, eds. 1978).

In addition to the lack of land area, due to the Islands' volcanic origin, only half of the state's land is available for agriculture and industry. Of the 4,128,000 acres of land in the state, the Land Use Commission has zoned 154,000 as "urban"; 1,972,000 as "agricultural"; and 9,000 as "rural." Nearly half of all state land, 1,976,000 acres, is zoned "conservation." Forest land accounts for 1,626,000 acres, or approximately 40% of the total land area in the state. DATA BOOK, *supra* note 1, at 155-56.

Due to this lack of land space, control over the interisland channels and an appurtenant EEZ could contribute significantly to the total surface area within the state's control. It is estimated that a 200-mile zone around Hawaii's islands would include 648,000 square miles of ocean, approximately 100 times Hawaii's land mass. STATE OF HAWAII DPED, OCEAN RESOURCES PROGRAM 1 (1981) [hereinafter cited as "OCEAN RESOURCES PROGRAM"].

[50] This argument was made, for example, by the Indonesian representative at the Third United Nations Conference on the Law of the Sea in 1974:

> It might be interesting for the conference to know that the Indonesian language equivalent for the word "fatherland" . . . is "tanah-air", meaning "land-water," thereby indicating how inseparable the relationship is between water and land to the Indonesian people. The seas, to our mind, do not separate but connect our islands. More than that, these waters unify our nation.

R. Schmitt, The Hawaiian Archipelago: Defining the Boundaries of the State 34 (1975) (Sea Grant College Program, University of Hawaii, Working Paper No. 16).

[51] *See, e.g.*, D. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW 98-105 (1979).

Archipelagic nation States, realizing the importance of the waters between their islands, claim those waters as their own. Archipelagic theories generally recognize waters between islands as internal waters, with baselines drawn around the headlands of all the islands in the chain and territorial seas extending outward from there.[52] Theories vary, however, and each archipelagic State has made its own unique claim.[53]

B. *The* Island Airlines *Case*

Hawaii has made archipelagic claims since it was a kingdom in the nineteenth century.[54] These claims were reviewed by the Federal District Court for the District of Hawaii in *Civil Aeronautics Board v. Island Airlines*.[55] As noted in that case, the Second Act of Kamehameha III asserted: "The marine jurisdiction of the Hawaiian Islands shall also be exclusive in all the channels passing between the respective islands, and dividing them; which jurisdiction shall extend from island-to-island."[56] It continued: "It shall be lawful for his Majesty to defend said closed seas and channels, and if the public good shall require it, prohibit their use to other nations, by proclamation."[57] In 1850, a Privy Council resolution confirmed the Second Act of Kamehameha III;[58] jurisdictional claims were made again in the 1854 Neutrality Proclamation.[59]

In conflict with these documents are section 1491 of the Hawaiian Civil Code of 1859, which repealed the Second Act of Kamehameha III, and the Neutrality Proclamation of 1877, which referred to "the full extent of our jurisdiction including not less than one marine league from the low water mark on the respective coasts of the islands," and did not claim the channels dividing the islands.[60] In addition, no reference to channel waters was made in the enactments which provided for the annexation of Hawaii in 1898, nor in the Hawaii Organic Act of 1900. However, in 1951, the Constitutional Convention of the State of Hawaii asserted that the

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[52] *Id.* at 90-97.

[53] *See* O'Connell, *Mid-Ocean Archipelagos in International Law*, BRIT. Y.B. INT'L L. 22-54 (1971) (a review of the claims of the Aaland Islands, the Faeroes, Galapagos Islands, Iceland, Malagasy Republic, the Philippines, Indonesia, Hawaii and the Pacific Trust Territory, Tonga, Fiji, Mauritius, Bermuda and the Bahamas); D. BOWETT, *supra* note 51, at 81-102.

[54] *See* R. Schmitt, *supra* note 50; *see also* J. Cades, The Boundaries of Hawaii: Its Historic Claim to Waters Beyond the Three-Mile Limit Under International Law (Jan. 9, 1967) (unpublished paper presented at the Social Science Association Meeting, Honolulu, Hawaii).

[55] C.A.B. v. Island Airlines, Inc., 235 F.Supp. 990 (D. Hawaii 1964), *aff'd*, 352 F.2d 735 (9th Cir. 1965).

[56] 235 F.Supp. at 997 (citing Stat. Laws of 1846, vol. 1, ch. VI, art. I, II §§ I-III).

[57] *Id.*

[58] *Id.* 998 (citing 3 Privy Council Rec. 425).

[59] *Id.*

[60] *Id.* at 999 (citing H. CROCKER, EXTENT OF THE MARGINAL SEA (1919)).

channels were included within the territory of Hawaii.[61] Two years later, during the 1953-1954 hearings on the statehood bills before the Committee on Interior and Insular Affairs of the U.S. Senate, Hawaii's delegates denied that Hawaii made any claims beyond the three-mile limit. Thus, the committee reported that Hawaii's territorial waters agreed with U.S. claims.[62] After reviewing these facts, the court in *Island Airlines* held that Hawaii's jurisdiction was limited to the traditional three miles around each island.[63]

C. *Recent Assertions of Jurisdiction*

For several years, the governor and other state officials have both implicitly and explicitly asserted claims over channel waters. The first of these claims was asserted with regard to coral harvesting six miles east of Makapuu Point, Oahu. On February 4, 1977, the Chairman of the Board of Land and Natural Resources wrote to Maui Divers of Hawaii, Ltd., and asserted exclusive state jurisdiction as follows:

> The State of Hawaii exercises jurisdiction and control over the waters lying between the main islands of the Hawaiian archipelago and, thus, well beyond three miles from the coastline of each island. This exercise of control is open, notorious and uninterrupted, and has existed since the first discovery of the islands. Therefore, the boundaries of the Hawaiian Monarchy, of the Republic, and of the Territorial Government, as a matter of actual practice, embraced these interisland channels; under the federal act admitting Hawaii to statehood, the boundaries of the State are coextensive with those of its predecessor governments, and equally include the interisland channels.
>
> Accordingly, it is the position of the State of Hawaii that, under accepted principles of law and of the United States Constitution, the channels lying between the main islands constitute an historic bay and are inland waters of the State. These waters are, as a matter of law, subject to exclusive State control. The area in which your company operates lies within an interisland channel which constitutes part of this historic bay and, although more than three miles from the coastline, is part of the State's inland waters.[64]

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[61] *Id.* at 1001 (citing Stand. Comm. Rep. No. 56, 1st Hawaii Const. Conv. 259 (1958)).

[62] *Id.* at 1002 (citing Hearings on S. 49, S.51 and H. Res. 3575 Part 2 Before the Senate Comm. on Interior and Insular Aff., 83rd Cong., 1st & 2nd Sess. 40-44, 47-48, 51-52, 121-124, 132, 265 (1953-54)(statement by Joseph R. Farrington, C. Nils Tavares and Oren E. Long).

[63] 235 F.Supp. at 1007.

[64] Letter from Christopher Cobb, Chairman of the Board of Land and Natural Resources, to Maui Divers of Hawaii, Ltd. (Feb. 4, 1977). This letter seems to indicate that in addition to an archipelagic claim, the state may be interested in asserting control over the channel waters on the basis that they are historic waters. For an explanation of the criteria which must be met to satisfy a claim for historic waters, *see* Broder & Van Dyke, *Ocean Boundaries in the South Pacific*, 4 U. HAWAII L. REV. 1, section II-B-2 (1982).

It is not only state officials who have asserted archipelagic claims over Hawaii's channel waters. In 1978, the State Constitutional Convention adopted, and the electorate approved, two amendments to the Hawaii Constitution. Article XI now provides, in part:

> The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the state, including the archipelagic waters of the state, and reserves to itself all such rights outside state boundaries not specifically limited by federal or international law.[65]

The state constitution's definition of boundaries was also amended. Article XV now provides, in part, "The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial and archipelagic waters, included in the Territory of Hawaii on the date of enactment of the Admission Act. . . ."[66] Unfortunately, this claim extends only to archipelagic waters included within the Territory of Hawaii at the time of admission. The Hawaii State Constitution does not, therefore, claim any archipelagic waters that did not exist as of 1959.[67]

In February, 1981, the Chairman of the Board of Land and Natural Resources wrote to the U.S. Department of Energy (DOE) Hawaii Site Representative to provide notice of acceptance and an environmental determination on a conservation district use application for OTEC-1, the *SS Ocean Energy Converter*, located at sea thirteen statute miles from Makolea Point and twenty-three statute miles from Kawaihae on the Island of Hawaii.[68] The letter noted that OTEC-1 had proceeded to its position and begun operations without a required state permit, but that the state believed that the project was important as an alternate energy demonstration, and was therefore processing an application for OTEC-1. The letter stated that the vessel's position was "definitely within the channel waters of the State of Hawaii."[69]

The DOE Hawaii Site Representative responded in March, 1981, that the DOE had not applied for a state permit, nor did it pay the fifty dollars for processing one.[70] The Chairman of the Board of Land and Natural Resources replied that the DOE did not submit or pay for the permit, but "[i]t is the view of the State that the action on the part of the Federal Government in deploying the Ocean Energy Converter in waters off Keahole Point was a constructive request for a State permit to operate."[71]

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[65] HAWAII CONST. art. XI, § 6.

[66] *Id.* art. XV, § 1.

[67] *See* section III-B *supra*.

[68] Letter from Susumu Ono, Chairman of the Board of Land and Natural Resources, to Dr. Takeshi Yoshihara, U.S. Dep't of Energy, Honolulu (Feb. 3, 1981).

[69] *Id.*

[70] Letter from Dr. Takeshi Yoshihara, U.S. Dep't of Energy, Honolulu, to Susumu Ono, Chairman of the Board of Land and Natural Resources (Mar. 11, 1981).

[71] Letter from Susumu Ono, Chairman of the Board of Land and Natural Resources, to

In May, 1981, the Board issued a conservation district use permit to the DOE for the OTEC-1 vessel.[72]

More recently, in September, 1981, several Soviet warships sailed through the Alenuihaha Channel as part of a world-wide tour to establish the free transit of channels and straits.[73] No effort was made by either the federal or state governments to prevent the entry of the Soviet vessels or resist their transit. However, a letter of protest was sent by Governor Ariyoshi to Secretary of State Haig, citing Soviet violation of Hawaii's sovereign waters.[74] In his letter, Governor Ariyoshi stated:

> As Governor of the State of Hawaii, I must call to your attention that the State of Hawaii has maintained and does maintain the position that the major islands of the State and the intervening waters are a Sovereign Archipelago and that transits through these waters are subject to the International Law of Archipelagic Waters.
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> . . . .
>
> As you know, the Archipelagic concept devices form [*sic*] the fact that commerce and trade between neighboring islands of the same sovereignty cannot be effectively and solely conducted unless the waters between these islands are under the jurisdiction and control of that sovereign. Such is the case for the Islands of Hawaii. The waters between the Island of Hawaii and the Island of Maui are subject to continuous use by the people of Hawaii. . . .
>
> The good order, peace and tranquility of our entire community is disrupted when incursions into these waters are made by ships of a foreign flag which engage in conduct which is competitive with, and in conflict with, the legitimate activities of the citizens of the United States who are residents of Hawaii. As Governor of the State of Hawaii, I cannot stand idly by when the sovereign rights of the State are infringed. I am nonetheless sensitive to the need for prudence in the international negotiations on the Law of the Sea, and in the wisdom of restraint in exerting our rights where there is international disagreement on the nature of these rights. At this time, therefore, I would only ask for your assurance that you will give full support to the archipelagic status of Hawaii in your negotiations in the Treaty of the Law of the Sea, and that you take such steps as you deem necessary to communicate to the International Committee, the archipelagic status of these waters and their duty to respect the obligations which are thereby incurred when transiting through these waters.[75]

Dr. Takeshi Yoshihara, Dep't of Energy, Honolulu (Mar. 27, 1981).

[73] Letter from Susumu Ono, Chairman of the Board of Land and Natural Resources, to Dr. Takeshi Yoshihara, Dep't of Energy, Honolulu (May 13, 1981); Whitten, *U.S. Granted Study Permit*, Honolulu Star-Bulletin, May 9, 1981, § A at 2, col. 4; Oshiro, *State Controls the Ocean up to 13 Miles, Board Says*, Honolulu Advertiser, May 9, 1981, § A at 3, col. 2.

[73] Borg, *Russian Mini-Fleet Cruising Off Hawaii*, Honolulu Advertiser, Sept. 10, 1981, § A at 11, col. 1.

[74] Kakesako & Altonn, *Ariyoshi Protests Soviet Ships in Hawaii Waters*, Honolulu Star-Bulletin, Oct. 10, 1981, § A at 1, col. 1.

[75] Letter from Governor George Ariyoshi, State of Hawaii, to Alexander M. Haig, Jr.,

James Malone, Special Representative of the President for Law of the Sea, responded to Governor Ariyoshi's letter:

> The Department of State is also concerned about the presence of Soviet warships near the islands of Hawaii and Maui and we are forwarding your letter to the Department of Defense for their information. However, under existing international law, ships (including warships) of all states have the right of innocent passage in the U.S. three mile territorial sea and freedom of navigation on the high seas seaward of three miles . . . .
>
> The archipelagic concept under negotiation at the Law of the Sea Conference is limited to states constituted wholly by one or more archipelagos which may include other islands. As thus defined, Hawaii would not qualify for archipelagic status . . . . I would also note that under the provisions of the current draft convention on the Law of the Sea all foreign ships have the right to transit states which qualify for archipelagic status through designated sealanes. Thus, even if Hawaii qualified for archipelagic status it would not be possible to prevent Soviet ships from traversing routes between its islands normally used for international navigation.[76]

Malone argued that existing laws already protect Hawaii in regard to the transit of foreign ships and the activities of foreign fishermen.[77]

D. Hawaii's Claims Under the Submerged Lands Act

The SLA[78] does not preclude Hawaii's claim to internal archipelagic waters. As a starting point, the SLA grants all states title to the lands beneath navigable waters within their boundaries.[79] The phrase, "lands beneath navigable waters," is defined to include:

> [A]ll lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastline of each such State and to the boundary line of each such State where in any case such boundary as it existed at the

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Secretary of State (Sept. 18, 1981).

[76] Letter from James Malone, Special Representative of the President for Law of the Sea, to Governor George Ariyoshi, State of Hawaii (Nov. 16, 1981).

[77] Malone stated:

> Other provisions of the existing text protect Hawaii from the problems you describe. For example, the coastal state will be able to require foreign ships exercising the right of innocent passage in the territorial sea (which could be twelve miles under the Draft Convention) to use appropriate designated sealanes and separation schemes where necessary to protect navigation, safety of life at sea or environmentally sensitive areas. In addition, under the text, as well as under existing U.S. law, the activities of foreign fishermen can be controlled to a distance of 200 miles. These provisions, of course, apply to the area around the Hawaiian islands.

Id. at 2.

[78] Submerged Lands Act, *supra* note 40.

[79] *Id.* § 1301(a)(3).

> time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles. . . .[80]

Thus, the extent of the submerged lands granted to Hawaii is either three miles from Hawaii's coastlines or to the state's boundaries at the time of admission. If the above boundaries are determined to be archipelagic, there would be no direct conflict with the SLA.

The SLA does stipulate that boundaries shall not be interpreted as extending more than three geographical miles from the coastline.[81] However, "coastline" is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[82] Since "inland waters" are not defined, there would be no conflict with the SLA if the "channel waters" claimed by Hawaii are "inland waters" of the state and state boundaries extend outward three miles from those "inland waters."

E. Hawaii's Claims Under Federal Case Law

At issue is not the breadth of the territorial sea, but rather from what point the territorial sea extends. This depends on the location of the baseline, a geographical line drawn along the coast. If the archipelagic theory is adopted, the three-mile territorial sea will extend from baselines drawn from headland to headland around the entire Hawaiian Island chain. If the archipelagic theory is not adopted, the territorial sea will extend from baselines drawn around each individual island.[83]

The United States Supreme Court has repeatedly made it clear that states are to exercise control over no more than three miles. But the Court has not put to rest the question: Three miles from where? The Court has used many different definitions of "baseline,"[84] and if the defi-

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[80] *Id.* § 1301(a)(2).

[81] *Id.* § 1301(b).

[82] *Id.* § 1301(c).

[83] Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, art. 10 [hereinafter cited as "Convention on the Territorial Sea and Contiguous Zone"].

[84] In United States v. Me. 420 U.S. 515 (1975), the U.S. Supreme Court referred to several different baseline definitions without distinguishing among them. The Court quoted the government complaint in the case, which referred to "three geographical miles seaward from the ordinary low watermark and from the outer limit of inland waters on the coast." *Id.* at 517. Then, the Court referred to United States v. Cal., 332 U.S. 19 (1947), and described the area as "extending three miles from the coastline and from the seaward limits of the State's inland waters." 420 U.S. at 519. The Court next mentioned a Texas case, where reference was made to property "seaward of low watermark." *Id.* at 521. In discussing the SLA, the Court referred to an area "within three miles . . . of the coastline." *Id.* at 526. At other times, the Court simply referred to the three-mile marginal sea. *Id.* at 528. Each definition agrees as to the three miles, but differs as to the baseline.

nition includes the seaward boundaries of inland waters, it is consistent with Hawaii's archipelagic claims.

The U.S. Supreme Court focused on baselines in the 1965 case of *United States v. California*.[85] There, the Court decided that the definition of inland waters was to have an international content, since determination of inland waters would in turn determine the nation's coastline for purposes of international law.[86] Thus, for purposes of the SLA, the Court adopted the definitions in the Convention on the Territorial Sea and Contiguous Zone, entered into force in 1964,[87] which set out the rules for delineating baselines[88] and which define "internal waters" as waters located landward of those baselines.[89] Although the Court based its decision on international law, it asserted that the definition it chose would be "frozen" and would not change even if the Convention were changed.[90]

Language in the 1965 *California* case indicates that the U.S. Supreme Court may defer to international law over the U.S. State Department for definitions of terms. In interpreting the meaning of "coastline" in the SLA, the Court stated:

> Congress, in passing the Act, left the responsibility for defining inland waters to this court. We think that it did not tie our hands at the same time. Had Congress wished us simply to rubber stamp the statements of the State Department as to its policy in 1953, it could readily have done so itself. It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available.[91]

The "best and most workable" definition in that case was the international definition.[92]

The 1965 *California* case was decided by the U.S. Supreme Court while *Island Airlines* was still on appeal.[93] The Ninth Circuit Court of Appeals took the 1965 *California* case into account in its *Island Airlines* decision, summarizing the Court's decision as deciding:

> (1) that Congress, by eliminating the definition of inland waters from the Submerged Lands Act intended to leave the meaning of the term to the courts, independently of the Act; (2) that the definition of "inland waters," as used in the Act, should conform to the "Convention on the Territorial

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[85] United States v. Cal., 381 U.S. 139 (1965).

[86] *Id.* at 164-65.

[87] The Convention on the Territorial Sea and Contiguous Zone, *supra* note 83, was entered into force for the United States on September 10, 1964.

[88] *Id.* arts. 3-13.

[89]. *Id.* art. 5(1).

[90] United States v. Cal., 381 U.S. 139, 166-67 (1965).

[91] *Id.* at 164-65.

[92] *Id.* at 165.

[93] C.A.B. v. Island Airlines, 235 F.Supp. 990, 1007 (D. Hawaii 1964).

> Sea and the Contiguous Zone . . . .[94]

Both the district court and the Ninth Circuit Court of Appeals denied the archipelagic claims argued by the airline. However, the narrow definition of "inland waters" and "coastline" found in the district court opinion was not followed by the court of appeals.[95] Inland waters were defined not by the SLA, which left the definition open, but by the international law of the sea.[96]

In future litigation, the U.S. Supreme Court might turn once again to international law, and if new definitions of an archipelago have become established under international law, it is possible that the Court could adopt archipelagic baselines for Hawaii. The Court might then find that internal archipelagic waters are inland waters of the state, since they are landward of the new baselines. Thus, Hawaii could become recognized as an archipelago by the federal government. However, this would not establish Hawaii as an archipelago under international law.

F. Hawaii's Claims Under International Law

The interdependence of land and ocean has been recognized in international treaty law with regard to coastal archipelagoes. Coastal States draw baselines along their coasts and establish their territorial seas outward from those baselines.[97] As asserted by Hawaii in the problem concerning coral harvesting off Makapuu Point,[98] formulas have been arrived at for declaring part or all of certain bays along coastlines to be "internal waters" inside the baselines. In the *Anglo-Norwegian Fisheries Case*,[99] the International Court of Justice allowed baselines to run out to and along

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[94] Island Airlines, Inc. v. C.A.B., 352 F.2d 735, 737 (9th Cir. 1964).

[95] The definition of "territorial waters" adopted by the U.S. District Court in *Island Airlines* is not the same as the definition in the SLA, to which the District Court refers. The opinion states:

> "[T]erritorial waters" has a uniformly well understood meaning and application, viz., the term includes 1, the water area comprising both inland waters (rivers, lakes and true bays, etc.) and 2, the waters extending seaward three nautical miles from the coast line, i.e., the line of ordinary low water, (oft time called the "territorial sea"). Seaward of that three-mile territorial sea lie the high seas. The Submerged Lands Act (1953) confirms titles to the States in the submerged lands off "their" coasts for a distance of three geographical miles from the coastline.

235 F.Supp. at 1007. The definition is not as well understood as the Court suggests. The Court defines inland waters as "rivers, lakes and true bays, etc.," when the SLA provides no definition at all; and "inland waters" are a part of the definition of "coastline" in the SLA, whereas the District Court here defines "coastline" merely as "the line of ordinary low water."

[96] 352 F.2d at 739.

[97] Convention on the Territorial Sea and Contiguous Zone, *supra* note 83, arts. 3, 6.

[98] *See* text accompanying note 64 *supra*.

[99] United Kingdom v. Norway (Fisheries Case), [1951] I.C.J. 116.

offshore islands, thus making areas which were formerly high seas into internal waters for baseline purposes. This concept was later embodied in article 4 of the Convention on the Territorial Sea and Contiguous Zone.[100]

The concept of straight baselines,[101] now accepted for coastal archipelagoes,[102] may also be appropriate for mid-ocean archipelagoes. Indeed, the Draft Convention on the Law of the Sea,[103] currently under discussion at the Third United Nations Conference on the Law of the Sea (UNCLOS III), would recognize straight baselines for mid-ocean archipelagoes.[104] However, under the current version of the Draft Convention, the United States could not claim archipelagic status for Hawaii because the Draft Convention would grant mid-ocean archipelagic status only to nations that consist wholly of islands. Specifically, article 46 of the Draft Convention provides that an "Archipelagic State" means a State constituted wholly by one or more archipelagoes, and may include other islands.[105]

Thus, because Hawaii is not part of the U.S. mainland geographically, it does not qualify as a coastal archipelago; because it is part of the U.S. mainland politically, it does not qualify as a mid-ocean archipelagic State. This means that the waters between the islands are not likely to be recognized by the international community as either "internal" or "archipelagic" waters.

G. Comment

Although the Draft Convention would not grant Hawaii archipelagic waters, it would allow the United States to draw a 200-mile exclusive economic zone (EEZ) around each island.[106] The EEZ would cover all the channels and would give the federal government virtually the same control over natural resources as it would have if Hawaii were allowed archipelagic status.[107] Eventually, the federal government may be willing to delegate its EEZ management responsibility to the State of Hawaii. The federal government could control foreign uses of the channels to fulfill its foreign affairs role, but delegate administrative authority to the

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[100] Convention on the Territorial Sea and Continguous Zone, *supra* note 83.

[101] A baseline, rather than following every identation of a coastline, may be drawn straight between appropriate points along a coastline. *Id.* art. 4.

[102] *Id.*; *see also* D. BOWETT, *supra* note 51, at 73-113.

[103] Draft Convention, *supra* note 48.

[104] *Id.* Part IV, "Archipelagic States," arts. 46-54.

[105] *Id.* art. 46(a).

[106] *Id.* art. 57.

[107] Under article 49, an archipelagic State exercises sovereignty over the archipelagic waters enclosed by the baselines, including the control of resources. The exercise of sovereignty is modified by articles 51-53, which require respect for traditional fishing rights, existing submarine cables, the right of innocent passage and the right of transit through designated sea lanes. Article 56 provides that in the EEZ, the coastal State has sovereignty for the purpose of exploring, exploiting, conserving and managing natural resources.

state in much the same way as it delegates authority under statutes such as the Federal Water Pollution Control Act.[108] This would give Hawaii the *de facto* control over its ocean resources that the state has sought under its archipelagic claims. In the absence of an EEZ, the federal government could claim a 200-mile OTEC zone[109] or other special purpose zone similar to the 200-mile zone it has already claimed for fisheries.[110]

A special grant of authority to Hawaii could also be achieved by a U.S. claim to "territorial" waters between the islands. This claim is not as strong as one for "internal" waters, since foreign vessels have the right of innocent passage in territorial seas.[111] A "territorial sea" claim, however, would avoid a claim to "archipelagic waters," as set forth in the Draft Convention and would not conflict directly with existing or proposed international law. It would also identify an area that could be managed by the state.

Thus, although Hawaii's claims to archipelagic status are not recognized under federal or international law, the state's goals could still be attained by the establishment of an EEZ, special purpose zone or a claim to territorial waters. By intergovernment agreement or statute, the channel waters could be assigned to Hawaii for management and development.

IV. The Regulation of Ocean Thermal Energy Conversion

The preceding sections provide the preliminary backdrop for the following discussions concerning various ocean resource industries that may be developed in Hawaii. The first discussion will focus upon ocean thermal energy conversion (OTEC). Development of OTEC in Hawaii is particularly attractive in view of the state's dependence upon imported petroleum for ninety percent of its energy consumption.

The following discussion begins with a brief description of the OTEC process, how it works, how it can be used and what developments have taken place in Hawaii as of this writing. The focus then shifts to a description of the various regulatory schemes within which OTEC may be expected to operate and their effect on OTEC development.

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[108] Federal Water Pollution, Prevention and Control Act, 33 U.S.C. §§ 1251-1376 (1976) [hereinafter cited as "FWPCA"].

[109] *See generally* V. Nanda, Selected Legal and Institutional Issues Related to Ocean Thermal Energy Conversion (OTEC) Development 31 (1979); Tefft, *Toward a Legal, Institutional and Financial Framework for OTEC Demonstration and Commercialization*, 5 Ocean Thermal Energy Conversion Con. Proc. II-267 (1978).

[110] Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (1976) [hereinafter cited as "FCMA"].

[111] Convention on the Territorial Sea and Contiguous Zone, *supra* note 83, art. 14.

A. Introduction

Recent technological advances have made ocean thermal energy conversion (OTEC)[112] a promising source of energy for the future. OTEC is a form of solar energy that utilizes the temperature differential between warm and cold ocean water to generate electricity. Twenty degrees centigrade is considered to be a sufficient temperature differential for OTEC operation. This differential is generally found in those ocean regions between twenty degrees north latitude and twenty degrees south latitude.

Two types of OTEC systems have been developed—a closed-cycle system and an open-cycle system. In the closed-cycle system, warm surface ocean water heats a working fluid, such as ammonia, which has a low boiling point, to produce steam. The steam drives a turbine to produce mechanical and then electrical energy. From the turbine, the vapor passes through to a condenser, where it is cooled by cold water pumped up through a long pipe descending into the deep ocean. On the other hand, the open-cycle system uses warm surface water itself as the working fluid. The seawater is boiled under low pressure, and the steam drives a turbine to produce energy. The steam is then condensed using the cold, deep ocean water.

Energy derived from these OTEC systems can be used in numerous ways. The electricity generated by onshore plants may be fed directly into a municipal power grid. OTEC plants built nearshore, standing on the ocean floor or floating in a moored position, may send electricity to shore by underwater electric cables. Alternatively, some OTEC plants may be designed to graze offshore, using the electricity they produce to make energy-intensive products such as ammonia or aluminum.[113] Grazing OTEC plantships may provide energy for manganese nodule mining or mariculture on the high seas.[114] It has been estimated that the total ocean ther-

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[112] P. YUEN, OCEAN THERMAL ENERGY CONVERSION: A REVIEW (1981); Haven, *Ocean Thermal Energy Conversion Systems for Hawaii*, 2 HAWAII INTEGRATED ENERGY ASSESSMENT 51-84 (1981); U.S. DEP'T OF COM., NAT'L OCEANIC AND ATMOSPHERIC AD., OFF. OF OCEAN MINERALS AND ENERGY, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR COMMERCIAL OCEAN THERMAL ENERGY CONVERSION (OTEC) LICENSING (1981) [hereinafter cited as "NOAA EIS"] at 1-7 to 1-27; J. VADUS & J. GIANOTTI, OCEAN THERMAL ENERGY CONVERSION (OTEC): OCEAN ENGINEERING (1980); Cohen, *Energy from Ocean Thermal Gradients*, 22 OCEANUS No. 4, 12 (Winter 1979/80); Douglas, *OTEC: Solar Energy from the Sea*, 3 QUEST No. 2, 2 (Autumn 1979); Avery, *Ocean Thermal Energy—Status and Prospects*, 12 MARINE TECH. No. 2, 9 (Apr.-May 1978); Anderson & Anderson, *Thermal Power from Seawater*, 88 MECHANICAL ENGINEERING No. 4, 41 (Apr. 1966).

[113] *See, e.g.*, Avery, *supra* note 112, at 9, and NOAA EIS, *supra* note 112, at 1-12.

[114] A look at a map of the best-known manganese nodule deposits shows that they fall within those ocean areas which have sufficient temperature differential for OTEC operations. OTEC plants could be the key to ocean floating cities, which could rely on OTEC to provide energy, food and water on the high seas. Such floating cities could manufacture ammonia or process nodules as export industries. Diplomatic recognition could result in independent city-states. Keith, *Floating Cities: A New Challenge for Transnational Law*, 1

mal resources within 200 miles of U.S. coasts is nearly equal to the total energy consumption in the United States today.[115]

All three of the nation's major OTEC seawater experiments are located in Hawaii: Mini-OTEC, the Seacoast Test Facility and OTEC-1. In 1978, the DPED entered into an agreement with Lockheed Missiles and Space Company and the Dillingham Corporation to fund, construct and operate a fifty kilowatt experimental OTEC plant, Mini-OTEC.[116] On August 2, 1979, Mini-OTEC became the world's first at-sea, closed-cycle OTEC plant to generate net energy.[117] Mini-OTEC operated for three and a half months, 1.3 miles off Keahole Point on the Island of Hawaii.[118] In November, 1979, it returned to the University of Hawaii's Snug Harbor facil-

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MARINE POL'Y No. 3, 202-04 (July 1977).

The cold water which is brought up during an OTEC operation could flow through ponds of algae, shellfish, shrimps, lobsters and seaweed before being discharged back into the ocean. Othmer & Roels, *Power, Fresh Water and Food from Cold, Deep Sea Water*, 182 SCIENCE No. 4108, 121, 122 (1973). It is thought that someday OTEC plants will be more important for food production than for energy. Bardach, *The Relation of Ocean Energy to Ocean Food*, in LAW OF THE SEA: NEGLECTED ISSUES 297 (1979); Roels, *Food, Energy, and Fresh Water*, 102 MECHANICAL ENGINEERING No. 6, 37 (1980); P. YUEN, OCEAN THERMAL ENERGY CONVERSION: A REVIEW 141 (1981). An open-cycle OTEC system could also provide potable water. In an open-cycle system, warm seawater is vaporized to drive the turbines. The condensed steam is clean, desalted water. OTEC's greatest contribution to the long-term energy situation may be the production of ammonia for use in ammonia fuel cells, as fertilizer or as fuel for automobiles. OTEC plants could also produce hydrogen for aircraft. During the transition from petroleum to a "hydrogen economy," OTEC hydrogen could be used to enrich fossil fuels. Craven, Overview of United States Ocean Thermal Energy Conversion Development (June 24, 1981)(speech presented to the Committee on Oceanic Resources, Keidanren, Tokyo).

[115] U.S. DEP'T OF COMM., NAT'L OCEANIC AND ATMOSPHERIC AD., OFF. OF OCEAN MINERALS AND ENERGY, PRELIMINARY REGULATORY IMPACT ANALYSIS AND INITIAL REGULATORY FLEXIBILITY ANALYSIS FOR PROPOSED REGULATIONS TO IMPLEMENT PUBLIC LAW 96-320, THE OCEAN THERMAL ENERGY CONVERSION ACT OF 1980, at 5 (1981) [hereinafter cited as "NOAA REGULATORY IMPACT ANALYSIS"]. It has been estimated that the world's oceans could support 30,000 OTEC plantships of 325 MW capacity, producing 10,000 gigawatts of electric power. It would take only 2,000 such plantships to meet the total projected electric energy needs of the United States in the year 2000. The Ocean Thermal Energy Conversion Act of 1980: Hearings on S. 2492, Before the Senate Committee on Commerce, Science and Transportation, 96th Congress 2nd Sess. 88 (1980)(statement of Frank T. O'Brien). It has also been estimated that in the Hawaiian archipelago, including Palmyra Island, it is possible to produce 10 to 15 quads per year, or roughly the amount of oil imported from the Middle East. *Id.* at 73 (statement of John P. Craven).

[116] HAWAII PUBLIC SECTOR OTEC PROGRAM, *supra* note 14, at 3.

[117] Kakesako, *OTEC Test A Success; 50,000 Watts In Use*, Honolulu Star-Bulletin, Aug. 3, 1979, § A at 1, col. 1; Burris, *OTEC Project Lights Its Own Way*, Honolulu Advertiser, Aug. 4, 1979, § A at 1, col. 1; Thompson, *Electricity From Ocean Proves To Be Feasible*, Honolulu Star-Bulletin, Aug. 4, 1979, § A at 2, col. 4; *Obtaining Energy From the Ocean*, Honolulu Star-Bulletin, Aug. 4, 1979, § A at 8, col. 1; Hastings, *50 Kilowatts Generate World Of Enthusiasm*, Honolulu Advertiser, Sept. 6, 1979, § A at 3, col. 2.

[118] *See, e.g.*, Trimble & Owens, *Review of Mini-OTEC Performance*, 15 INTERSOC'Y ENERGY CONVERSION ENGINEERING CONF. PROC. (1980).

ity on Oahu.[119]

Also in 1978, the U.S. Department of Energy (DOE), acting through the Argonne National Laboratory, accepted the proposal of state and County of Hawaii officials to establish an OTEC Seacoast Test Facility at the Natural Energy Laboratory of Hawaii (NELH) at Keahole Point on the Island of Hawaii.[120] A laboratory building, power center, warehouse and administration building have since been constructed.[121] In 1981, the facility began pumping warm water for heat exchanger biofouling and corrosion experiments and a cold-water pipe was deployed for use in OTEC aquaculture experiments.[122]

Research on OTEC components and systems has been sponsored by the DOE for a number of years.[123] The DOE's first major project was OTEC-1. Now known as the *SS Ocean Energy Converter,* OTEC-1 was dedicated at Aloha Tower on July 5, 1980, and began operating fourteen miles northwest of the NELH in December, 1980.[124] It was designed to test a one-megawatt heat exchanger and other hardware necessary for a commercial-level OTEC operation. However, after only four months of testing, the project was terminated by the DOE in April, 1981, due to a lack of federal funds.[125]

The next step in the DOE's program is a pilot plant. In September, 1980, the DOE issued a Program Opportunity Notice[126] for the conceptual design of a forty-megawatt OTEC pilot plant. In February, 1981, nine responses were filed for sites in Hawaii, Puerto Rico, Florida, the Virgin Islands, the Northern Marianas and Alaska.[127] A year later in February, 1982, the DOE announced that two awards would be made, both

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[119] HAWAII PUBLIC SECTOR OTEC PROGRAM, *supra* note 14, at 3.

[120] *Id.* at 2.

[121] Interview with Dr. Lawrence Hallanger, Acting Executive Director, The Natural Energy Laboratory of Hawaii, in Honolulu (Nov. 23, 1981).

[122] *Id.*

[123] *See, e.g.,* Richards & Vadus, *Ocean Thermal Energy Conversion: Technology Development,* MARINE TECHNOLOGY SOC'Y J. 3 (Feb.-Mar. 1980).

[124] HAWAII PUBLIC SECTOR OTEC PROGRAM, *supra* note 14, at 4.

[125] Wiles, *OTEC-1 project to shut down,* PAC. BUS. NEWS, Apr. 6, 1981, at 1; *Government grounds OTEC-1,* Honolulu Advertiser, Apr. 7, 1981, § A at 5; Whitten, *OTEC Leaders to Decide Next Step in Energy Research,* Honolulu Star-Bulletin, Apr. 8, 1981, § A at 2, col. 1; *Lighter Gear Removed from Former OTEC Ship,* Honolulu Star-Bulletin, June 4, 1981, § A at 8, col. 1; *OTEC Vessel Move to Pearl Harbor Berth,* Honolulu Star-Bulletin, June 18, 1981, § B at 5, col. 1.

[126] U.S. DEP'T OF ENERGY, PROGRAM OPPORTUNITY NOTICE FOR CLOSED CYCLE OCEAN THERMAL ENERGY CONVERSION PILOT PLANT (1980).

[127] Whitten, *9 Corporate Huis Seek OTEC Work,* Honolulu Star-Bulletin, Mar. 4, 1981, § C at 1, col. 1. The Hawaii-based responses to the Program Opportunity Notice were filed by Ocean Thermal Corporation, bidding an onshore plant at Kahe Point, Oahu; General Electric, bidding a nearshore jacket tower at Kahe Point; and Solaramco, bidding an at-sea grazing ammonia-type plant. Wiles, *3 to bid for Isle OTEC funds,* PAC. BUS. NEWS, Feb. 23, 1981, at 1, col. 1; Whitten, *Three Development Groups Will Bid on OTEC Project,* Honolulu Star-Bulletin, Feb. 23, 1981, § C at 7, col. 1.

for Hawaii-based plants.[128] A forty-megawatt pilot plant is expected to cost approximately $300 million in 1981 dollars.[129] It has been estimated that cold water pipe construction and outfitting of a forty-megawatt plant in Hawaii would mean direct expenditures of $200 million, a local impact of $92.4 million and total employment of 2,104 persons during construction.[130]

The nature and extent of government regulation is of critical importance to the OTEC industry's future development. Regulation of OTEC plants will largely depend upon whether the plants are to be considered structures or vessels.[131] This distinction between vessels and structures has had a long legal history.[132] Vessels are defined under 1 U.S.C. § 3 (1976) to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." More specifically, U.S. courts have held that the term "vessel" includes barges, bathhouses, floating boarding houses or restaurants, houseboats and pleasure barges.[133] A "ship" is also considered a vessel, and often the words are used interchangeably.[134] The significance of this

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[128] Whitten, *Two Island Groups Get Funds for OTEC Designs*, Honolulu Star-Bulletin, Feb. 19, 1982, § A at 1, col. 1.

[129] OCEAN RESOURCES PROGRAM, *supra* note 49, at 2.

[130] Interview with Frank McHale, OTEC Project Manager, Hawaiian Dredging and Construction Company, in Honolulu (Dec. 23, 1980). It is estimated that OTEC plants become more cost-effective and competitive in the 200-400 megawatt range, five to ten times the size of the pilot plant. *See generally* P. YUEN, OCEAN THERMAL ENERGY CONVERSION: A REVIEW 113 (1980).

[131] *See* K. Keith, *The International Regulation of Ocean Floating Energy Platforms*, in LAW OF THE SEA: NEGLECTED ISSUES 275, 277, 288 (1979).

[132] Since ancient times, vessels have been governed by sea codes which are enforced by maritime courts. Unique property concepts have emerged, such as salvage rights and general average. *See generally* G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 3-18 (2nd ed. 1975).

[133] Woods Bros. Const. Co. v. Iowa Unemployment Compensation Comm'n, 229 Iowa 1171, 296 N.W. 345 (1941)(barge); The Public Bath No. 13, 16 F. 692 (S.D.N.Y. 1894)(bathhouse); Petition of Kansas City Bridge Co., 19 F. Supp. 419 (W.D.Mo. 1937)(floating boarding house); The Club Royale, 13 F. Supp. 123 (D.C.N.J. 1935)(floating restaurant); The Ark, 17 F. 2d 446 (S.D. Fla. 1926)(houseboat); and The City of Pittsburgh, 45 F. 699 (W.D.Pa. 1891)(pleasure barge).

[134] In common usage the word ship is applied generally to all larger vessels which are capable of self-propulsion either mechanically or by sails. "In maritime law . . . in the absence of a compelling statutory definition, the terms ship and vessel are used interchangeably as synonymous terms, connoting a craft capable of being used for transportation on oceans, rivers, seas, and navigable waters. . . ." BENEDICT ON ADMIRALTY, § 162 (1974). According to the U.S. Supreme Court, a ship has a life of its own. In Tucker v. Alexandroff, 183 U.S. 424 (1902), the Court stated: "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her

characterization is that OTEC plants which are considered ships, flying a national flag, will have certain rights under international law.[135] On the other hand, if an OTEC plant is considered to be a structure, it will have no such rights, and regulation will be based on factors such as location and use.[136] With this "vessel-structure" distinction in mind, the following sections will discuss the international, federal and state laws which will apply to OTEC operations.

B. International Law[137]

Under existing conventions, the sea is divided into territorial seas (which are not defined but are three miles in the case of the United States),[138] contiguous zones (which extend up to twelve miles from the baselines of coastal States)[139] and high seas (which include all ocean space beyond the twelve-mile contiguous zones).[140]

1. High Seas

Under the Convention on the High Seas,[141] a ship is regulated by the State whose flag it flies.[142] Thus, a U.S. OTEC plantship grazing on the high seas would be regulated by U.S. authorities, and would be free from interference by other States.

Certain "reasonable uses" of the high seas are permitted under the Convention. These include the freedoms of navigation, fishing, laying submarine cables and pipelines and overflight.[143] These freedoms must be exercised with reasonable regard to the interests of other States in their

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obligations, upon which she may sue in the name of her owner . . . . She is capable too, of committing a tort, and is responsible in damages therefor." *Id.* at 438.

[135] These rights include the right of innocent passage. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as "Convention on the High Seas"], art. 14.

[136] While property-owners have rights regarding property, the author is aware of no case, other than vessels, in which property has rights. Even in the case of vessels, a vessel in the course of construction is merely a structure. Chaffee v. Erie R. Co., 68 App. Div. 578, 73 N.Y.S. 908 (1902).

[137] *See generally* Keith, *Laws Affecting the Development of Ocean Thermal Energy Conversion in the United States*, 43 U. PITT. L. REV. 1, 10-14 (1981); Nanda, *Ocean Thermal Energy Conversion (OTEC) Development Under U.S. and International Law and Institutions*, 8 DEN. J. INT'L L. & POL'Y 239 (1979); and Knight, *International Jurisdictional Issues Involving OTEC Installations*, OCEAN THERMAL ENERGY CONVERSION 45 (1977).

[138] Convention on the Territorial Sea and Contiguous Zone, *supra* note 83, art. 1.

[139] *Id.* art. 24.

[140] Convention on the High Seas, *supra* note 135, art. 1.

[141] Convention on the High Seas, *supra* note 135.

[142] *Id.* arts. 4-6.

[143] *Id.* art. 2.

exercise of the freedom of the high seas.[144] Construction of an OTEC structure would most likely also qualify as such a "reasonable use" consistent with the freedom of the high seas. The use of the high seas for OTEC structures has also been characterized as an exercise of an "international legal right"[145]—this concept is embodied in the Draft Convention[146] being developed at UNCLOS III. Specifically, article 87 of the Draft Convention adds to the existing freedoms of the high seas the freedom to "construct artificial islands and other installations permitted under international law."[147]

2. *Foreign Territorial Seas*

Although the construction of an OTEC plantship may be a reasonable use of the high seas, coastal States have certain powers with regard to OTEC plantships which enter their territorial waters. Article 1 of the Convention on the Territorial Sea and the Contiguous Zone[148] gives a coastal State sovereignty over its territorial sea, subject to the right of innocent passage guaranteed to ships under article 14. Limitations on this right provide some basis for the regulation of OTEC plantships. Pursuant to article 16, "[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." Passage which is not innocent is defined as passage which is prejudicial to the good order, peace or security of the coastal State.[149] A coastal State could thus assert control over an OTEC plantship by arguing that it is disruptive of "good order" because it is very large and slow-moving, and thereby interferes

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[144] *Id.*

[145] Knight, *supra* note 137, at 53-58; Krueger, *The Promise of OTEC*, 14 MARINE TECH. 33-34 (June 1980).

[146] Draft Convention, *supra* note 48.

[147] Article 87 would also add the freedom of "scientific research" to the existing freedoms. Previously, there had been some concern that OTEC operations on the high seas would be subject to regulation by an international authority under treaty provisions being developed at UNCLOS III. Keith, *supra* note 137, at 11. Part XI of the Informal Composite Negotiating Text of 1977 would have given the International Seabed Authority power to regulate resources found on the seabed beneath the high seas. Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP.10 (1977). "Resources" were defined to mean "minerals," and "minerals" were defined to include water, steam and hot water as well as metallic deposits such as manganese nodules. In view of these definitions, the question arose as to whether the International Seabed Authority would regulate OTEC on the high seas, since OTEC used "water" and arguably even "hot water." The counter interpretation was that the water or hot water covered by the definition was from the deep seabed, and would not be used by an OTEC plant. Fortunately, this was clarified in the Draft Convention which emerged from the Ninth Session of UNCLOS III in 1980. Article 133 of the Draft Convention does not mention water, steam or hot water in the definition of "resources," and there is no separate definition of "minerals." Thus, it appears that OTEC will not be regulated on the high seas by the International Seabed Authority if the Draft Convention comes into force.

[148] Convention on the Territorial Sea and Contiguous Zone, *supra* note 83.

[149] *Id.* art. 14(4).

with coastal shipping, pleasure craft, fishing and other uses of the sea. If an OTEC plantship broadcasts unauthorized radio or television programs, arguably this might be considered prejudicial to "peace," and if a plantship obstructs the movement of military ships or blocks access to harbors of the coastal State, it might arguably be prejudicial to "security."[150] Under article 22 of the Draft Convention, a coastal State may require foreign ships to use certain sea lanes, but under article 24, it would not be able to "[i]mpose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."

Although status as a U.S. vessel or ship would give an OTEC plantship the right of innocent passage in territorial seas, it is a right which few OTEC plantships are expected to exercise. OTEC plantships are likely to graze on the high seas, not close to shore,[151] and if close to shore, an OTEC plantship is likely to take up a permanent position to provide electricity to a municipal grid.

If an OTEC plant consists of a "jacket tower"[152] or other similar structure, it will not have the rights of a ship and will be considered a structure or installation. Accordingly, it will be subject to control by a foreign coastal State if it is established in that State's territorial sea.[153] Adoption of the Draft Convention by UNCLOS III would strengthen this control further by setting forth the rights of coastal States over installations and structures. Under article 56 of the Draft Convention, the coastal States' rights over the exclusive economic zone (EEZ)[154] would include:

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[150] Article 21 of the Draft Convention also provides that the coastal State can make laws and regulations in regard to the safety of navigation and regulation of marine traffic, but not in such a way as to "apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards." OTEC plantships will be among the most unusually designed and constructed of all ships, but under this clause their design and construction cannot be regulated.

[151] OTEC plantships will have pipes extending to depths of approximately 3,000 feet, and thus will not be able to operate in waters of less than that depth. In Hawaii, 3,000-foot depths begin approximately three miles from shore. In the Gulf of Mexico, 3,000-foot depths begin as far as 100-150 miles from shore. Grazing OTEC plants are thus not likely to travel within the three-mile territorial sea.

[152] A "jacket tower" OTEC plant would resemble a Texas tower oil rig standing on the ocean floor. The OTEC heat exchangers would be located under water inside the legs of the tower, while the generator and operations offices would be on the platform above the ocean surface.

[153] Article 1 of the Convention on the Territorial Sea and the Contiguous Zone, *supra* note 83, provides that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." This sovereignty is subject to the provisions of the Convention and other rules of international law. *Id.* The only limitation on this sovereignty under the Convention is the right of innocent passage set forth in full in articles 14 through 23. Since a structure is not a vessel or a ship, there are no limitations on State sovereignty in regulating structures within the territorial sea.

[154] The Draft Convention, *supra* note 48, generally defines the EEZ as the area adjacent to the territorial sea (article 55), not extending beyond 200 nautical miles from baselines from which the breadth of the territorial sea is measured (article 57).

> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
> (i) the establishment and use of artificial islands, installations and structures. . . .[155]

If this article is adopted, OTEC structures established within the EEZ would clearly be subject to such regulation. Also, any OTEC plantship which stabilizes its position within the EEZ for any length of time could also be covered by this provision since such a plantship could be classified as an "installation or structure."[156] Furthermore, if OTEC plants are considered to be artificial islands,[157] installations or structures, article 60 of the Draft Convention provides:

> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
> (a) artificial islands;
> (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.
>
> 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.[158]

3. Comment

Under the international law of the sea, an OTEC plantship registered

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[155] Draft Convention, *supra* note 48.

[156] K. Keith, *supra* note 131, at 287. A plantship dynamically positioned could be as "fixed" in its position as an installation attached to, or a structure standing on, the ocean floor. The fact that it is free-floating would make it no less a permanent installation which could interfere with the rights of the coastal State in the EEZ.

[157] It is not clear that stationary OTEC plants, either floating or standing on the ocean floor, could be considered to be artificial islands. *See* N. PAPADAKIS, THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS 89-91 (1977).

[158] Draft Convention, *supra* note 48. Article 60 further provides that (1) due notice must be given of the construction of artificial islands, installations or structures; (2) such artificial islands, installations or structures may not be established where they will interfere with recognized sea lanes essential to international navigation; and (3) coastal States may establish safety zones of up to 500 meters around them to ensure their safety and the safety of navigation.

in the U.S. will be regulated only by the U.S. on the high seas. An OTEC structure would generally constitute a reasonable use of the high seas. OTEC plants may be regulated in great detail by a foreign coastal State if the plants are structures installed or plantships positioned within that coastal State's territorial waters or prospective EEZ. However, it is unlikely that foreign coastal State controls will affect the initial development of the OTEC industry in the U.S. since such development will probably begin in U.S. waters or on the high seas. Thus, at the present time, no barriers to OTEC development are likely under international law.

C. *Federal Law*

1. *Introduction*

The supporters of OTEC perceived that a major barrier to OTEC development was uncertainty over the laws and regulations which would apply to OTEC plants and the ocean thermal resource.[159] It was felt that these uncertainties would make it difficult to attract investment capital, or obtain loans and insurance. These uncertainties were largely resolved by the passage of national legislation[160] only a year after Mini-OTEC first produced net energy.

2. *Ocean Thermal Energy Conversion Act of 1980*

On August 3, 1980, President Carter signed into law the Ocean Thermal Energy Conversion Act of 1980[161] which provides the basis for the

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[159] These uncertainties included:

1. Lack of any clear statement that OTEC activities are legal under national or international law;
2. Lack of any law or regulation assuring continued access to the ocean thermal resource being used by a particular OTEC plant;
3. Lack of clarity as to whether admiralty, land-based, or some other body of residual and common law would apply to activities on OTEC platforms located on the high seas beyond the normal coverage of national laws;
4. Absence of certainty that OTEC operations would not be declared illegal or partially restricted in the future by national laws or international treaties; and
5. Lack of clarity as to which federal agency regulations might apply to OTEC operations in U.S. waters, and how those regulations which might apply would be interpreted when applied to OTEC operations.

NOAA REGULATORY IMPACT ANALYSIS, *supra* note 115, at 13. Uncertainty over federal agency jurisdiction was evident in the deployment of OTEC-1. The EPA and Army Corps of Engineers both required permits without asserting proper legal jurisdiction to do so. Keith, *State and Federal Regulation of OTEC Plants in Hawaii*, 2 SOLAR LAW REPORTER 512-14, 517-21 (Sept./Oct. 1980).

[160] *See* Krueger & Yarema, *New Institutions for New Energy Technology: The Case of Ocean Thermal Energy Conversion*, 54 S. CAL. L. REV. 767 (1981); Keith, *supra* note 137.

[161] Ocean Thermal Energy Conversion Act, 42 U.S.C. §§ 9101-9167 (1980) [hereinafter

regulation of U.S. OTEC plants, wherever they are located. When the original bill was introduced by Representative Gerry E. Studds of Masschusetts as House Resolution 6154, it was described in the following manner:

> The bill . . . provides for one-stop Federal licensing of OTEC facilities and plantships by the National Oceanic and Atmospheric Administration; provides that OTEC facilities and plantships be treated as vessels for most purposes under U.S. laws; allows owners of OTEC facilities and plantships to use the capital construction fund tax treatment now available to vessel owners under the Merchant Marine Act, 1936; and makes both commercial and demonstration OTEC facilities and plantships eligible for Federal loan guarantees under Title XI of the Merchant Marine Act, 1936. The bill's provisions are completely in accord with the current negotiating text of the Third United Nations Conference on the Law of the Sea.[162]

This legislation established a stable regulatory regime for OTEC development. The OTEC Act provides that no person may engage in the ownership, construction or operation of an ocean thermal energy conversion facility or plantship which is documented under U.S. law, located in the territorial sea of the United States or connected to the United States by pipeline or cable, without a license issued in accordance with the OTEC Act.[163]

Under the OTEC Act, licenses will be issued by the National Oceanic and Atmospheric Administration (NOAA).[164] The principal goals of

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cited as "The OTEC Act"].

[162] 125 CONG. REC. E6173 (1979). The Senate Bill, S. 2492, was introduced by Hawaii Senator Daniel K. Inouye *et. al.*, on March 27, 1980. 126 CONG. REC. S3187 (daily ed. Mar. 27, 1980).

[163] The OTEC Act, *supra* note 161, § 9111.

[164] Section 9111 provides that:

> (c) The Administrator may issue a license to a citizen of the United States in accordance with the provisions of this Act unless—
>
> (1) he determines that the applicant cannot and will not comply with applicable laws, regulations, and license conditions;
>
> (2) he determines that the construction and operation of the ocean thermal energy conversion facility or plantship will not be in the national interest and consistent with national security and other national policy goals and objectives, including energy self-sufficiency and environmental quality;
>
> (3) he determines, after consultation with the Secretary of the department in which the Coast Guard is operating, that the ocean thermal energy conversion facility or plantship will not be operated with reasonable regard to the freedom of navigation or other reasonable uses of the high seas and authorized uses of the Continental Shelf, as defined by United States law, treaty, convention, or customary international law;
>
> (4) he has been informed, within 45 days after the conclusion of public hearings on that application, or on proposed licenses for the designated application area, by the Administrator of the Environmental Protection Agency that the ocean thermal energy conversion facility or plantship will not conform with all

NOAA's licensing system are to permit and encourage development of

applicable provisions of any law for which he has enforcement authority;
(5) he has received the opinion of the Attorney General, pursuant to section 104 of this Act, stating that issuance of the license would create a situation in violation of the antitrust laws, or the 90-day period provided in section 104 has expired;
(6) he has consulted with the Secretary of Energy, the Secretary of Transportation, the Secretary of State, the Secretary of the Interior, and the Secretary of Defense, to determine their views on the adequacy of the application, and its effect on programs within their respective jurisdictions and determines on the basis thereof, that the application for license is inadequate;
(7) the proposed ocean thermal energy conversion facility or plantship will not be documented under the laws of the United States;
(8) the applicant has not agreed to the condition that no vessel may be used for the transportation to the United States of things produced, processed, refined, or manufactured at the ocean thermal energy conversion facility or plantship unless such vessel is documented under the laws of the United States;
(9) when the license is for an ocean thermal energy conversion facility, he determines that the facility, including any submarine electric transmission cables and equipment or pipelines which are components of the facility, will not be located and designed so as to minimize interference with other uses of the high seas or the Continental Shelf, including cables or pipelines already in position on or in the seabed and the possibility of their repair;
(10) The Governor of each adajacent coastal State with an approved coastal zone management program in good standing pursuant to the Coastal Zone Management Act of 1972 (33 U.S.C. 1451 *et. seq.*) determines that, in his or her view, the application is inadequate or inconsistent with respect to programs within his or her jurisdiction;
(11) when the license is for an ocean thermal energy conversion facility, he determines that the thermal plume of the facility is expected to impinge on so as to degrade the thermal gradient used by any other ocean thermal energy conversion facility already licensed or operating, without the consent of its owner;
(12) when the license is for an ocean thermal energy conversion facility, he determines that the thermal plume of the facility is expected to impinge on so as to adversely affect the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation, unless the Secretary of State approves such impingement after consultation with such nation;
(13) when the license is for an ocean thermal energy conversion plantship, he determines that the applicant has not provided adequate assurance that the plantship will be operated in such a way as to prevent its thermal plume from impinging on so as to degrade the thermal gradient used by any other ocean thermal energy conversion facility or plantship without the consent of its owner, and from impinging on so as to adversely affect the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation unless the Secretary of State approves such impingement after consultation with such nation; and
(14) when a regulation has been adopted which places an upper limit on the number or total capacity of ocean thermal energy conversion facilities or plantships to be licensed under this Act for simultaneous operation, either overall or within specific geographic areas, pursuant to a determination under the provisions of section 107(b)(4) of this Act, issuance of the license will cause such

OTEC as a commercial energy technology, to insure that no OTEC plant interferes with the ocean thermal resource used by another OTEC plant, to protect the marine and coastal environment and to insure that commercial OTEC facilities and plantships licensed by NOAA comply with the international treaty obligations of the United States.[165]

NOAA's general regulatory approach is characterized by the "establishment of general guidelines and performance standards in initial regulations and use of detailed guidelines and performance standards as license terms and conditions coupled with subsequent operational and environmental monitoring to ascertain whether additional requirements are necessary in the future."[166] This approach is designed to set forth the procedural steps so that OTEC developers can include them in their timetables. However, since very little is known about the environmental impact of large-scale OTEC plants, substantive regulations will remain flexible during the scale-up of the technology, with emphasis on monitoring to analyze impacts.

NOAA's one-stop licensing procedure consists of an application review process coordinated with the other federal agencies and departments which have jurisdiction over some aspect of the proposed OTEC plant.[167] Section 981.380(a) of the regulations provides for the early designation of representatives from each participating federal, state and local government entity as well as the OTEC license applicant to serve as members of a Consolidated Application Review (CAR) team.[168] The team develops and signs a joint agreement detailing the regulatory and review responsibilities of each government agency and the responsibilities of the applicant.[169] This is followed by the holding of interagency meetings and the implementation of an agreed upon schedule for review, hearings, preparation of environmental impact statements and other activities.[170]

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upper limit to be exceeded.

Id.

[165] NOAA REGULATORY IMPACT ANALYSIS, *supra* note 115, at 15-16. An advance notice of proposed rulemaking was published in November, 1980. Advance Notice of Proposed Rulemaking for the Licensing of Ocean Thermal Energy Conversion Facilities and Plantships, 45 Fed. Reg. 77038 (1980). Proposed regulations to implement the OTEC Act were published by NOAA in March, 1981. 46 Fed. Reg. 19418 (1981). Final regulations were promulgated on July 31, 1981. Final Rule, Licensing of Ocean Thermal Energy Conversion Facilities and Plantships. 46 Fed. Reg. 39388 (1981)(to be codified at 15 C.F.R. §§ 981.10-981.640).

[166] 46 Fed. Reg. 19419 (1981).

[167] 46 Fed. Reg. 39388, 39406 (1981)(to be codified in 15 C.F.R. § 981.380(a)).

[168] *Id.* at 39407 (to be codified in 15 C.F.R. § 981.380(b)).

[169] *Id.*

[170] *Id.* (to be codified at 15 C.F.R. § 981.380(b)-.380(c)). The OTEC Act prescribes that within 21 days after receipt of an application, the Administrator of NOAA must determine whether the application contains all the required information. If so, within five days the Administrator must publish notice of the application and a summary of the applicant's plans in the Federal Register. When the notice is published, the Administrator must forward a copy of the application to federal agencies and departments with jurisdiction over

Although the OTEC Act was designed to provide a comprehensive regulatory system, there remains a question as to whether it regulates onshore plants. With respect to this question, the Act's definitions of OTEC facilities and plantships indicate that the answer is in the negative.[171]

These definitions are consistent with the DOE OTEC program's early focus on moored floating plants and substantial interest in grazing plantships. However, when industry and local government agencies responded in 1981 to the DOE's Program Opportunity Notice for a forty-megawatt OTEC pilot plant, a majority of the bids were for onshore or nearshore shelf-mounted plants. Many members of the business community thus relied more heavily on the proven technology of land-based and offshore oil rig construction than on new concepts for floating plants. When the DOE decided in 1982 to grant two awards for the conceptual design phase of

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any aspect of the ownership, construction, or operation of an OTEC plant. A license can be issued only after public notice, opportunity for comment and public hearings.

At least one public hearing must be held in the District of Columbia and one in any adjacent coastal state to which an OTEC facility is proposed to be connected by cable or pipeline. All public hearings are to be consolidated and concluded within 240 days of public notice of the application. Within 45 days after public hearings are concluded, federal agencies that received copies of the application must recommend approval or disapproval. If an agency recommends disapproval, it must say how the application fails to comply with existing laws or regulations and notify the Administrator of any amendment or condition that would bring the license within the law or regulations involved. Within 90 days after the public hearings, the Administrator must approve or deny the application. The whole procedure takes at least 12 months. The OTEC Act, *supra* note 161, § 9112.

[171] The OTEC Act, *supra* note 161, § 9101(11)-(12) reads as follows:

> (11) "ocean thermal energy conversion facility" means any facility which is standing or moored in or beyond the territorial sea of the United States and which is designed to use temperature differences in ocean water to produce electricity or another form of energy capable of being used directly to perform work, and includes any equipment installed on such facility to use such electricity or other form of energy to produce, process, refine, or manufacture a product, and any cable or pipeline used to deliver such electricity, freshwater, or product to shore, and all other associated equipment and appurtenances of such facility, to the extent they are located seaward of the highwater mark;
>
> (12) "ocean thermal energy conversion plantship" means any vessel which is designed to use temperature differences in ocean water while floating unmoored or moving through such water, to produce electricity or another form of energy capable of being used directly to perform work, and includes any equipment installed on such vessel to use such electricity or other form of energy to produce, process, refine or manufacture a product, and any equipment used to transfer such product to other vessels for transportation to users, and all other associated equipment and appurtenances of such vessel. . . .

Although these definitions explicitly include equipment installed on the facility, associated equipment and appurtenances, such attachments are included only "to the extent they are located seaward of the highwater mark." The plain meaning, then, is that both the facility and all its appurtenances must be seaward of the highwater mark to fall under the OTEC Act's regulatory jurisdiction. It is not enough for the pipes to extend into the water if the heat exchangers and turbines are on land.

the OTEC pilot plant, one was for a land-based plant.[172] As the State of Hawaii Energy Resources Coordinator has pointed out, the development of land-based plants poses a dilemma for regulation:

> Some engineers believe that land-based plants are the lowest risk, lowest cost plants, and therefore the most likely for early commercialization. While it is difficult to predict, it is possible that the development of OTEC will in fact take place on land. If land-based plants are not within the scope of the Act, this would leave NOAA with nothing to regulate. This would also leave OTEC developers without a clear set of procedures, and without the advantage of having NOAA as a facilitator in the permit process. There is also the problem that a land-based plant with a cold water intake pipe stretching two or three miles offshore could impinge upon the operations of a shelf-mounted or moored floater, thus creating a conflict which NOAA would not be able to settle because the land-based plant would not be under its jurisdiction . . . .[173]

NOAA's solution to this gap in the regulations has been to add to the definition of an OTEC facility the phrase: "[i]f part of the OTEC facility is built on land, the definition includes that portion of the warm water intake structure, cold water intake structure, effluent discharge structure, and any other parts of the facility, located seaward of the high water mark."[174] The fundamental rationale behind this addition is that the cold and warm water pipes are part of the OTEC plant, and since the pipes of an onshore plant are in the ocean, the plant can then be deemed to be in the territorial sea.

NOAA's action is wise, for the public interest will best be served by the comprehensive regulation of OTEC plants, whether onshore, nearshore or on the high seas and the definitions in the OTEC Act simply omit onshore plants.[175] The preferable solution would be, however, an amendment to the OTEC Act itself which will provide a new definition to cover onshore OTEC plants.[176]

3. *Coast Guard Regulations*

The U.S. Coast Guard is also assigned significant responsibility under

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[172] *See* note 128 *supra* and accompanying text.

[173] Testimony of Hideto Kono, Energy Resources Coordinator and Director of Planning and Economic Development, State of Hawaii, at a hearing before the Office of Ocean Minerals and Energy, in Honolulu, Hawaii (Apr. 27, 1981). The world's second successful OTEC plant, located at Nauru, is a land-based plant. *See* 5 SOLAR OCEAN ENERGY LIAISON 1 (Nov. 1981).

[174] 46 Fed. Reg. 39388, 39395 (1981)(to be codified in 15 C.F.R. § 981.40).

[175] *See* note 171 *supra* and accompanying text.

[176] NOAA is considering proposing amendments to resolve the definition problem. Interview with Richard D. Norling, NOAA OTEC Program Manager, and Lowell F. Martin, OTEC Licensing Program Manager, in Washington, D.C. (June 11, 1981).

the OTEC Act. The Coast Guard's task includes prescribing rules governing OTEC vessel movement, the transfer of materials, the safety of life and property at sea and the prevention of pollution.[177] The Coast Guard is required to issue and enforce regulations regarding lights and other warning devices and safety equipment,[178] mark components for the protection of navigation[179] and designate safety zones around OTEC facilities and plantships.[180] In addition, the Act provides that the Coast Guard will promulgate and enforce regulations concerning the documentation, design, construction, alteration, equipment, maintenance, repair, inspection, certification and manning of ocean thermal energy conversion facilities and plantships.[181] In addition, the Coast Guard may require compliance with those vessel documentation, inspection and manning laws which are determined to be appropriate. Significantly, the OTEC Act further provides that:

> (3) For the purposes of the documentation laws, for which compliance is required under paragraph (1) of this subsection, ocean thermal energy conversion facilities and plantships shall be deemed to be vessels and, if documented, vessels of the United States for the purposes of the Ship Mortgage Act, 1920.[182]

The Coast Guard's approach to the implementation of its responsibilities is to tailor existing regulations to set specific standards for OTEC facilities and plantships, while holding in abeyance the discretionary authority conveyed by the OTEC Act until there is a demonstrated need for

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[177] (a) The Secretary of the department in which the Coast Guard is operating shall, subject to recognized principles of international law, prescribe by regulation and enforce procedures with respect to any ocean thermal energy conversion facility or plantship licensed under this Act, including, but not limited to rules governing vessel movement, procedures for transfer of materials between such a facility or plantship and transport vessels, designation and marking of anchorage areas, maintenance, law enforcement, and the equipment, training, and maintenance required (1) to promote the safety of life and property at sea, (2) to prevent pollution of the marine environment, (3) to clean up any pollutants which may be discharged, and (4) to otherwise prevent or minimize any adverse impact from the construction and operation of such ocean thermal energy conversion facility or plantship.

The OTEC Act, *supra* note 161, § 9118.

[178] *Id.* § 9118(b).

[179] *Id.* § 9118(c).

[180] *Id.* § 9118(d)(1). The Act also requires the Coast Guard to promulgate and enforce regulations governing the movement and navigation of OTEC plantships to ensure that the thermal plume of an OTEC plantship does not unreasonably impinge on any other OTEC plantship or facility. *Id.* § 9119(c).

[181] *Id.* § 9118(e).

[182] *Id.* Proposed rules were published on October 5, 1981. Proposed Rules, Ocean Thermal Energy Conversion Facility and Plantship Requirements, 46 Fed. Reg. 49078 (1981)(to be codified in 46 C.F.R. §§ 50.01-1(k), .05-15(c), 66.03-5, .03-21, .03-23, 106.001-.1101, 110.01-10(h), .05-1(b)).

agency action.[183] Since OTEC plantships will generally resemble currently regulated ships, many existing regulations will be applicable.[184]

The role of the Coast Guard in documenting OTEC plants has significant implications since the Administrator of NOAA can only issue licenses to OTEC plants documented under the laws of the United States.[185] Furthermore, maritime financing is only available to documented OTEC plants.[186] The Coast Guard has traditionally documented vessels, and under the OTEC Act it will document at-sea facilities such as jacket towers. In response to NOAA's Advance Notice of Proposed Rulemaking, however, the Coast Guard "noted that existing U.S. documentation laws do not provide for 'documenting' buildings,"[187] and stated that the OTEC Act conveyed no authority to document OTEC facilities constructed landward of the mean low mater mark.[188] If the OTEC Act is not amended and the Coast Guard maintains this position, licenses cannot be issued and OTEC plants cannot be built onshore in the United States. One Coast Guard attorney has urged amendment of the OTEC Act to justify the "radical departure from the comprehensive structure of U.S. documentation laws" which documentation of land-based plants would require.[189]

4. *Outer Continental Shelf Lands Act*

Control over the subsoil and seabed resources found within the United States' three-mile territorial sea was granted to the coastal states under the Submerged Lands Act.[190] Shortly thereafter, Congress passed the Outer Continental Shelf Lands Act (OCSLA),[191] which affirmed federal

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[183] T. Watts-Fitzgerald, United States Coast Guard and OTEC Development (June 9, 1981)(paper presented at the 8th Ocean Energy Conference, Washington, D.C.).

[184] Regulations currently address fixed structures and permanently moored floating obstructions, 33 C.F.R. § 67 (1980); international regulations for the prevention of collisions at sea, 33 C.F.R. § 87, App. A (1980); and radiotelephone communication equipment, 33 C.F.R. § 26 (1980). The proposed rules would amend Title 46, Code of Federal Regulations, to make parts 50 and 66 applicable to OTEC facilities and plantships, and to insert a new Part 106, which not only has substantive regulations but also serves as a directory or reference for all the applicable provisions in Titles 33 and 46. Proposed Part 106, subpart B, would incorporate the inspection and certification procedures now applicable to mobile offshore drilling units; subpart C would establish construction requirements, in accordance with American Bureau of Shipping standards; subpart D would cover the dangers of potentially hazardous working fluids on board OTEC facilities and plantships; and subpart L would incorporate the manning restrictions set forth in the OTEC Act. 46 Fed. Reg. 49081 (1981).

[185] The OTEC Act, *supra* note 161, § 9111(c)(7).

[186] *Id.* § 9141(b).

[187] 46 Fed. Reg. 19420 (1981).

[188] T. Watts-Fitzgerald, *supra* note 183, at 3.

[189] *Id.*

[190] Submerged Lands Act, *supra* note 40.

[191] Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (1976) [hereinafter cited

control over the subsoil and seabed resources beyond the three-mile limit. Together, these two statutes established United States control over the U.S. continental shelf and its natural resources. As defined by the SLA, the term "natural resources":

> [I]ncludes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, *or the use of water for the production of power*. . . .[192]

OTEC utilizes water for the production of power, and the SLA excludes such use from the "natural resources" granted to the states. Thus, the power to regulate the use of water for the production of power is vested in the federal government.

Beyond the territorial sea lies the high seas.[193] Not intending to conflict with the Convention on the High Seas, Congress declared in its policy for the OCSLA that "[t]his subchapter shall be construed in such manner that the character as high seas of the water above the Continental Shelf and the right to navigation and fishing therein shall not be affected."[194] In the OTEC Act, Congress stated that "nothing in this Act shall be construed to affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the Continental Shelf."[195] Thus, OTEC plantships may take full advantage of the freedom of the high seas.

In *Employers Mutual Casualty Co. v. Samuels*,[196] the Texas Court of Civil Appeals was faced with the question of whether the superjacent waters of the outer continental shelf were included in the coverage of the OCSLA. Reviewing the Convention on the High Seas and the Truman Proclamation of 1945,[197] the court held that the OCSLA explicitly disclaimed "any intention to affect the 'character as high seas' of the waters above the shelf,"[198] and that "these unilateral declarations of the United States concerning the subsoil and seabed of the shelf do not affect the status of the superjacent waters as 'high seas.' "[199] Thus, it would appear

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as "Outer Continental Shelf Lands Act"].

[192] Submerged Lands Act, *supra* note 40, § 1301(e) (emphasis added).

[193] Convention on the High Seas, *supra* note 135, art. 1.

[194] Outer Continental Shelf Lands Act, *supra* note 191, § 1332(b).

[195] The OTEC Act, *supra* note 161, § 9101.

[196] 407 S.W.2d 839 (Tex. Civ. App. 1966)(death of employee in plane crash did not occur within the United States, its territories or possessions and within the meaning of the workmen's compensation policy affording coverage).

[197] Proclamation on the Continental Shelf of September 28, 1945. Proclamation No. 2667, 59 Stat. 884 (1945).

[198] 407 S.W.2d at 843.

[199] *Id.* The Texas Court stated that the OCSLA does not include "the sea above the subsoil and seabed and does not include the air above the sea." *Id.* The Texas Court followed the Fifth Circuit's holding in Guess v. Read, 290 F. 2d 622, 624 (5th Cir. 1961) (employee

that OTEC plantships operating on the high seas will not be covered by the OCSLA.

It further appears that the OCSLA does not apply to shelf-mounted plants located beyond the U.S. territorial sea. Federal jurisdiction over the outer continental shelf extends:

> to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .[200]

A shelf-mounted "jacket tower" could be "erected" on the seabed, and a moored, floating OTEC plant could be categorized as an "installation attached to the seabed" within the language of this provision. However, since no OTEC plant has as its purpose the exploration, development, removal or transport of subsoil and seabed resources, the OCSLA will not apply to OTEC plants, and the U.S. Army Corps of Engineers will not have jurisdiction over those plants located beyond U.S. territorial waters.[201]

5. *Occupational Safety and Health Act*

While the OCSLA may not apply to OTEC plants, its definitions make federal safety and health regulations applicable to OTEC facilities. This is because the Occupational Safety and Health Act (OSHA)[202] applies to states, U.S. territories and outer continental shelf lands as defined in the OCSLA.[203] The OCSLA in turn defines the term "outer Continental Shelf" as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in Section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. . . ."[204] This means that the

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killed in helicopter crash in the area subject to the Outer Continental Shelf Lands Act, widow was not entitled to join as party defendant the liability insurance carrier of the manufacturer of the helicopter under the Louisiana direct action statute). A line of case law thus indicates that OTEC plantships on the high seas are not covered by OCSLA.

[200] Outer Continental Shelf Lands Act, *supra* note 191, § 1333(a)(1).

[201] The Army Corps will have jurisdiction over structures and obstructions to navigation within three miles, based upon the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1976).

[202] Occupational Safety and Health Act, 29 U.S.C. § 651 (1976).

[203] *Id.* § 653(a).

[204] Outer Continental Shelf Lands Act, *supra* note 191, § 1331(a). The extent of that jurisdiction is defined by article 1 of the Convention on the Continental Shelf:

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the

applicable area consists of all the submerged lands seaward of the territorial sea, to the extent they appertain to the U.S. and are subject to its jurisdiction.

These definitions appear to conflict with the intent of Congress that OSHA not be applied to vessels operating on the high seas. This intent was the basis for the holding in *Clary v. Ocean Drilling and Exploration Co.*[205] In *Clary*, the plaintiff sought damages for injuries received while working on a submersible drilling barge on the outer continental shelf off the coast of Louisiana. In holding that such mobile drilling units operating on the high seas were not "workplaces" and thus not subject to the regulations of the Occupational Safety and Health Administration, the court stated, "[W]e cannot conceive that Congress . . . intended . . . these stringent controls upon all manner of vessels, including drilling barges . . . that ply the high seas over the continental shelf . . . ."[206]

Although this case holds that OSHA does not apply to OTEC plants operating afloat above the continental shelf, it does suggest that OSHA will apply to shelf-mounted OTEC plants in U.S. territorial waters and beyond, to the extent of federal jurisdiction under the Convention on the Continental Shelf. Once again, a distinction is made between structures and vessels.

6. *Maritime Law*

For laws protecting personnel on OTEC plantships, one must look to maritime or admiralty law, which embodies the rules and legal practices governing the transportation of goods and passengers by water.[207] Histori-

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depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Convention on the Continental Shelf, 29 Apr. 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as "Convention on the Continental Shelf"], art. 1.

[205] 429 F. Supp. 905 (W.D. La. 1977).

[206] *Id.* at 909.

[207] G. GILMORE & C. BLACK, JR., *supra* note 132, at 22-25, states that admiralty jurisdiction includes the following:

> Suits on contracts for the carriage of goods and passengers; for the chartering of ships (charter parties); for repairs, supplies, etc., furnished to vessels, and for services such as towage, pilotage, wharfage; for the services of seamen and officers; for recovery of indemnity or premiums on marine insurance policies.
>
> Suits in tort for collision damage, or for any physical damage to ships or cargoes on navigable waters; (by special statute) for any damage caused by a vessel, whether or not consummated on land; for personal injuries to seamen, passengers, and probably to all others while aboard a vessel on navigable waters. . . .
>
> Suits for wrongful death . . . .
>
> Suits on claims for salvage, general average, and maintenance and cure (the seaman's ancient right to be supported and cared for by his ship when injured in her service, irrespective of fault).

cally, maritime law is the private law which applies to the shipping industry. Article III, section 2 of the United States Constitution places admiralty jurisdiction within the power of the federal courts.

Maritime law applies to "vessels." OTEC plantships would meet the general statutory definition of a "vessel" found in 1 U.S.C. § 3 (1976), *i.e.*, "every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." OTEC facilities are, by definition, standing or moored, and will not serve as a means of transportation on water. However, they may be "capable of being used" as a means of transportation. Even standing OTEC facilities may be floated into position, and might be capable of being disengaged and towed away at a later time. Moored floating facilities are arguably as "capable of being used" for transportation as any ship which is temporarily moored. Thus, OTEC plantships will fall within admiralty jurisdiction, and it is very possible that OTEC facilities will also be subject to such jurisdiction. An examination of prior caselaw provides further support for this conclusion.

In *Offshore Co. v. Robison*,[208] a case involving injuries sustained by a member of a drilling crew, the court held that the evidence pertaining to the crew's presence on the platform and to the crew's working conditions and duties raised a question for the jury as to whether the injured party was a member of the crew of a *vessel*. The opinion indicates that the court considered the mobile oil rig to be a vessel,[209] although not a conventional one. The court stated that "under the Jones Act a vessel may mean something more than a means of transport on water."[210]

Ten years later, in *Rodrigue v. Aetna and Surety Co.*,[211] the United States Supreme Court considered the status of oil rigs mounted on the continental shelf. In *Rodrigue*, the families of two men who died on rigs located off the Louisiana coast, brought suit for wrongful death under both the Death on the High Seas Act[212] and Louisiana law, as made applicable by the OCSLA. In holding that the petitioners' remedy was provided for under the OSCLA, supplemented by Louisiana law, the Court determined that the oil rigs were to be treated as artificial islands, not

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Petitions for limitation of shipowner's liability (statutory).

Proceedings to foreclose preferred ship-mortgages (statutory), or to enfoce bottomry or respondentia bonds.

Suits to recover ships wrongfully taken or withheld.

[208] 266 F.2d 769, 776 (5th Cir. 1969).

[209] The rig was a mobile drilling platform, which was towed from position to position. Once on site, the rig lowered retractable legs to the ocean floor, raising the platform 50 feet above the ocean surface. The plaintiff was injured while working on the platform, and he sued under the Jones Act.

[210] 266 F.2d at 776.

[211] 395 U.S. 352 (1969).

[212] 46 U.S.C. § 761 (1976).

vessels.[213] Justice White reasoned that because the accidents involved no collision with a vessel and the structures were not navigational aids, "the accidents had no more connection with the ordinary stuff of admiralty than . . . accidents on piers."[214]

Consistent with this application of maritime law is *Executive Jet Aviation v. Cleveland*.[215] This case involved a plane which had ingested seagulls into its engine during take-off and, as a result, lost power and crashed into Lake Erie. Because the plane had crashed in navigable waters, its owners sought to invoke admiralty jurisdiction. However, the Supreme Court affirmed the district court's dismissal of the case for lack of admiralty jurisdiction. The Court stated that admiralty jurisdiction could be invoked in tort cases only when two criteria were met: "(1) the locality where the alleged tortious wrong occurred must have been on navigable waters; and (2) there must have been a relationship between the wrong and some maritime service, navigation, or commerce on navigable waters."[216]

It is evident that OTEC plantships moving upon the ocean will meet this two-part test and thus will fall within admiralty jurisdiction. Although OSHA does not apply to these OTEC plantships, personnel aboard these plantships will be seamen, and will have remedies under the Jones Act[217] in the event of injury or death during the course of their employment.[218]

7. *Federal Water Pollution Control Act*

The Federal Water Pollution Control Act (FWPCA)[219] was enacted to

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[213] The Court noted that the men working on the oil rigs were closely tied to the adjacent state, "to which they often commute and on which their families live, unlike transitory seamen to whom a more generalized admiralty law is appropriate." 395 U.S. at 355.

[214] *Id.* at 360.

[215] 409 U.S. 249 (1972).

[216] *Id.* at 251. The Court reviewed 160 years of maritime law, noting that initially, the test of admiralty jurisdiction had been primarily whether the wrong had occurred on navigable waters. Later, admiralty scholars suggested that a traditional maritime activity was also necessary to invoke admiralty. *Id.* at 253-59. Noting it had based its holding in *Rodrique* on this two-part test, the Court reaffirmed the requirement "that the wrong bear a significant relationship to a traditional maritime activity." *Id.* at 268. Consequently, in *Executive Jet*, admiralty jurisdiction did not apply because the alleged wrong, failure to keep the runway free of seagulls, was not related to maritime service, navigation or commerce on navigable waters.

[217] Merchant Marine Act of 1920, 46 U.S.C. § 688 (1976).

[218] The Jones Act was enacted to provide seamen with the same rights to recover for negligence which they would have if they were not seamen. It has been interpreted to preserve the seaman's special rights to recover maintenance and cure and indemnity for unseaworthiness under general maritime law. G. GILMORE & C. BLACK, *supra* note 132, at 328-29.

[219] FWPCA, *supra* note 108.

control the discharge of pollutants[220] into U.S. navigable waters, the waters of the contiguous zone and the ocean.[221] Under the FWPCA, the Environmental Protection Agency (EPA) is charged with regulation of "the discharge of pollutants," defined as: "(A) any addition of any pollutant to navigable waters from any point source; or (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."[222] Before the OTEC Act was enacted, a floating OTEC plant located beyond the U.S. territorial sea would not have been within the scope of the FWPCA, since it would not have been within navigable waters, and would have been a "vessel or other floating craft" exempted from the definition of a point source in the contiguous zone or ocean.

In order to make the FWPCA applicable to all OTEC plants, the OTEC Act declares that "[a]n ocean thermal energy conversion facility or plantship licensed under this title shall be deemed not to be a 'vessel or other floating craft' for the purposes of the Federal Water Pollution Control Act of 1972."[223] This means that OTEC plants will be required to obtain permits for the discharge of any pollutants into the ocean, within and beyond the territorial sea. A National Pollution Discharge Elimination System permit will be required for the discharge of any chemical

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[220] A pollutant is defined as: "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6).

[221] There is some question as to the applicablity of the FWPCA beyond the three-mile territorial sea. Environmental law scholars have argued that the FWPCA's jurisdiction beyond the territorial sea was superceded by passage of the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C.A. § 1401 (1978). *See, e.g.*, W. RODGERS, ENVIRONMENTAL LAW 496-98 (1977); Lettow, *The Control of Marine Pollution*, 1974 FED. ENVT'L L. 596, 655-58 (1974); Zener, *The Federal Law of Water Pollution Control*, 1974 FED. ENVT'L L. 738-41 (1974). However, the OTEC Act makes the FWPCA applicable to all OTEC plants regardless of their location within or outside the territorial sea. Furthermore, the Marine Protection Act will not apply to OTEC plants. First of all, their discharges will probably constitute no more than normal vessel discharges, cold warm water used in heat exchangers and chlorine used to control biofouling in heat exchangers. The definition of "material" in § 1402(c) of the Marine Protection Act does not include sewage from vessels, water or heat. The definition of "dumping" in § 1402(f) does not include routine vessel discharges. The definition of "material" would, however, include chlorine as a chemical. The question is whether the chlorine would be deemed to be "transported for dumping." Chlorine would not be transported for dumping if it were manufactured on board, which was the case with Mini-OTEC and OTEC-1. If sponge balls were used for cleaning the heat exchangers, the chlorine question could disappear. The sponge balls are retrieved and recirculated, so it is not expected that they will be "dumped." Finally, § 1402(f) of the Marine Protection Act provides that dumping "does not mean a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under the provisions of the Federal Water Pollution Control Act." Since the OTEC Act makes the FWPCA applicable to all OTEC facilities and plantships, the Marine Protection Act, by its own provisions, will not apply.

[222] FWPCA, *supra* note 108, § 1362(12).

[223] The OTEC Act, *supra* note 161, § 9117(f).

wastes, heat, and industrial waste. The permit may be obtained as part of the CAR process under the OTEC Act.

8. *Comment*

The OTEC Act blurs the traditional distinctions between vessel and structures. Both OTEC plantships and OTEC facilities are to be documented by the Coast Guard as vessels, and are to be allowed maritime financing. Maritime law will apply to plantships, which are vessels, and to those facilities which may in certain cases be deemed to be vessels. However, pursuant to the OTEC Act, neither plantships nor facilities will be deemed vessels under the FWPCA. This regime is obviously inconsistent. Consistency might be achieved if the Army Corps of Engineers were given jurisdiction over OTEC facilities within navigable waters, and if the OCSLA were amended to extend Corps jurisdiction to OTEC facilities standing on or moored above the outer continental shelf. Personnel on all OTEC facilities would then have remedies under OSHA. The Coast Guard would have jurisdiction over OTEC plantships, with personnel remedies available under maritime law as well as under the Jones Act. The FWPCA would apply to facilities, while international pollution conventions would apply to plantships.

Though inconsistent, the present regime is comprehensive—it covers pollution control, safety at sea, financing and remedies for personal injuries. NOAA is mandated to consider many factors before issuing licenses, and since NOAA is the licensing agency for all OTEC facilities and plantships, an integrated overview is provided, allowing for the coordinated development of the United States' ocean thermal resources.

D. State and Local Law

The state governments in U.S. coastal areas will have regulatory powers over OTEC plants positioned near shore or built onshore. Two federal laws provide the states with a basis for such regulation: (1) the SLA,[224] and (2) the Coastal Zone Management Act.[225]

1. *Submerged Lands Act*

Historically, states have regulated activities occurring off their coasts. However, when nearshore submerged lands were found to be lucrative sources of oil, the federal government filed suit to gain control of them

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[224] Submerged Lands Act, *supra* note 40.

[225] Coastal Zone Management Act, *supra* note 18.

and was victorious in the 1947 case of *United States v. California*.[226] The U.S. Congress overturned this result in 1953 by passing the SLA, which granted the states title to the lands under navigable waters within their boundaries.[227] Thus, coastal states can rely upon the SLA for authority to issue permits for OTEC cables and pipes resting on submerged lands beneath their nearshore waters.

2. *Coastal Zone Management Act*

States with approved Coastal Zone Management programs have been given effective veto power over federally licensed projects within their coastal zones.[228] Under the Coastal Zone Management Act, the state not only must be consulted, but it must also concur, before a federal license can be issued.[229] The OTEC Act is consistent with the Coastal Zone Management Act in this regard.[230] The OTEC Act has been interpreted as giving the governors of adjacent coastal states an effective veto over the issuance of a license for an OTEC plant connected to, or impacting upon,

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[226] 332 U.S. 19 (1947).

[227] Submerged Lands Act, *supra* note 40, § 1311(a).

[228] The Coastal Zone Management Act, *supra* note 18, § 1456(c), provides:

(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development projects in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. . . . No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

[229] *Id.*

[230] The OTEC Act, *supra* note 161, §9110(c)(10) provides:

The Administrator may issue a license to a citizen of the United States in accordance with the provisions of this Act unless—

. . . .

(10) The Governor of each adjacent coastal state with an approved Coastal Zone Management program in good standing pursuant to the Coastal Zone Management Act of 1972 (33 U.S.C. 1451 et seq.) determines that, in his or her view, the application is inadequate or inconsistent with respect to programs within his or her jurisdiction.

the adjacent coastal state.[231]

3. *State and Local Law*[232]

A number of state and county permits will be required to site and operate OTEC plants in Hawaii. The State Board of Land and Natural Resources regulates public lands, including submerged lands, which are included in the conservation district and would therefore require a conservation district use permit.[233] All shore waters, navigable streams, harbors and roadsteads in Hawaii are under the care and control of the Department of Transportation, which may require a permit for work within the shore waters of the state.[234] The State Department of Health administers the National Pollution Discharge Elimination System under the FWPCA,[235] and may require a permit for an OTEC plant. The Department of Health may also require a zone of mixing approval for the discharge of water from an OTEC plant.[236] The counties administer the Special Management Area (SMA)[237] which extends inland from the shoreline and a SMA permit is required for developments in the SMA.[238] An

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[231] The following colloquy took place at a hearing held by NOAA's Office of Ocean Minerals and Energy in Honolulu on the proposed regulations for the OTEC Act:

> [GOVERNOR ARIYOSHI]: First, Section 1001.330(d) [46 Fed. Reg. 39388, 39405 (1981)(to be codified in 15 C.F.R. § 981.330(d)] provides for consultation with adjacent coastal states with approved Coastal Zone Management programs regarding license conditions. Under these provisions, the governor of a coastal state may determine that an application for a license is inadequate or inconsistent with the State's CZM Program. If so, the Governor may notify the Administrator of NOAA, so that a license can be conditioned upon consistency with the CZM Program and other state laws. Section 1001.330(d)(4) [46 Fed. Reg. 39388, 39406 (1981)(to be codified in 15 C.F.R. § 981.330(d)(4)] states that "if a license cannot be so conditioned, the Administrator will not issue the license." We interpret that to mean that the Governor of an adjacent coastal state can veto an application if it is not consistent, and cannot be made consistent, with the CZM Program. We approve of this provision, and would like confirmation that our interpretation of the proposed regulation is correct.
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> . . . .
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> [THE CHAIRMAN]: With regard to the question on the interpretation that you raised, your first point concerning the role of adjacent coastal states with the approved Coastal Zone Management Program, we would agree with the interpretation that is contained in the Governor's testimony.

Proposed Rulemaking and Draft Environmental Impact Statement, 1981 U.S. DEP'T OF COMM., NAT'L OCEANIC AND ATMOSPHERIC ADMINISTRATION, OFFICE OF OCEAN MINERALS AND ENERGY PROC. 10-12.

[232] *See generally* Keith, *supra* note 159.

[233] HAWAII REV. STAT. § 171-2, -6(4) (1976).

[234] *Id.* § 266-1, -16.

[235] FWPCA, *supra* note 108.

[236] STATE OF HAWAII DEP'T OF HEALTH, PUBLIC HEALTH REG., ch. 37-A, §§ 4, 7.

[237] HAWAII REV. STAT. § 205A-22(4) (Supp. 1981).

[238] *Id.* § 205A-28.

Environmental Impact Statement (EIS) could also be required.[239] The counties also require shoreline setback permits for facilities located between twenty and forty feet inland from the shoreline.[240]

4. *Comment*

Grazing plantships are expected to operate too far from shore to create an impact on an adjacent coastal state. The Governor's veto power under the OTEC Act will thus apply to OTEC facilities. While this veto power may appear unusual, it is clear that coastal states can block the construction of an OTEC facility connected to their shores, without recourse to the provisions of the OTEC Act. Various permits will be required by the state and counties for constructing onshore receiving stations and power lines, laying cables and pipelines resting on submerged lands, constructing facilities in the shore waters of the state and discharging pollutants during plant operations. Thus, although the OTEC Act recognizes state power, it does not greatly increase it.

The regulations issued pursuant to the OTEC Act encourage state-federal cooperation by drawing states into the consultative process. Section 981.380(a)(1) of the regulations provides for "early designation of a representative from each participating Federal, State, and local government entity, as well as the OTEC license applicant, to serve as members of the Consolidated Application Review (CAR) Team."[241]

Thus, coastal states will have direct regulatory power over OTEC activities affecting their submerged lands. Additionally, those with an approved coastal zone management program will have effective veto power over the licensing and positioning of OTEC plants by the federal government. State and local agencies may make their concerns and requirements known to federal agencies and to the OTEC applicant by participating in the CAR process.

V. The Regulation of Manganese Nodule Mining and Processing

This section deals with another potentially valuable ocean resource—manganese nodules. Manganese nodules are abundant in the tranquil waters of the Pacific seabed and the mining and processing of these nodules could significantly boost Hawaii's total economic output.

The major issues with respect to development of a manganese nodule industry in Hawaii involve the ownership of the nodules, the proposed limitations on their production and the disposal of processing wastes. This section begins with a discussion of existing international and federal

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[239] *Id.* § 205A-26(2)(A).

[240] *See* note 345 *infra.*

[241] 46 Fed. Reg. 39388, 39406 (1981)(to be codified in 15 C.F.R. § 1981.380(a)(1)).

laws which currently affect the mining of the nodules. A discussion concerning processing of the nodules follows, focusing on possible processing plant-sites for Hawaii and alternative waste disposal methods.

A. *Introduction*

Manganese nodules[242] are concretions which are found on the seabed of deep ocean basins and the bottoms of some lakes and inland seas. Most nodules range in size and shape from peas to potatoes, and are composed chiefly of metal oxides, usually occurring as a crust which has slowly accumulated layer by layer on some nucleating object, such as a small rock or shark's tooth.[243] Current interest in nodules focuses on their nickel, copper, cobalt and manganese content. Other metals such as molybdenum may be commercially valuable by the time an industry develops.[244] The nodules receiving the most attention from industry are those located in the near-equatorial northeastern Pacific Ocean in the Clarion-Clipperton Fracture Zone.[245]

The United States is almost totally dependent upon foreign imports for its supply of certain primary metals.[246] The mining or "recovery" of manganese nodules by domestic interests could provide the United States with a stable, new source of copper, nickel, cobalt, manganese and other nonferrous metals at prices competitive with the world market.

B. *Manganese Nodule Mining*

1. *International Law*

a. *Convention on the High Seas*

Under the current Convention on the High Seas,[247] manganese nodule mining companies are free to mine nodules so long as they do not unrea-

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[242] *See generally* CONG. RESEARCH SERV., OCEAN MANGANESE NODULES (1975) [hereinafter cited as "OCEAN MANGANESE NODULES"]; B. HEEZEN & C. HOLLISTER, THE FACE OF THE DEEP (1971); J. MERO, THE MINERAL RESOURCES OF THE SEA (1965); D. ROSS, OPPORTUNITIES AND USES OF THE OCEAN 137-55 (1980); STATE OF HAWAII DPED, BIBLIOGRAPHY AND INDEX TO LITERATURE ON MANGANESE NODULES (1861-1979) (1981); Heath, *Deep-Sea Manganese Nodules*, OCEANUS 60 (Winter 1978).

[243] PUNA/KOHALA REPORT, *supra* note 5, at 5.

[244] *Id.*

[246] Industry interest is based on the comparatively high nickel and copper contents of the nodules in this region, plus their dense distribution and the absence of major topographic obstructions on the seafloor. *Id.*

[246] *See, e.g.*, U.S. DEP'T OF COMMERCE, OFFICE OF POLICY, COBALT, COPPER, NICKEL AND MANGANESE: FUTURE SUPPLY AND DEMAND AND IMPLICATIONS FOR DEEP SEABED MINING (1979).

[247] Convention on the High Seas, *supra* note 135.

sonably interfere with the use of the high seas by any other country or company. Although the right to mine on the high seas is not specifically granted by the Convention, nodule mining can be argued to be a reasonable use of the high seas, much like the taking and appropriating of fishery resources.[248] The vastness of the ocean and the almost limitless supply of nodules[249] indicate that mining could be carried out without interfering with other reasonable ocean activities.

It is argued by conferees at UNCLOS III that manganese nodule companies are no longer free to mine nodules, due to resolutions adopted by the United Nations calling for a moratorium on deep seabed exploitation and declaring that the mineral resources of the deep seabed are the common heritage of mankind.[250] These resolutions are intended to express

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[248] Article 2 of the Convention on the High Seas, *supra* note 135, states that freedom of the high seas comprises for both coastal and non-coastal States, *inter alia*, the freedoms of navigation, of fishing, to lay submarine cables and pipelines and to fly over the high seas. Marine mining is analagous to fishing, since it involves the capture of an ocean resource which is deemed to subsequently belong to the captor. Article 2 prohibits States from subjecting any part of the high seas to its sovereignty, but sovereignty is not necessary to mine nodules, just as it is not necessary to lay a cable or navigate in a region rich with nodules. Mining companies may prefer to have vested interests in mining sites backed by national sovereignty, but this preference does not affect the freedoms under the existing Convention. *Cf.* Van Dyke & Yuen, *"Common Heritage v. Freedom of the High Seas": Which Governs the Seabed?* 19 SAN DIEGO L. REV. 493 (1982).

[249] It is estimated that 25% of the seafloor is covered with nodules. D. ROSS, *supra* note 242, at 140. It has also been estimated that the Pacific Ocean contains 1.6 trillion tons of nodules. J. MERO, *supra* note 242, at 121-241. The Ocean Mining Administration of the U.S. Department of the Interior estimated in 1976 that potential global nodule reserves were 69 billion dry tons. HOLSER, MANGANESE NODULE RESOURCES AND MINE SITE AVAILABILITY 11 (1976). The United Nations estimated in 1979 that total potential nodule reserves are 23 billion dry tons, and total nodule resources are 175 billion tons. MANGANESE NODULES: DIMENSIONS AND PERSPECTIVES 77 (1979). Since not all nodules will be minable due to topographic or oceanic conditions, the estimates of "reserves" indicate the available resources. Van Dyke and Yuen argue, however, that the supply of nodules could be exhausted within a few decades. Van Dyke & Yuen, *supra* note 248, at 509-10.

[250] Arvid Pardo, then U.N. Ambassador for Malta, asserted in a speech to the General Assembly in 1967 that the resources of the deep seabed are the "common heritage" of mankind. On December 18, 1967, the U.N. passed a resolution establishing an ad hoc committee to study the peaceful uses of the seabed. G.A. Res. 2340, 22 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6964 (1967). A year later on December 21, 1968, the U.N. adopted another resolution establishing a Committee on Peaceful Uses of the Sea-Bed and Ocean Floor Beyond Limits of National Jurisdiction. G.A. Res. 2467, 23 U.N. GAOR Supp. (No. 18), U.N. Doc. A/7218 (1968). On December 15, 1969, a resolution was passed calling for a moratorium on deep seabed exploitation. G.A. Res. 2574, 24 U.N. GAOR Supp. (No. 30), U.N. Doc. A/7630 (1969). On December 17, 1970, the U.N. passed a resolution which was a Declaration of Principles governing the seabed, ocean floor, and subsoil beyond national jurisdiction. This resolution asserted that the sea-bed, ocean floor and subsoil beyond national jurisdiction, as well as the resources of the area, are the common heritage of mankind. G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8028 (1970). On the same day, the General Assembly passed a resolution convening a Third Conference on the Law of the Sea, to be held in 1973, and increasing the membership on the Sea-Bed committee to 86 members. G.A. Res. 2750, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8028 (1970).

the position of the General Assembly and the individual parties to the resolutions, but there is a dispute as to their continued binding effect. It has been twelve years since the moratorium was declared, and although exploration has continued, no commercial mining has yet begun. Nations opposed to unilateral mining under the Convention on the High Seas contend that mining would be illegal under the resolutions,[251] while nations interested in mining assert that the resolutions do not have the force of law, and whatever force they may have had has been abrogated by the lack of further definition by the United Nations.[252]

b. Draft Convention on the Law of the Sea

After six preparatory meetings, the first session of UNCLOS III began in December, 1973, in New York.[253] A Draft Convention was produced by the tenth session in 1981.[254]

The Draft Convention proposes an elaborate regulatory authority and management system for deep-sea mining. All together fifty-eight articles in the Draft Convention apply to deep-sea mining on the high seas. Part XI of the Draft Convention describes the Area to be governed, principles governing the Area, conduct of activities in the Area, development of resources in the Area, the Authority, the Assembly, the Council, the Secretariat, the Enterprise, privileges and immunities, the settlement of disputes and advisory opinions.

The new United Nations regime would control the sea-bed, ocean floors and subsoil beyond the claims of coastal or island nations.[255] Under article 133, the resources to be controlled would include:

> (i) Liquid or gaseous substances at or beneath the surface such as petroleum, gas, condensate, helium, and also sulphur and salts recovered in liquid form;
> (ii) Solid substances occurring on the surface or at depths of less than three

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[251] *See, e.g.*, Legal Position of the Group of 77 on the Question of Unilateral Legislation Concerning the Exploration and Exploitation of the Sea-Bed and Ocean Floor and Subsoil Thereof Beyond National Jurisdiction, U.N. Doc. A/CONF.62/106 (1980).

[252] *See, e.g.*, T. KRONMILLER, THE LAWFULNESS OF DEEP SEABED MINING (1979).

[253] An informal single negotiating text emerged from the third session in 1975. Third United Nations Conference on the Law of the Sea, Informal Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8 (1975). A revised single negotiating text emerged from the fourth session in 1976. Third United Nations Conference on the Law of the Sea, Revised Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8/Rev.1 (1976). The sixth session produced an informal composite negotiating text in 1977. Third United Nations Conference on the Law of the Sea, Informal Composite Negotiating Text, U.N. Doc. A/CONF.62/WP.10 (1977). The ninth session produced an informal Draft Convention in 1980. Third United Nations Conference on the Law of the Sea, Draft Convention on the Law of the Sea (Informal Text) U.N. Doc. A/CONF.62/WP.10/Rev.3 (1980).

[254] Draft Convention, *supra* note 48.

[255] *Id.* art. 1(1).

> meters below the surface, including polymetallic nodules;
> (iii) Solid substances at depths of more than three meters below the surface;
> (iv) Metal-bearing brine at or beneath the surface.

Under article 135, the legal status of the superjacent waters or airspace above the waters in the Area would not be affected by the Draft Convention.

Article 136 states that "[t]he Area and its resources are the common heritage of mankind." Article 137 adds that "[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act." The "benefit of mankind" is further defined by article 140, where it is stated that:

> Activities in the Area shall . . . be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or landlocked, and taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status recognized by the United Nations . . . .

Under article 144, the Authority would be obligated to promote and encourage the transfer of technology to developing States. Article 150 would establish a policy of protecting the metals industries of developing States by preventing price reductions due to the introduction into the market of competing metals derived from manganese nodules. The policy is incorporated into article 151 on production policies. Pursuant to that article, a mining company or "operator" would submit to the Authority a plan of work for its approval.[256] The operator would have to obtain a production authorization from the Authority.[257] In applying for this authorization, the operator would have to specify the annual quantity of nickel which is expected to be recovered.[258] The Authority would then issue the authorization unless the level of nickel added to the market would exceed the nickel production ceiling.[259]

The Authority would be obligated to reserve 38,000 tons of nickel from

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[256] *Id.* art. 151(2).

[257] *Id.*

[258] *Id.*

[259] *Id.* An "interim period" begins five years prior to the commencement of commercial production, and lasts 25 years, or until a Review Conference or other arrangements. The nickel production ceiling is established by first taking the trend-line values for annual nickel production for the year before the 25-year "interim period" begins, and the projection for the year before commercial production begins. Commercial production begins the fifth year of the "interim period." Then, 60% of the difference between the trend-line values for nickel consumption for the year in which the production authorization is being applied for and the projection for the year before commercial production begins is added to obtain the ceiling.

the production ceiling for the Enterprise,[260] and could not authorize the production under any plan of work of a quantity in excess of 46,500 tons of nickel per year.[261] The levels of production of other metals such as copper, cobalt and manganese "should not be higher than those which would have been produced had the operator produced the maximum level of nickel from those nodules" under his production authorization.[262]

Article 156 would establish the International Sea-Bed Authority, which article 157 describes as "the organization through which States Parties shall organize and control activities in the Area." The principal organs of the Authority would be an Assembly, a Council, a Secretariat and the Enterprise.[263] The Assembly would consist of all members of the Authority, or all States Parties to the Convention.[264] Article 160 would establish the Assembly as the "supreme organ of the Authority" with "the power to establish general policies in conformity with the relevant provisions of this Convention." The Assembly would elect the members of the Council, the Secretary-General and the Governing Board of the Enterprise.[265]

The Council would consist of thirty-six members of the Authority, elected by a formula set forth in article 161, to insure the election of representatives from the following classifications of nations: those with the greatest investment in nodule mining, those consuming the most metals of the type found in nodules, those which are exporters of the metals found in nodules and developing States which have large populations, are land-locked or geographically disadvantaged, are major importers of minerals found in the Area or are potential producers of such minerals.[266] The formula also requires the Council's composition to reflect an equitable geographical distribution of seats on the Council as a whole.[267] The Council would be the executive organ of the Authority;[268] its powers under article 162 include the approval of plans of work.[269] The organs of the Council would include a Legal and Technical Commission and an Economic Planning Commission.[270]

The Secretariat would be composed of a Secretary-General and his staff.[271] The Secretary-General would be elected by the Assembly for a four-year term and would be the chief administrative officer of the

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[260] Draft Convention, *supra* note 48, art. 141(2)(c).
[261] *Id.* art. 151(2)(e).
[262] *Id.* art. 151(2)(f).
[263] *Id.* art. 158(1).
[264] *Id.* art. 159.
[265] *Id.* art. 160.
[266] *Id.* art. 161(1)(a)-(1)(d).
[267] *Id.* art. 161(1)(e).
[268] *Id.* art. 162(1).
[269] *Id.* art. 162(2)(j).
[270] *Id.* art. 163(1).
[271] *Id.* art. 166(1).

Authority.[272]

The Enterprise is described in article 170 as "the organ of the Authority which shall carry out activities in the Area directly, pursuant to Article 153, paragraph 2(a), as well as transportation, processing and marketing of minerals recovered from the Area." Article 153 relates to exploration and exploitation of the Area, which the Enterprise may undertake in association with States Parties or States Entities.

The Draft Convention would thus establish an elaborate United Nations organization, reminiscent of the United Nations itself—an Assembly, Council and Secretariat. There is the interesting addition of the Enterprise, the Authority's own company and entrepreneur, which, by the terms of the Draft Convention, is given specific advantages over private companies.[273] While stating that the resources of the seabed are the common heritage of mankind,[274] several articles in the Convention give preference to disadvantaged and developing States. These States would presumably receive a larger share of the proceeds from mining operations, and would receive new technology at the expense of developed countries.[275] The Draft Convention is therefore an explicit attempt at a "New International Economic Order," designed to redress economic wrongs of the past.[276]

2. *Deep Seabed Hard Mineral Resources Act*

United States legislation regarding manganese nodule mining, first introduced in 1971, took various forms and required a substantial number

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[272] *Id.*

[273] *Id.* art. 170.

[274] *Id.* art. 136.

[275] *Id.* art. 266(2).

[276] In proposing a New International Economic Order, the developing countries sought a solution of global economic problems related to resources through cooperation between States, through participation of all States in international decision making and through implementation of the concept of equity at the international level. These concepts, it was believed, should replace the economic domination by a few States over the majority of the international community and lead in due course to a world order based on cooperation rather than competition between States. Pardo, *The Evolving Law of the Sea: A Critique of the Informal Composite Negotiating Text (1977)*, 1978 OCEAN Y.B. 1, 26. Pardo asserts that, "[i]t is clear that the provisions of the Text do not promote the practical realization of the objectives of a New International Economic Order," due to the vast expansion of national control over marine resources which will result from the 200-mile exclusive economic zones. *Id.* It has been argued by a proponent of the New International Economic Order that it does not matter if the 200-mile zones leave little of value on the high seas to become the common heritage of mankind, since the law of the sea is the first implementation of the New International Economic Order, and it is the idea which is the most important thing. Comments by Jorge A. Lozoya, Workshop on the Management of the Pacific Marine Commons, Tokyo, Japan (June 27, 1981).

of hearings.[277] On February 26, 1979, Hawaii's Senator Spark M. Matsunaga introduced the "Deep Seabed Hard Mineral Resources Act," which was signed into law on June 28, 1980.[278]

The Congressional findings in the Deep Seabed Act state that the United States needs hard minerals, that dependence on foreign sources of supply is a significant factor in the national balance of payments, that an independent supply is needed and that deep seabed minerals can be that alternate source of supply.[279] The findings further state that although the United States supported the United Nations General Assembly Resolution which declared that the mineral resources of the deep seabed are the common heritage of mankind,[280] there was the "expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty yet to be agreed upon."[281] While the United States encourages a treaty, Congress found that one is not likely to be concluded in the near future.[282] Moreover, even if a treaty is concluded, it would take time for a new regime to become established and begin operation.[283] In the meantime, the Act states, mining technology will require substantial investment for many years before commercial production can occur, and uncertainty among investors as to the future legal regime is likely to discourage or prevent the necessary investments.[284] Pending a Law of the Sea Treaty, there is also a need to protect the environment.[285] Therefore, Congress found that "[l]egislation is required to establish an interim legal regime under which technology can be developed and the exploration and recovery of the hard mineral resources of the deep seabed can take place until such time as a Law of the Sea Treaty enters into force with respect to the United States."[286]

The purposes of the Deep Seabed Act are: (1) to encourage the successful conclusion of a comprehensive Law of the Sea Treaty which will define the common heritage of mankind and assure nondiscriminatory access to deep-sea resources for all nations; (2) to establish an international revenue-sharing fund which can be shared with the international community when a treaty comes into force; (3) to establish an interim program to regulate the exploration for and commercial recovery of hard mineral

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[277] *See, e.g.*, OCEAN MANGANESE NODULES, *supra* note 242, at 59-83.

[278] Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-1473 (Supp. IV 1980) [hereinafter cited as "Deep Seabed Act"]. *See generally* Collins, *Deep Seabed Hard Mineral Resources Act—Matrix for United States Deep Seabed Mining*, 13 NAT. RESOURCES LAW. 571 (1981).

[279] Deep Seabed Act, *supra* note 278, § 1401(a)(2)-(a)(4).

[280] G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8028 (1970).

[281] Deep Seabed Act, *supra* note 278, § 1401(a)(7).

[282] *Id.* § 1401(a)(8)-(a)(9).

[283] *Id.* § 1401(a)(10).

[284] *Id.* § 1401(a)(11).

[285] *Id.* § 1401(a)(14).

[286] *Id.* § 1401(a)(16).

resources of the deep seabed by United States citizens; (4) to accelerate the environmental assessment program regarding exploration and commercial recovery, and assure that such activities will encourage the conservation of resources, protect the environment, and promote the safety of life and property at sea; and (5) to encourage the continued development of mining technology.[287]

In its findings, Congress asserted that "it is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms recognized by general principles of international law."[288] The Deep Seabed Act's "Disclaimer of Extraterritorial Sovereignty" maintains consistency with principles of the Convention on the High Seas by providing that:

> By the enactment of this Act, the United States:
> (1) exercises its jurisdiction over United States citizens and vessels, and foreign persons and vessels otherwise subject to its jurisdiction, in the exercise of the high seas freedom to engage in exploration for, and commercial recovery of, hard mineral resources of the deep seabed in accordance with generally accepted principles of international law recognized by the United States; but
> (2) does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed.[289]

Under the Deep Seabed Act, no U.S. citizen may engage in any exploration or commercial recovery unless authorized to do so under a license or permit issued pursuant to the Deep Seabed Act, a license, permit or authorization issued by a reciprocating State or an international agreement which is in force with respect to the United States.[290] Licenses for exploration and permits for recovery are to be issued by the Administrator of NOAA.[291] NOAA was authorized to begin issuing licenses for exploration on July 1, 1981, and may issue permits for commercial recovery commencing January 1, 1988.[292]

Applicants must provide an exploration plan to obtain a license, and a recovery plan to obtain a permit.[293] These plans must set forth the activities which the applicant proposes to carry out, the schedule, the area, the methods and environmental safeguards.[294] The area selected by the appli-

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[287] *Id.* § 1401(b).
[288] *Id.* § 1401(a)(12).
[289] *Id.* § 1402.
[290] *Id.* § 1411(a)(1)(A)-(a)(1)(C).
[291] *Id.* § 1412(a).
[292] *Id.* § 1412 (c)(1)(D).
[293] *Id.* § 1413(a)(2)(A).
[294] *Id.* § 1412(a)(2)(B).

cant shall be approved unless the Administrator finds that the area is not a logical mining unit or commercial recovery activities in the proposed location would result in a significant adverse impact on the environment which cannot be avoided even with the imposition of reasonable restrictions.[295] Exploration licenses shall be issued for ten years, and each permit for commercial recovery shall be issued "for a term of 20 years and for so long thereafter as hard mineral resources are recovered annually in commercial quantities from the area to which the recovery plan associated with the permit applies."[296]

The Deep Seabed Act requires the Administrator to expand and accelerate the Deep Ocean Mining Environmental Study (DOMES) to assess the effects on the environment of exploration and commercial recovery activities.[297] It further requires a continuing program of ocean research to support environmental assessment activities.[298] The issuance of any permit or license under the Deep Seabed Act is "deemed to be a major federal action significantly affecting the quality of the human environment for the purposes of section 102 of the National Environmental Policy Act of 1969," thus requiring the preparation of a federal EIS.[299]

While giving due respect to UNCLOS III, the Deep Seabed Act also authorizes a reciprocating State's regime, and sets forth the intent of Congress regarding the transition to an international agreement.[300] These are, no doubt, the most provocative sections of the Deep Seabed Act from

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[295] *Id.* § 1413(a)(2)(D).

[296] *Id.* § 1417(b). In addition to issuing exploration licenses, the Administrator of NOAA is required to issue regulations necessary and appropriate to the implementation of the Deep Seabed Act. *Id.* § 1468. The proposed rules for exploration licenses were issued on March 24, 1981. Proposed Rules, Deep Seabed Mining Regulations for Exploration Licenses, 46 Fed. Reg. 18448 (1981). The final rules were issued on September 15, 1981. Final Rules, Deep Seabed Mining Regulations for Exploration Licenses, 46 Fed. Reg. 45890 (1981)(to be codified in 15 C.F.R. §§ 970.100-.1107).

[297] Cognizant of the fact that deep seabed mining is a new activity, the effects of which are still substantially unknown, the Administrator is empowered to amend the regulations to provide for the conservation of natural resources. Deep Seabed Act, *supra* note 278, § 1468(c).

[298] The Act required NOAA to prepare a plan for a five-year research program and submit it to Congress within 160 days of enactment. NOAA's plan was completed in 1981.

[299] *Id.* § 1419(d). Furthermore, if the Administrator, in consultation with the Administrator of the Environmental Protection Agency, determines that a programmatic environmental impact statement (EIS) is required with respect to any area of the ocean in which any U.S. citizen is expected to undertake exploration and commercial recovery, he is required to prepare and publish both a draft and final programmatic EIS regarding such areas. *Id.* § 1419(c). Such a determination was made, and a draft programmatic EIS was published in March, 1981. U. S. DEP'T OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, OFFICE OF OCEAN MINERALS AND ENERGY, DEEP SEABED MINING: DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (1981). The final programmatic EIS was published in September, 1981. U.S. DEP'T OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, OFFICE OF OCEAN MINERALS AND ENERGY, DEEP SEABED MINING: FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (1981).

[300] Deep Seabed Act, *supra* note 278, §§ 1428, 1441.

the point of view of United Nations conferees. Section 1428(a) sets forth the criteria for the designation of States which will "reciprocate" with the United States in terms of the regulation of mining, mutual recognition of permits and licenses, recognition of priority of mining rights and the establishment of an interim legal framework for exploration and commercial recovery.[301] Section 1428(b) prohibits the Administrator from issuing a license or permit which conflicts with a license or permit issued by a reciprocating State. Section 1428(e) authorizes the President to negotiate agreements with foreign nations to implement the section. Such negotiations were underway by the spring of 1981.[302]

Even more striking are the provisions regarding transition to an international agreement. Section 1441 states that it is the intent of Congress to provide assured and nondiscriminatory access to the hard mineral resources of the deep seabed for United States citizens, and to provide security of tenure for United States citizens who have undertaken exploration or commercial recovery before a law of the sea treaty enters into force with respect to the United States. The fulfillment of Congressional intent is to be judged by reviewing the totality of the provisions of a law of the sea treaty.[303] Section 1442 provides that any provision of Title I, II

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[301] Section 1428(a) provides:

(a) DESIGNATION. The Administrator, in consultation with the Secretary of State and the heads of other appropriate departments and agencies, may designate any foreign nation as a reciprocating state if the Secretary of State finds that such foreign nation—

(1) regulates the conduct of its citizens and other persons subject to its jurisdiction engaged in exploration for, and commercial recovery of, hard mineral resources of the deep seabed in a manner compatible with that provided in this Act and the regulations issued under this Act, which includes adequate measures for the protection of the environment, the conservation of natural resources, and the safety of life and property at sea, and includes effective enforcement provisions;

(2) recognizes licenses and permits issued under this title to the extent that such nation, under its laws, (A) prohibits any person from engaging in exploration or commercial recovery which conflicts with that authorized under any such license or permit and (B) complies with the date for issuance of licenses and the effective date for permits provided in § 102(c)(1)(D) of this Act;

(3) recognizes, under its procedures, priorities of right, consistent with those provided in this Act and the regulations issued under this Act, for applications for licenses for exploration or permits for commercial recovery, which applications are made either under its procedures or under this Act; and

(4) provides an interim legal framework for exploration and commercial recovery which does not unreasonably interfere with the interests of other states in their exercise of the freedoms of the high seas, as recognized under general principles of international law.

[302] Interview with Robert Knecht, Director of the Office of Ocean Minerals and Energy, National Oceanic and Atmospheric Administration, in Honolulu (Apr. 23, 1981).

[303] Section 1441 provides:

It is the intent of Congress—

(1) that any international agreement to which the United States becomes a

or III of the Deep Seabed Act and any regulation based on them which is not inconsistent with a new international agremeent entered into by the United States, shall continue in effect after the international agreement enters into force.

Concern for the fate of U.S. miners under an international agreement is further shown by section 1442. That section provides that "[i]n the implementation of such international agreement the Administrator, in consultation with the Secretary of State, shall make every effort, to the maximum extent practicable consistent with the provisions of that agreement, to provide for the continued operation of exploration and commercial recovery activities undertaken by United States citizens prior to entry into force of the agreement."[304] The Administrator is also required to submit to Congress proposed legislation necessary for the United States to imple-

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party should, in addition to promoting other national oceans objectives—

(A) provide assured and nondiscriminatory access, under reasonable terms and conditions, to the hard mineral resources of the deep seabed for United States citizens, and

(B) provide security of tenure by recognizing the rights of United States citizens who have undertaken exploration or commercial recovery under Title I before such agreement enters into force with respect to the United States to continue their operations under terms, conditions, and restrictions which do not impose significant new economic burdens upon such citizens with respect to such operations with the effect of preventing the continuation of such operations on a viable economic basis;

(2) that the extent to which any such international agreement conforms to the provisions of paragraph (1) should be determined by the totality of the provisions of such agreement, including, but not limited to, the practical implications for the security of investments of any discretionary powers granted to an international regulatory body, the structures and decision-making procedures of such body, the availability of impartial and effective procedures for the settlement of disputes, and any features that tend to discriminate against exploration and commercial recovery activities undertaken by United States citizens; and

(3) that this Act should be transitional pending—

(A) the adoption of an international agreement at the Third United Nations Conference on the Law of the Sea, and the entering into force of such agreement, or portions thereof, with respect to the United States, or

(B) if such adoption is not forthcoming, the negotiation of a multilateral or other treaty concerning the deep seabed, and the entering into force of such treaty with respect to the United States.

[304] Section 1442 further provides:

The Administrator shall submit to the Congress, within one year after the date of such entry into force, a report on the actions taken by the Administrator under this section, which report shall include, but not be limited to—

(1) a description of the status of deep seabed mining operations of United States citizens under the international agrement; and

(2) an assessment of whether United States citizens who were engaged in exploration or commercial recovery on the date such agreement entered into force have been permitted to continue their operations.

ment a system for the protection of interim investments that is adopted as part of an international agreement.[305] If no such system is adopted, the Administrator must report on the status of negotiations relating to the establishment of such a system.[306]

However, concern for U.S. miners does not extend as far as compensating mining companies for losses incurred due to the United States entering into an international agreement. While earlier bills included a compensation provision,[307] the Act disclaims any such obligation of the United States government.[308] Instead, emphasis is placed on treaty terms which will not impair investments[309]—an emphasis which seems to be on a collision course with the provisions of the Draft Convention.

3. *Comment*

Manganese nodule mining companies began exploring deep seabed mineral resources fifteen years ago.[310] By 1975, more than 100 companies around the world were involved in some aspect of manganese nodule mining.[311] It is estimated that over $300 million has now been spent by various international consortia to explore the ocean floor, to test mining equipment and to research processing techniques for a manganese nodule industry.[312] Considering the amount of time and money invested, and the companies interested, it is not difficult to understand why many experts expected manganese nodule mining to be a reality by the late 1970's. However, it is now 1982, and the scale-up for commercialization has not yet begun.

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[305] *Id.* § 1443(1).

[306] *Id.* § 1443(2).

[307] For example, H.R. 3350 was introduced by Mr. Murphy of New York on February 9, 1977, and reported with amendments on August 9, 1977. Entitled "Deep Sea Bed Hard Mineral Resources Act," the bill provided up to 90 percent of a mining company's investment or $350 million, whichever is less, for losses incurred as the result of the United States entering into a new law of the sea treaty. *See generally* Ott, *An Analysis of Deep Seabed Mining Legislation*, 10 NAT. RESOURCES LAW 591 (1977).

[308] Deep Seabed Act, *supra* note 278, § 1444.

[309] *Id.* § 1401(a)(11).

[310] Accounts of early industry activities can be found in Q. STEPHEN-HASSARD, THE FEASIBILITY AND POTENTIAL IMPACT OF MANGANESE NODULE PROCESSING IN HAWAII (1978); and OCEAN MANGANESE NODULES, *supra* note 242, at 31-37.

[311] OCEAN MANGANESE NODULES, *supra* note 242, at 37.

[312] In 1974, Kennecott Copper Corporation announced a five-year, $50 million research and development program to determine the feasibility of manganese nodule mining. D. Ross, *supra* note 242, at 146. Conrad G. Welling, Vice-President of Programs, Ocean Minerals Company, estimates that Ocean Minerals Company has spent $100 million to develop its mining system. Hastings, *Ocean Miner Let Out Of The Bag At Last*, Honolulu Advertiser, July 18, 1980, § A at 3. Mr. Welling estimates total industry costs to be $300 million. Telephone interview with Conrad G. Welling, Vice President of Programs, Ocean Minerals Company (June 15, 1980).

While there are technological problems yet to be overcome, the root of the present delay appears to be primarily political. In general, the companies appear to be waiting for a resolution of the deep seabed mining issues at UNCLOS III. While the United States, West Germany, the United Kingdom and France have recently passed national legislation regarding manganese nodule mining,[313] this, in and of itself, has not been sufficient to stimulate the scale-up to commercialization.

There are a number of conceivable scenarios for the future of marine mining in this decade. These scenarios include: (1) waiting for the treaty; (2) unilateral action or a reciprocating States regime while waiting for the treaty; (3) unilateral action by, or a reciprocating States regime among, those not party to the treaty; (4) marine mining within exclusive economic zones; (5) no mining by the existing international mining consortia; and (6) all or several of the above.[314]

Waiting for the treaty may be the scenario adopted by those companies which are multinational or transnational[315] in their activities. Companies which are now doing business with Third World nations may wish to remain on good terms with the lesser developed States at UNCLOS III. The existing investments and enterprises of these multinational companies may simply be too great to set at risk over deepsea mining.[316]

Waiting for the treaty may also be the policy of developed States dependent on lesser-developed States for their current supply of strategic metals. A developed State may be interested in developing marine minerals as a new source of supply, but may not be capable of marine mining for many years. In the meantime, it could not afford to be cut off by land-based suppliers. By supporting the treaty, the developed State signals that it will only begin mining under treaty terms acceptable to the lesser-

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[313] Deep Seabed Act, *supra* note 278; Act on Interim Regulation of Deep Seabed Mining, Bundesgesetzblatt, Part I, 9080, No. 50, Aug. 22, 1980, at 1429 (W. Ger.), 19 INT'L LEGAL MATERIALS 1330; Deep Sea Mining (Temporary Provisions) Act, House of Lords Bill 81, Feb. 26, 1981 (United Kingdom); Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, Law No. 81-1135, Dec. 23, 1981, Journal Official de la Republique Francaise, Dec. 24, 1981, at 3499 (France).

[314] This analysis is based on K. Keith, Marine Mining: Six Scenarios for the Eighties (June 1981)(paper presented at the Management of the Pacific Marine Commons, Tokyo).

[315] It can be argued that the world economy is becoming less "international" and more "transnational." In international trade, the goods of one country are exchanged for those of another. In a transnational economy, production involves several countries—one for the raw materials, another for labor, a third for management or technology and so on. *See, e.g.*, DRUCKER, MANAGING IN TURBULENT TIMES 95-110 (1980). In the transnational economy, alienating less developed States may mean the alienation of major sources of both labor and raw materials.

[316] One thing they may not wish to set at risk is oil. It is significant that one of the three owners of Ocean Mining Associates is Sun Oil Company; two of the owners of Ocean Minerals Company are Standard Oil of Indiana (Amoco) and Royal Dutch Shell; and British Petroleum has a 53% interest in Standard Oil of Ohio (Sohio), which has recently taken over Kennecott Copper. The oil industry is bigger than marine mining and is likely to be for many decades. This perspective may be persuasive for some corporate leaders.

developed States. Presumably, there would then be little reason for the lesser-developed States to cut off supplies to the developed State in the scale-up period before mining begins.

Waiting for the treaty may also be the position of the financial communities of developed States. Unilateral national legislation may provide for the establishment of claims, and a reciprocating States regime would resolve conflicts between the companies of different States. While some security is thereby provided, the question hovers in the background: If an UNCLOS III treaty is ratified, will the International Sea-Bed Authority recognize the claims established under a reciprocating States regime? If not, what is the point of proceeding? Until the Authority accepts the claim, the investment risk may be too high. Security of tenure depends on a successful transition from the validation of claims by reciprocating States to the validation of claims by the Authority. Since that transition cannot be assured, the financiers may prefer to wait.

One disadvantage of waiting for a treaty is that the treaty may be unfavorable to the mining companies. In both public and private statements, many members of the consortia have been critical of the Draft Convention.[317] In general, those States with the technology and capital to develop deep ocean mining are those States with free enterprise or modified capitalistic systems. In those systems, companies generally compete with each other, while the government plays the role of referee or guide. The ideology of the proposed international regime for deep seabed mining in the UNCLOS III Draft Convention is alien to these companies. Under the Draft Convention, a company would have to contribute a share of profits to develop "the common heritage" for the benefit of mankind, especially the developing States; it would have to live within certain quotas, which would give it less flexibility in responding to the market; it would have to transfer technology which may be its prime asset in market competition; and most unusual of all, it would have to compete with an Enterprise, which is the organ of its regulator. The International Sea-Bed Authority will set the rules, and may set them to the advantage of the Enterprise.[318]

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[317] *See, e.g.*, Dubs, *Deep Seabed Mining: Where Do We Go From Here?*, ENGINEERING AND MINING JOURNAL 123-33 (Sept. 1981).

[318] These are among the major areas of concern which led the Reagan Administration to review the UNCLOS III Draft Convention. The major areas of concern with the treaty were summarized by James L. Malone, Asst. Sec. of State Designate, Oceans and International Environmental and Scientific Affairs, Dept. of State:

(1) It imposes burdensome international regulations on the development of seabed resources beyond the limits of national jurisdiction.

(2) It establishes a supranational mining company—the Enterprise—that could eventually monopolize production of seabed minerals.

(3) It requires the U.S. and other nations to fund the first capitalization for the Enterprise in proportion to their contributions to the United Nations.

(4) It compels the sale of proprietary information and technology now largely in U.S. hands.

(5) It limits annual production of manganese nodules and the amount a single com-

Another disadvantage of waiting is that a Law of the Sea Treaty may never materialize, or that it may have too few parties to enter into force or to be effective after entering into force. Even with success assured, it could still take ten to fifteen years for ratification.[319]

The desire to preserve industry momentum may lead to commercialization and even mining under unilateral legislation or a reciprocating States regime while awaiting the ratification of an UNCLOS III treaty. The Deep Seabed Hard Mineral Resources Act of the United States, the Act

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pany can mine for 20 years, creating artificial scarcities.

(6) It creates a one-nation, one-vote international body governed by an Assembly and an Executive Council on which the Soviet Union and its allies have three seats, while the U.S. must compete with its allies for representation.

(7) It permits amendment of the exploration provisions of the treaty after five years negotiation and an affirmative vote of two-thirds of the parties to the treaty.

(8) It imposes revenue-sharing obligations on seabed mining companies that would significantly increase the costs of mining.

(9) It imposes an international revenue-sharing obligation on hydrocarbon production from the Continental Shelf beyond the 200-mile limit.

(10) It contains provisions setting out the eligibility of "national liberation movements" to get a share of revenues of the Seabed Authority.

Malone Outlines '10 Major Concerns' Leading to Review of Seabed Treaty, 11 AM. MINING CONG. NEWS BULLETIN 4 (June 5, 1981). *See also The U.S. Stands Tough in Sea-Mining Talks*, BUSINESS WEEK, Jan. 18, 1982, at 27. In February 1982, the Reagan Administration announced that it had completed its review and would return to UNCLOS III to seek changes in the deep sea mining provisions of the Draft Convention. Nossiter, *U.S. to Return to Law of Sea Parley*, Honolulu Star-Bulletin, Feb. 2, 1982, § A at 1, col. 1.

[319] International experience with treaty-making is not encouraging. One commentator suggests that 80 parties will be necessary for an UNCLOS III treaty to be a success. Gamble, *Post World War II Multilateral Treaty-Making: The Task of the Third United Nations Law of the Sea Conference in Perspective*, 17 SAN DIEGO L. REV. 527 (1980). However, the multilateral treaties which entered into force from 1947-1971 averaged only 30-48 parties. Even large, relatively non-controversial treaty-making efforts have not resulted in a large number of ratifying parties. For example, the 1968-1969 Vienna Conference on the Law of Treaties was attended by 100 States; the final text was accepted by 79, and it was signed by only 47. By 1980, ten years later, only 33 States had ratified or acceded to the treaty, two short of the number needed to enter into force. *Id.* at 535.

Fifteen ocean-related treaties which came into force after 1946 were still in force by 1979. Most of these treaties were narrowly focused and relatively unimportant. Only three achieved more than 80 parties—the IMCO Convention, the International Convention for the Safety of Life at Sea and the International Convention on Loadlines. The proposed Draft Convention, of course, is far broader in scope than these treaties. A more meaningful comparison is with the four 1958 Geneva Conventions and Optional Protocol. States could sign the individual conventions; only 14 signed all five. *Id.* at 536-42. Since all five together are equivalent to the Draft Convention, there is some doubt as to whether UNCLOS III will attract the 60 parties necessary to enter into force.

If the treaty does enter into force, it could take many years to do so. It took an average of six years for the four Geneva Conventions to enter into force. The Convention on the Territorial Sea and Contiguous Zone was signed by 43 States, less than half of those at the Conference. Only half of those 43 have ratified the treaty in the 20 years since then. The least controversial Convention, the Convention on the High Seas, took 13 years to obtain 50 parties.

on Interim Regulation of Deep Seabed Mining of the Federal Republic of Germany, the Deep Sea Mining (Temporary Provisions) Act of the United Kingdom and the Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed of France all provide that commercial mining may begin before the ratification of an UNCLOS III treaty. However, all of these laws provide that commercial mining shall not be permitted before January 1, 1988.[320] This gives UNCLOS III six years to obtain ratification of a treaty before U.S., West German, British or French companies begin commercial operations. Each law allows the creation of a reciprocating States regime while the treaty moves toward ratification.[321]

An attractive aspect of moving ahead before an UNCLOS III treaty enters into force is the fact that a reciprocating States regime could serve as a model for the Authority. Permit procedures, conflict resolution and a range of multilateral administrative agreements would be in operation as part of a reciprocating States regime. Their effectiveness would be influential, and the established system could be adopted in whole or in part by the Authority. This could give developed States a role in shaping a regime which is suitable to them.

The disadvantage of moving ahead before an UNCLOS III treaty enters into force is that it would not eliminate the risk that the Authority which comes into existence will not recognize the claims established under the reciprocating States regime. This risk could be allayed by national legislation providing insurance or compensation, an approach which was rejected by the Congress in passing the U.S. legislation[322] and the Bundestag in passing the West German legislation.[323]

Of course, a number of States may decline to ratify the treaty.[324] States

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[320] Deep Seabed Act, *supra* note 278, § 102(c)(1)(D); Act on Interim Regulation of Deep Seabed Mining, *supra* note 313, § 4(3); Deep Sea Mining (Temporary Provisions) Act, *supra* note 313, Clause 2.(4); Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, *supra* note 313, art. 7.

[321] Deep Seabed Act, *supra* note 278, § 1428; Act on Interim Regulation of Deep Seabed Mining, *supra* note 313, § 14; Deep Sea Mining (Temporary Provisions) Act, *supra* note 313, Clause 3.(1); Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, *supra* note 313, art. 13.

[322] *See* note 307 *supra*.

[323] The "Bill on the Interim Regulation of Deep Seabed Mining" introduced in the Deutscher Bundestag on December 12, 1978, provided at section 15 that the holder of an authorization for exploration or recovery "shall receive compensation for financial losses resulting from the accession of the Federal Republic of Germany to an international agreement" on deep seabed mining. Section 15 also provided that "the amount of such compensation shall be assessed on the basis of the investment made for developing the authorized field," unless ten years have elapsed from the time of issuing the authorization. These provisions do not appear in the Act which was promulgated in 1980. *See also* notes 307 & 308 *supra* and accompanying text.

[324] James Malone, the head of the U.S. delegation to UNCLOS III, has stated in regard to the UNCLOS III Draft Convention that "it is the best judgment of this Administration that this Draft Convention would not obtain the advice and consent of the Senate." He also

may oppose specific treaty terms, and may also believe that much of what is good in the treaty has already become accepted and may even be customary international law. The acceptance of the EEZ is an example of a major new concept which benefits many coastal States and is not likely to be challenged even if it is not specifically ratified in the form of an UNCLOS III treaty.

The rejection of the treaty by the States with mining technology could lead to a multilateral treaty or reciprocating States regime. A multilateral treaty among those nations capable and interested in manganese nodule mining would be consistent with the pattern of international law over the past centuries. Those nations with the ability to conduct deep ocean mining would negotiate a treaty to protect their own claims. A reciprocating States regime might involve only a handful of countries—U.S., Germany, Britain, France, Japan, the Netherlands, Belgium and Italy. Since these are the major countries whose governments and companies are involved in deep ocean mining development,[335] an agreement among these States could establish a workable international regime.

Undoubtedly, technologically advanced nations have something to lose, either ideologically or practically, by rejecting the treaty. Presumably, they would not be at the bargaining table unless they felt there was something to gain. However, technologically advanced nations are vulnerable to a shut-down of their entire economies if critical metals are not available. The U.S., for example, is dependent upon imports for overwhelming

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stated that the Reagan Administration will review the Draft Convention in regard to U.S. national interests and objectives, and "will also examine with great care whether these same interests and objectives would fare better or worse in the absence of a treaty." *Law of the Sea—10th Session: Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 1st Sess. 646-47 (1981) (prepared statement of James L. Malone, Asst. Sec. of State Designate, Oceans and International Environmental and Scientific Affairs, Dept. of State). The U.S. has since completed its review and has returned to the negotiations of UNCLOS III. *See* Nossiter, *supra* note 318.

[335] There are four major international consortia involved in nodule mining. The Kennecott Corporation consortium consists of Kennecott Mineral Company (U.S.), Noranda (Canada), Consolidated Gold Fields (United Kingdom), Rio Tinto Zinc (United Kingdom), British Petroleum (United Kingdom) and Mitsubishi (Japan). Ocean Mining Associates consists of Essex Minerals Company (owned by U.S. Steel, U.S.), Union Seas, Inc. (owned by Union Miniere, S.A. of Belgium), Sun Ocean Ventures, Inc. (U.S.) and Samim (owned by Ente Nazionale Indrocarburi, Italy). Ocean Minerals Company consists of Lockheed Missiles and Space Company, Inc. (U.S.), Amoco Minerals Company (U.S.), Billiton International Metals, B.V. (Netherlands) and Bos Kalis Westminister Group, N.V. (Netherlands). Ocean Management, Inc., consists of International Nickel Company, Ltd. (Canada), SEDCO, Inc. (U.S.), the AMR Group (West Germany) and the DOMCO Group (Japan). The French government is active in manganese nodule research through its agency, CNEXO. While Canada has two major companies in these consortia, Canada is a major supplier of the world's land-based nickel, and is supporting quotas and controls over seabed mining through a United Nations treaty. Thus, at present, Canada is not a likely member of a reciprocating states regime. PUNA/KOHALA REPORT, *supra* note 5, at 16; Addison, *Muddied Waters for Ocean Miners*, HAWAII BUSINESS Sept. 1980, at 40.

percentages of many critical metals;[326] ninety-eight percent of the domestic manganese supply is imported.[327] U.S. Steel needs manganese as a scavenger and alloy in steel production. Thus, it is no surprise that one of the most active consortia today is Ocean Mining Associates, which is partly owned by that company. While the total amount needed is not large and might be supplied by a single ocean mining operation, the metal is critical to U.S. industry.

The prospects for a reciprocating States regime composed of nations which have rejected the treaty are clouded by the fact that a treaty could be ratified by the lesser-developed States and be considered by them to be in full force and effect. The Authority would then be brought into existence, and would be in direct conflict with the activities of the reciprocating States regime. Should a situation such as this come into being, the Authority would be obliged to assert its regulatory control, since it would otherwise have no one to regulate and no profits to share as the common heritage of mankind. In response, the governments of the reciprocating States regime would be obligated to protect the interests of their nationals. At best, this conflict could lead to the negotiating table for more years of discussion. The rejection of the treaty and establishment of a reciprocating States regime could thus give those reciprocating States a better bargaining position in achieving a final resolution many years further down the road. However, the conflict could also lead to retaliation, such as boycotts, cartel action, the cutting off of land-based supplies and other forms of "economic warfare." At worst, the conflict could lead to incidents of armed warfare. Retaliatory action by lesser-developed States would be modified by the need of some of these States to continue selling products—including land-based metals—to developed States, or the need of some lesser-developed States to obtain capital from developed States for a variety of projects.

A further disadvantage is that not all States passing unilateral legislation may become part of a reciprocating States regime. Differences in national legislation may preclude reciprocal recognition. This may create confusion and result in conflicting claims. Also, in the same way that "flags of convenience" have affected marine shipping, "permits of convenience" may affect marine mining.[328] As one commentator has noted, "if

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[326] In 1976, the United States imported 98% of its cobalt, 98% of its manganese and 90% of its primary nickel. Q. STEPHEN-HASSARD, K. CHAVE, Q. FERNANDO, K. KEITH, M. MEYLAN, & W. MIKLIUS, THE FEASIBILITY AND POTENTIAL IMPACT OF MANGANESE NODULE PROCESSING IN HAWAII B-3 (1978) [hereinafter cited as "FEASIBILITY OF PROCESSING"]. In 1980, the United States imported 94% of its cobalt. BUREAU OF MINES BULLETIN 671, U.S. DEP'T OF THE INTERIOR, MINERAL FACTS AND PROBLEMS (1980).

[327] FEASIBILITY OF PROCESSING, *supra* note 326.

[328] Under the Convention on the High Seas, each State has the right to sail ships under its own flag, and the regulation of each ship under its own flag is up to the State in question. Convention on the High Seas, *supra* note 135, arts. 4, 5. Certain States have registered large numbers of vessels in order to raise revenues, with no intention of regulating its flag vessels.

nations initiate deep seabed mining under reasonable regulatory programmes on the basis that such mining is a freedom of the high seas, there is an inherent risk that other nations may abuse this freedom."[329] If they do, an inclusive reciprocating States regime may not be possible.

The mining consortia with an immediate need for critical metals may move to exploit the marine minerals within the 200-mile EEZ's. Within each EEZ, a mining consortium can deal directly with a single coastal State. An agreement with the coastal State would allow commercial mining which is consistent with both present conventions and the proposed Draft Convention. The mining consortium would not have to wait ten years for ratification of an UNCLOS III treaty, or take the risk of operating under a reciprocating States regime which conflicts with or is superseded by the Authority. The advantage to the coastal State is that it may be able to negotiate a favorable arrangement to obtain a share of the profits for itself, rather than sharing the profits among the entire common heritage of mankind. This would not violate the spirit of the proposed UNCLOS III treaty, since the Draft Convention would establish EEZ's for purposes such as this.

There are several disadvantages to this approach. First of all, the largest, richest known deposits of manganese nodules are in the deepest ocean waters, far beyond most EEZ's.[330] Deposits within the EEZ's may not be as extensive or valuable. Second, deposits within 200-mile zones may be in the form of multi-metallic crusts or metallic brines rather than nodules.[331] Mining these deposits would require a reworking of mining technology. Also, there is the simple fact that surveying, sampling and analyzing prospective marine mining sites can take many years. Surveying and sampling in the Clarion-Clipperton Fracture Zone has been going on for a decade. It would take a number of years to evaluate the metallic

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These "flags of convenience" have included Cyprus, Liberia and Panama. *See, e.g.*, N. Jones, Flags of Convenience in the Pacific (1975) (unpublished paper prepared for Sea Grant College Program, University of Hawaii). Flags of convenience are known to ignore safety features, manning, and training standards accepted and enforced by other nations. Any State with the right to unilaterally license marine mining operations could similarly ignore international standards for safety, manning and training, and "authorize" companies to mine in areas established by other companies or international authorities. "Permits of convenience" could thus increase the danger and the likelihood of conflict on the high seas.

[329] Caron, *Deep Seabed Mining—A Comparative Study of U.S. and West German Legislation*, 5 MARINE POLICY 13 (1981).

[330] PUNA/KOHALA REPORT, *supra* note 5, at 5.

[331] The metallic deposits near Hawaii's islands are crusts, or "pavements" rather than individual nodules. *See, e.g.*, Glasby & Andrews, *Manganese Crusts and Nodules From the Hawaiian Ridge*, 1977 PACIFIC SCIENCE, 363 (1977). Metalliferous muds have been discovered in the Red Sea, beneath hot salt water near areas of active seafloor spreading. D. Ross, *supra* note 242, at 134-37. Recent research in the Pacific Ocean on hydrothermal vents along fracture zones has led to the discovery of sulfide deposits rich in copper and containing other metals such as silver, zinc, cadmium, molybdenum, lead, tin, vanadium and cobalt. Rossiter, *$2 Billion In Metals Found On Floor Of Pacific*, Honolulu Advertiser, Oct. 8, 1981, § A at 22.

deposits within the EEZ's of countries interested in doing business. Mining in the EEZ's may thus be several years behind the state of the art of deep-sea mining in the Clarion-Clipperton Fracture Zone.

International mining ventures are often joint ventures established to share the risks and accumulate capital for specific projects. These appear to be two of the major reasons the existing consortia were formed. Much of the attention of the consortia has been focused on security for their investments, in order to obtain capital from the money markets. A single mining operation could require a capital investment of anywhere between $700 million and $1.2 billion in today's dollars,[322] and the mining consortia may not be able to obtain this kind of money without investment banker support. This is not an especially large amount of money, compared to other mining projects. Money may be hard to come by, however, since a treaty could be unfavorable to a return on investment, a reciprocating States regime pending a treaty could end in the non-recognition of the investment by a new Authority, a reciprocating States regime among States not party to the treaty could lead to conflict and it may not be feasible to rework the mining technology and obtain satisfactory agreements with coastal States for mining in the EEZ's. Thus, a sufficient amount of money may not be available in the coming decade under the four scenarios discussed above. If so, the existing consortia may decide to defer action or give up and write off their losses.[323]

For the consortia themselves, the disadvantage of giving up is not only loss of experience on the part of their teams, but the fact that they remain vulnerable to price escalation or the cut-off in supply of metals critical for industry in the developed States. Even if individual companies are willing to risk price escalation or a cut-off in supply, it is not clear that governments are. The governments of the U.S., Germany and Japan,

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[322] PUNA/KOHALA REPORT, *supra* note 5, at 115.

[323] Even if money becomes available, the companies involved in these consortia have many economic opportunities outside of marine mining. Other opportunities may have an earlier payback period, and be less risky. In addition to money, the consortia have assigned key personnel from their own staffs and have kept them at work for a number of years. These people are valuable, and, along with the money, may be reassigned to more promising and more immediate opportunities. Once reassigned, it is unlikely that all of these personnel would be available again in the near future. A new team would have to be formed, and much of the previous experience could be lost in the process. Companies may be willing to do this, however, in order to make more productive use of their funds and personnel in the interim. While one or two years of startup time would be added due to the need to assemble and train a new team, this second start would only be made when there was much greater assurance that mining would indeed take place in the very near future.

For the existing consortia, disbanding may not even mean the forfeiture of each company's leadership position. In light of the headstart which the existing consortia have over new entrants into the market, a new entrant with major financing could require three or four years to catch up. The existing consortia would have the same period of time to reactivate their teams or form new teams to continue work based on previous company experience.

for example, are likely to encourage and promote the development of the marine mining industry by their private sectors in order to support national strategic interests in metals.[334] Which particular company goes forward may not be at issue; it will be in each developed State's interest that at least one of its companies do so.

The strategic interests of States and the activities of their companies vary sufficiently that none of the above scenarios may describe what all of the States or consortia will do. For example, Ocean Management, Inc., is partly owned by INCO of Canada, which produces forty-three percent of the free world's nickel supply.[335] The Kennecott Copper Group is led by Kennecott, which is the United States' largest domestic producer of copper.[336] Both of these consortia are largely inactive at present. Since they have significant supplies of land-based ores, they can afford to "give up" for now. They are in a defensive position—if someone else moves in to mine, they can reactivate to defend their market positions.

On the other hand, Ocean Mining Associates (OMA) may move ahead to secure manganese for U.S. Steel. Ocean Minerals Company (OMCO) may also move ahead. OMCO is partly owned by Standard Oil of Indiana, whose subsidiary, Amoco Minerals Company, has embarked upon a broad program of minerals acquisition. OMA and OMCO may push for a reciprocating States regime pending an UNCLOS III treaty. If the U.S. declines to become a party to the treaty, these companies may seek compensation provisions to proceed under unilateral legislation or a reciprocating States regime composed of States which are not parties to the treaty.

The existing consortia, of course, may split up. Preussag, for example, is a member of the OMI group, but has ventured on its own to mine metalliferous sediments in the Red Sea. Deep Ocean Mining Company (DOMCO) of Japan, also an OMI member, may wait for a treaty. The Japanese government announced in 1980 that it was launching a seven-year research program to survey sites,[337] a program which is consistent with the timetable for a treaty. Passage of unilateral legislation which would be superseded by a treaty would allow Japanese companies to participate in a reciprocating States regime which could recognize and establish DOMCO claims while waiting for treaty ratification.

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[334] The United States, Germany and Japan are all heavily dependent upon imports for strategic metals. In 1978-1979, "[t]he Federal Republic of Germany remained one of the world's major processors and consumers of minerals, most of which had to be imported . . . the securing of the supply of raw materials remained one of the Federal Republic of Germany's chief objectives." Huvos, *The Mineral Industry of the Federal Republic of Germany*, 3 MINERALS Y.B. 387 (1978-79). "[L]arge imports of mineral commodities are required to meet Japan's industrial needs. . . . Some industries are almost wholly dependent on imported raw materials. . . ." Chin, *The Mineral Industry of Japan*, 3 MINERALS Y.B. 549 (1978-79). Japan imports all of its nickel needs. *Id.* at 562.

[335] 37 VALUE INVESTMENT SURVEY 632 (1981).

[336] MOODY'S INDUSTRIAL MANUAL 3778-89 (1981).

[337] Addison, *supra* note 325, at 38.

Whatever the scenario, there is little doubt that marine mining will begin. While supplies of land-based ores may still be large, existing mines will become exhausted or uneconomical. The percentage of value metals in the ores has been decreasing, and the amount of land withdrawn into wilderness or unavailable for technical or environmental reasons has also increased. The cost of land-based mining will thus continue to rise. As for new mines, the record to date in laterite ore processing is not encouraging.[338] In short, marine minerals will eventually be mined because they will become economically competitive, and are the only major long-term alternative to today's land-based mining.

C. *Manganese Nodule Processing*

1. *Introduction*

The Deep Seabed Act calls for manganese nodule processing to take place within the United States unless there are contrary overriding national interests, or if doing so would make the industry economically nonviable.[339]

Hawaii is a leading contender for a processing site.[340] Although other locations are being considered,[341] the advantages of placing a plant in Ha-

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[338] PUNA/KOHALA REPORT, *supra* note 5, at 100.

[339] The Deep Seabed Act, *supra* note 278, § 1401 states that:

> Except as otherwise provided in this paragaph, the processing on land of hard mineral resources recovered pursuant to a permit shall be conducted within the United States: *Provided*, That the President does not determine that such restrictions contravene the overriding national interests of the United States. The Administrator may allow the processing of hard mineral resources at a place other than within the United States if he finds, after opportunity for an agency hearing, that—
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> (A) the processing of the quantity concerned of such resource at a place other than within the United States is necessary for the economic viability of the commercial recovery activities of a permittee; and
>
> (B) satisfactory assurances have been given by the permittee that such resource, after processing, to the extent of the permittee's ownership therein, will be returned to the United States for domestic use, if the Administrator so requires after determining that the national interest necessitates such return.

[340] *See A 'Welcome Sign' Worth $300 Million*, Honolulu Advertiser, Dec. 1, 1979, § A at 11, col. 1 (representative of Ocean Minerals Company states that his company will spend $300 million to build a processing plant in the islands if a site which is acceptable to the people of Hawaii can be found); *Expert Sees Isles as Global Center of Ocean Mining*, Honolulu Star-Bulletin, June 28, 1978, § F at 7, col. 3 (Dr. John Mero, President of Ocean Resources, Inc., and a world-renown scholar in manganese nodule research, states that Hawaii will become a world center for commercial processing operations); *Mining Corp. Eyes Hawaii Plant Sites*, Hawaii Tribune-Herald, Sept. 20, 1977, at 1, col. 6 (Kennecott Copper Corp. rates the Big Island as a "prime contender" for a processing site); *Big Island Studied as Ocean-Mining Plant Site*, Honolulu Star-Bulletin, Sept. 20, 1977, § C at 16, col. 1.

[341] Other areas of interest to industry include the Gulf Coast, the U.S. West Coast, British Columbia, Mexico, Columbia, Fiji and Australia. PUNA/KOHALA REPORT, *supra* note 5, at

waii make it an attractive possibility.[342]

A manganese nodule processing industry would be a boost to the state's economy. A joint report issued by the DPED and the NOAA indicates that the estimated annual revenues of a processing plant on the island of Hawaii would range from $485 million to $767 million, depending upon the location of the plant and the number of metals processed.[343] The estimated impact on the State of Hawaii during the operational phase includes 1,300 to 1,800 new jobs, and $572 million to $880 million in increased state economic output.[344]

The construction and operation of a processing plant in Hawaii would be subject to a series of government regulations. Environmental laws would affect the development of an appropriate harbor and processing plant, and the disposal of the waste material.[345] The following discussion is based on two hypothetical processing sites on the island of Hawaii which have been studied by the DPED—Hilo/Puna on the east side of the island, and Kawaihae/Kohala on the west side.[346]

2. *The Harbor*

New harbor facilities would be necessary at both hypothetical sites.[347]

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[342] The State's disadvantages—the cost of construction and energy, and the need for additional infrastructure—are countered by its numerous advantages. Positive factors include: Hawaii's geographical location, the availability of land, water and labor, the State's political stability and governmental cohesion, state efforts to streamline relevant permit procedures and the DPED's comprehensive Manganese Nodule Program. Keith, *Hawaii and Manganese Nodule Mining*, Honolulu Advertiser, Mar. 14, 1981, § A at 15, col. 1.

[343] PUNA/KOHALA REPORT, *supra* note 5, at 115.

[344] *Id.* at 159.

[345] *See generally* STATE OF HAWAII DPED, HAWAII COASTAL ZONE MANAGEMENT PROGRAM, A REGISTER OF GOVERNMENT PERMITS REQUIRED FOR DEVELOPMENT (1977); HONOLULU-PACIFIC FED. EXECUTIVE BOARD, ENVIRONMENTAL ACTIVITY APPROVAL AND PERMIT INDEX (1977).

[346] The following discussion is based on the author's work on the PUNA/KOHALA REPORT, *supra* note 5, at 211-22, and Keith, *Manganese Nodule Processing in Hawaii: An Environmental Prospectus*, 14 HAWAII B.J. 103 (1978).

[347] If vessels were moored offshore to a permanent mooring structure, the structure would be a potential obstruction to navigation and would require approval from the Army Corps of Engineers. 33 C.F.R. § 322.2(b) (1980) states that a "permanent mooring structure" requires a permit under 33 U.S.C. § 403 (1976). Since the slurry pipeline would run from the moored barge to the ocean floor, laying such a pipeline could also require approval by the Army Corps of Engineers. 33 C.F.R. § 322.2(b) (1980) does not specifically mention a slurry pipeline as a "structure" for purposes of 33 U.S.C. § 403 (1976), but a permit could be required under other provisions of the codes. *See* 33 C.F.R. §§ 322.2(a)(1), 8322.2(n) (1980). As a "sunken obstruction," the pipeline would also have to be marked in accordance with Coast Guard regulations. 33 C.F.R. § 64.01 (1981).

Section 404 of the Federal Water Pollution Control Act gives the Army Corps of Engineers authority to issue permits for dredged or fill material. The Corps could require an Environmental Impact Statement (EIS) to evaluate the impact of the pipeline on marine ecosystems. The EIS requirement would most likely be based upon the Army Corps of Engi-

Any expansion of the facilities, or any new structure affecting navigation in the harbor area, would require a permit issued by the U.S. Army Corps of Engineers.[348] Since harbor construction could harm the coastal environment, a federal environmental impact statement (EIS) may be required.[349] Such an expansion would also be reviewed by the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the State Division of Aquatic Resources.[350] Furthermore, construction in navigable waters would require Coast Guard notification so that a "Notice to Mariners" could be issued.[351]

A state EIS may also be required for harbor development. The H.R.S. requires an EIS for uses within the conservation district (which includes submerged lands and coastal waters) and for any use 100 yards seaward of the shoreline which will probably have significant environmental effects.[352] In addition, a conservation district use permit would be required by the State Department of Land and Natural Resources,[353] and a permit for work in the shorewaters of the state would be required by the Harbors Division of the State Department of Transportation.[354]

As shoreside storage, slurry pumping and conveyor activity would take place within the SMA, a use permit may be required.[355] County setback regulations would also require a variance if the project were to be located from twenty to forty feet of the shoreline.[356]

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neers' water pollution responsibility under section 403 of the Act. The concern is more likely to be for the mud and material distributed on the ocean floor when the pipe is laid than for any obstruction to navigation once the pipe has come to rest on the seabed.

[348] 33 U.S.C. § 403 (1976) requires the recommendation of the Chief Engineer and authorization by the Secretary of the Army before structures may be built in any harbor or the capacity of any harbor modified. Permits for structures and/or work affecting navigable waters of the United States are regulated by provisions of 33 C.F.R. § 322 (1981).

[349] National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976) [hereinafter cited as "NEPA"].

[350] The Army Corps of Engineers would consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. § 662(a) (1976).

[351] 33 C.F.R. § 72.01-5 (1981). The "Local Notice to Mariners" is published by each Coast Guard district.

[352] HAWAII REV. STAT. § 343-5(a)(2)-(a)(3) (Supp. 1981).

[353] HAWAII REV. STAT. § 171-6(6) (1976); Title 13, DEPARTMENT OF LAND AND NATURAL RESOURCES, Subtitle 1, Administration, Chapter 2, Conservation Districts (1981).

[354] HAWAII REV. STAT. § 226-16 (Supp. 1981).

[355] HAWAII REV. STAT. § 205A-22(4) (1976). The County of Hawaii uses a coastal road as its shoreline SMA boundary in the Kohala districts, and a coastal jeep trial as its boundary in Puna. The SMA thus extends as far as 1,500 yards into these regions. Interview with Rodney Nakano, Planner, County of Hawaii Planning Department, in Hilo (Jan. 7, 1982). Activity within this area would require a county SMA use permit if the cost or fair market value of the development is more than $25,000 or has a significant effect on the SMA, regardless of the cost. HAWAII REV. STAT. §§ 205A-22(7), 205A-28 (1976). If the cost or fair market value is less than $25,000 and has no substantial adverse environmental or ecological effect, a SMA "minor permit" may be issued. *Id.* § 205A-22(6) (Supp. 1981).

[356] *See generally* note 345 *supra*.

3. The Processing Plant

A manganese nodule processing plant would require hundreds of acres of land.[357] The state would probably require an EIS if rezoning were necessary to obtain such a large tract of land, for section 343-(5)(a)(b) of the H.R.S. requires an EIS for "all actions proposing any amendments to existing county general plans where such amendment would result in designations other than agriculture, conservation, or preservation. . . ."[358] A processing plant would fall within this statute because it would probably be built on land redesignated by the state government from agriculture to urban, and would have significant environmental effects.[359]

A state designated groundwater area use permit would also be required if groundwater from a privately drilled well were utilized.[360] Since portions of the Big Island have not been surveyed for historic sites or monuments, a survey of the plant site area may also be necessary before construction could begin.[361] On the county level, additional permits would be required to alter the land[362] and to construct the plant.[363]

A processing plant would produce minimal emissions[364] which would be regulated by the Federal Clean Air Act and state environmental quality statutes.[365] Particulate matter in the emissions would come within the scope of federal regulations designed to prevent the deterioration of air quality.[366] Since the Puna and Kohala sites are in Class II under these regulations, emissions of particulate matter from all new sources in these regions will be limited to an increase of nineteen micrograms/m^3 as an annual geometric mean. If it appears that a processing plant would cause

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[357] The amount of land is expected to range between 318 acres for a three-metal hydrometallurgical plant, to 1,012 acres for a four-metal pyro/hydro-metallurgical plant. PUNA/KOHALA REPORT, *supra* note 5, at 83. This is larger than the Campbell Industrial Park on Oahu. Such large amounts of land are available, but are now zoned agricultural.

[358] HAWAII REV. STAT. § 343-5(a)(b) (Supp. 1981).

[359] A possible exception to the state EIS requirement under this clause is Hawaii County's "floating zone" concept, which would allow a special use within an agricultural area without an amendment to the county general plan. The procedure to obtain a floating zone from the county, however, would be similar to that required by an EIS. Telephone interview with Rodney Nakano, Planner, County of Hawaii Planning Department, in Hilo (Jan. 7, 1982). Furthermore, a state EIS would still be required under HAWAII REV. STAT. § 343-4(a)(1) (1976) if the plant used state or county funds or lands.

[360] HAWAII REV. STAT. § 177-19 (1976).

[361] HAWAII REV. STAT. § 6E-15 (1976).

[362] HAWAII COUNTY CODE ch. 15 (1978).

[363] HAWAII COUNTY CODE ch. 17 (1975).

[364] A recent NOAA report concluded that oxygen, nitrogen, water, carbon dioxide and trace amounts of ammonia and carbon monoxide would constitute the stacked gases in the "gaseous effluent steams" in the reduction ammonia leach process. *See* DAMES, MOORE & EIC CORPORATION, 3 DESCRIPTION OF MANGANESE NODULE PROCESSING ACTIVITIES FOR ENVIRONMENTAL STUDIES 5-25 (1977); PUNA/KOHALA REPORT, *supra* note 5, at 199.

[365] 42 U.S.C. § 7401 (Supp. II 1978); HAWAII REV. STAT. § 342-22 (1976).

[366] 43 Fed. Reg. 26380 (1978).

an increase greater than nineteen micrograms, permits will not be issued and the plant could not be built.

The annual arithmetic mean in micrograms/m^3 for particulate matter in Hilo rose from thirty in 1975[367] to thirty-four in 1978,[368] and then declined to twenty-one in 1980.[369] Thus, even if emissions of particulate matter were increased by as much as nineteen micrograms/m^3, the average amount of particulate matter in the air would only be about forty micrograms/m^3. This figure would satisfy the national goal of sixty micrograms/m^3, set forth in the secondary ambient air quality standards as the maximum annual geometric mean for clean air.[370]

4. *Waste Disposal*

Waste disposal is expected to be the major environmental problem for a processing plant.[371] The nickel, copper and cobalt obtained in a three-metal operation will amount to only three percent of the total matter produced.[372] The waste from a three-metal hydrometallurgical plant will thus constitute roughly ninety-seven percent of the nodules by dry weight. This waste will consist mostly of iron compounds, manganese compounds, trace metals and some clay.[373] A four-metal process will extract manganese in addition to nickel, copper and cobalt. However, the waste material from a pyrometallurgical four-metal plant will still be significant.[374] It will consist of a coarse granulated slag,[375] which could be disposed of either on land or at sea.

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[367] STATE OF HAWAII DEP'T OF HEALTH, STATISTICAL REPORT 1975, at 98 (Supp. 1976).

[368] STATE OF HAWAII DEP'T OF HEALTH, STATISTICAL REPORT 1978, at 111 (Supp. 1979).

[369] STATE OF HAWAII DEP'T OF HEALTH, STATISTICAL REPORT 1980, at 118 (Supp. 1981).

[370] National primary and secondary ambient air quality standards for particulate matter are found at 40 C.F.R. § 50.6-.7 (1981). Hawaii's ambient air quality standards are set out in chapter 42, section 6 of the State Public Health Regulations. The standard for particulate matter is 55 micrograms per cubic meter as an annual arithmetic mean. Emissions of particulate matter by processing industries are also regulated by chapter 43, section 13 of the State Public Health Regulations.

[371] Keith, *supra* note 346, at 112.

[372] While nodules vary in composition, average compositions include nickel at 1.45 to 1.65% dry weight; copper, 1.25 to 1.39% dry weight; and cobalt, .25% dry weight. PUNA/KOHALA REPORT, *supra* note 5, at 8.

[373] DAMES, MOORE & EIC CORPORATION, *supra* note 364, at 5-24; PUNA/KOHALA REPORT, *supra* note 5, at 197-98.

[374] Average nodule compositions include manganese at 27.0 to 31.69% dry weight. PUNA/KOHALA REPORT, *supra* note 5, at 8. Thus, the extraction of nickel, copper, cobalt and manganese would leave approximately 70% of the nodules by dry weight for disposal.

[375] *Id.* at 85.

a. Disposal on the High Seas

The Hilo/Puna plan envisions that the waste be dumped on the high seas. Since nodules are composed of elements which are present in the ocean, it is probable that returning them to the sea would cause minimal environmental harm. A major concern is, however, the effect the dumped waste might have on marine life in the top 200 meters of the water column.[376] The following review of international and domestic law indicates that any disposal of waste on the high seas from a processing plant in Hawaii will be closely regulated and monitored.

An international framework for the regulation of ocean dumping was established by the Convention of Marine Pollution by Dumping of Wastes and Other Matter.[377] This Ocean Dumping Convention requires its signatory States to comply with certain restrictions on the dumping of waste and other matter into the sea. The Convention includes three Annexes which list waste material of differing degrees of harmfulness to the environment. The Convention prohibits the dumping of wastes or other matter listed in Annex I and requires a special permit for the dumping of wastes or other matter listed in Annex II or a general permit for the dumping of all other wastes.[378]

Both the Ocean Dumping Convention and the proposed provisions of the UNCLOS III Draft Convention provide for the regulation of dumping by each member nation.[379] The Ocean Dumping Convention requires each

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[376] Photosynthesis requires light, so food and oxygen in the ocean are only produced in the near-surface area known as the photic or photosynthetic zone. M. GROSS, OCEANOGRAPHY 61 (2d ed. 1971). The photic zone is at most 200 meters; nearly all visible light is absorbed at 100 meters, and less than 0.01% of the incoming radiation remains as visible light at 200 meters. *Id.* at 71. The top 200 meters of the water column is of environmental concern since it is important to marine organisms and the food chain.

[377] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165 [hereinafter cited as "Ocean Dumping Convention"].

[378] Article III(1)(c) states that "the disposal of wastes or other matter directly arising from, or related to the exploration, exploitation and associated off-shore processing of seabed mineral resources will not be covered by the provisions of this Convention."

The Ocean Dumping Convention thus excludes associated "*off-shore*" processing of seabed mineral resources, such as a processing operation aboard a ship or floating platform on the high seas, but does not exclude land-based processing. A member of the U.S. delegation to the London dumping conference explained the exclusion of off-shore processing as follows:

> One of the major items for negotiation in the Law of the Sea Conference is a regime for activities relating to seabed minerals, and an integral part of that regime will be an arrangement to provide comprehensive regulations governing pollution from seabed mineral resource activities. Consequently, it was thought unnecessary, and a duplication of effort, to deal with the problem in the dumping convention.

Leitzell, *The Ocean Dumping Convention—A Hopeful Beginning*, 10 SAN DIEGO L. REV. 502, 505 (1973).

[379] Ocean Dumping Convention, *supra* note 377; Draft Convention, *supra* note 48, art. 210.

signatory State to establish an appropriate authority to issue permits, to keep records of the matter being dumped and to monitor the condition of the oceans.[380] The Draft Convention urges States to establish global and regional rules, but relies upon each State for implementation and enforcement.[381] Thus, we must look to the United States government to regulate the at-sea disposal of waste from a processing plant in Hawaii.

The United States has been a leader in regulating ocean dumping. In 1970, the Council on Environmental Quality published a report to the President entitled *Ocean Dumping—A National Policy*.[382] In 1971, President Nixon submitted legislative proposals to the 92nd Congress to implement the Council's report.[383] What emerged was the Marine Protection, Research, and Sanctuaries Act of 1972.[384]

The Marine Protection Act prohibits all ocean dumping except dump-

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[380] Ocean Dumping Convention, *supra* note 377, art. 6(1).

[381] Article 210 provides as follows:

Dumping

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. Such laws, regulations and measures shall ensure that dumping is not carried out without the permission of the competent authorities of States.

4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment by dumping. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

5. Dumping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping after due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby.

6. National laws, regulations and measures shall be no less effective in preventing, reducing and controlling pollution of the marine environment by dumping than global rules and standards.

[382] COUNCIL ON ENVT'L QUALITY, OCEAN DUMPING—A NATIONAL POLICY (1970).

[383] S. REP. No. 92-451, 92d Cong., 1st Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4234, 4235.

[384] 33 U.S.C. § 1401 (1976) [hereinafter cited as "Marine Protection Act"]. The Marine Protection Act and the Ocean Dumping Convention are closely related. After the Act was prepared, the United States drafted a substantively similar convention, and presented it at the first session of the United Nations Stockholm Environmental Conference's Intergovernmental Working Group on Marine Pollution in 1971. This draft was the basis of the Ocean Dumping Convention which was eventually adopted. The Marine Protection Act is thus similar in scope and approach to the Ocean Dumping Convention, which was signed two months after the Marine Protection Act was passed by the U.S. Congress. Members of Congress felt that passage of the Marine Protection Act was important because it would serve as an example to the world of the kind of self-regulation which would be necessary to save the marine environment. S. REP. No. 92-451, 92d Cong., 1st Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4242.

ing that is authorized by a permit issued by the EPA and subject to regulations issued by the EPA pursuant to the Act. The Marine Protection Act covers: (1) matter transported from the United States for dumping; (2) matter transported from any location for dumping in the ocean by a vessel or aircraft registered in the United States; and (3) any material transported from a location outside the United States if it is to be dumped in the territorial sea or contiguous zone of the United States.[385] Since waste from a processing plant in Hawaii will originate in the United States, the Marine Protection Act will be applicable and permits from the EPA will be required.

The Act sets out the factors which must be considered by the Administrator of the EPA in establishing criteria for reviewing permit applications.[386] Proposed regulations were issued by the EPA in 1973 and final regulations were promulgated in 1977.[387] They establish six permit categories: general, special, emergency, interim, research and incineration at sea. The "Criteria for the Evaluation of Permit Applications for Ocean Dumping of Materials," set forth in 40 C.F.R. Section 227, includes criteria for evaluating the environmental impact, the need for ocean dumping, the impact of dumping on aesthetic, recreational and economic values

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[385] Marine Protection Act, *supra* note 384, § 1411.

[386] These factors are:

(A) The need for the proposed dumping.

(B) The effect of such dumping on human health and welfare, including economic, aesthetic, and recreational values.

(C) The effect of such dumping on the fisheries resources, plankton, fish, shellfish, wildlife, shorelines and beaches.

(D) The effect of such dumping on marine ecosystems, particularly with respect to:

(i) the transfer, concentration, and dispersion of such material and its by-products through biological, physical, and chemical processes.

(ii) potential changes in marine ecosystem diversity, productivity and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.

(H) The effect of alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.

Id. § 1412(a).

[387] The purpose and scope of the regulations states, in part:

Relationship to international agreements. In accordance with section 102(a) of the Act, the regulations and criteria included in this Subchapter H apply the standards and criteria binding upon the United States under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter to the extent that application of such standards and criteria do not relax the requirements of the Act.

42 Fed. Reg. 2462 (1977).

and the impact of dumping on other uses of the ocean.[388]

The regulations prohibit the dumping of radioactive wastes, materials produced or used for radiological, chemical or biological warfare, materials that cannot be adequately evaluated due to insufficient data provided by the applicant regarding their composition and properties and inert, synthetic or natural materials which may float or remain in suspension.[389] Nodule waste will fall in the prohibited category if the composition and properties of the waste are not sufficiently known.

The regulations permit the dumping of only trace amounts of certain compounds, such as those containing mercury and cadmium.[390] Although nodules are known to accumulate trace amounts of mercury and cadmium, they carry these elements in inert form. The dumping of untreated waste could be prohibited, however, if processing will cause these elements to be transferred to soluble compounds or will significantly increase their concentrations in the inert solid phase.

Ocean dumping of wastes could be generally approved under present regulations which provide:

> *Insoluble wastes.* (b) Solid wastes consisting of inert natural minerals or materials compatible with the ocean environment may be generally approved for ocean dumping provided they are insoluble above the applicable trace or limiting permissible concentrations and are rapidly and completely

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[388] 40 C.F.R. §§ 227.4-227.22 (1981).

[389] *Id.* § 227.5.

[390] 40 C.F.R. § 227.6 provides in part as follows:

Constituents prohibited as other than trace contaminants.

(a) Subject to the exclusions of paragraphs (f), (g) and (h) of this section, the ocean dumping, or transportation for dumping, of materials containing the following constituents as other than trace contaminants will not be approved on other than an emergency basis:

(1) Organohalogen compounds;

(2) Mercury and mercury compounds;

(3) Cadmium and cadmium compounds;

(4) Oil of any kind or in any form, including but not limited to petroleum, oil sludge, oil refuse, crude oil, fuel oil, heavy diesel oil, lubricating oils, hydraulic fluids, and any mixtures containing these, transported for the purpose of dumping insofar as these are not regulated under the FWPCA [Federal Water Pollution Control Act];

(5) Known carcinogens, mutagens, or teratogens or materials suspected to be carcinogens, mutagens, or teratogens by responsible scientific opinion.

(b) These constituents will be considered to be present as trace contaminants only when they are present in materials otherwise acceptable for ocean dumping in such forms and amounts in liquid, suspended particulate, and solid phases that the dumping of the materials will not cause significant undesirable effects, including the possibility of danger associated with their bioaccumulation in marine organisms.

The EPA has experienced difficulty in defining "trace contaminants" under the Convention and the Marine Protection Act. There is also little scientific data upon which to evaluate "significant undesirable effects." *See* Rogers, *Ocean Dumping*, 7 ENVIRONMENTAL LAW 1 (1976).

> settleable, and they are of a particle size and density that they would be deposited or rapidly dispersed without damage to benthic, demersal, or pelagic biota.[391]

However, the concentrations, the rate of settlement and the rate of dispersal of nodule waste are not yet known.[392]

The issuance of a permit will also depend upon the need for ocean dumping. One factor to be considered is the existence of feasible alternatives, such as the use of waste as land fill, spreading the material over open ground or storage of the waste.[393] It is possible that nodule waste could be used as land fill on lava fields, or as part of a fertilizer mix to enrich Big Island soils. Also, if only nickel, copper and cobalt are extracted from the nodules, the waste could be stored for later removal of the manganese.[394] These factors could tip the balance away from ocean dumping and toward disposal or use of the waste on land. The determination that there is a *need* for ocean dumping can be reached if it can be shown that (1) there are no practicable improvements that can be made in process technology to reduce the adverse impacts of the waste, and (2) there are no practicable alternative locations and methods of disposal or recycling available with less adverse environmental impact or potential risk to other parts of the environment than ocean dumping.[395] For example, use as land fill or fertilizer mix, or storage for later mining could all become alternative methods of disposal with less adverse effect on the environment.[396]

If the waste is dumped on the high seas hundreds of miles from shore, it is unlikely that there will be any impact on recreational uses of the ocean or inshore waters. The effect on the commercial value of living marine resources will probably be minimal since the potential dumping

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[391] 40 C.F.R. § 227.12(b) (1981).

[392] The burden of persuasion is clearly upon the applicant seeking the permit. Section 104(e) of the Marine Protection Act states that the EPA Administrator shall require an applicant to provide such information as he may consider necessary to review and evaluate the application. 40 C.F.R. § 222.11(e) (1981) states that the burden of going forward with the evidence at an adjudicatory hearing is on the party filing the request for the permit, and this burden exists as to each issue raised by the request. Thus, unless information on the concentrations, the rate of settlement and the rate of dispersal of tailings becomes available to applicants, permits are not likely to be issued.

[393] 40 C.F.R. § 227.15 (1981).

[394] The stockpiling of wastes could possibly be required under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976) [hereinafter cited as "Resource Conservation Act"].

[395] 40 C.F.R. § 227.16(a)(1)-(2) (1981).

[396] Use of waste as land fill could be economically beneficial on the Island of Hawaii, where it could be used to level off lava fields for agricultural use. If the waste could be used as a fertilizer mix, it would also have benefits on land. It is not yet known if either of these uses would be environmentally acceptable or economically feasible. For example, storage on land could be advantageous if minerals in the waste, such as manganese, were later processed and sold. However, land storage would require large amounts of land.

areas are not expected to be heavily populated with marine life[397] and most commercial species are migratory. It is also unlikely that there will be any appreciable impact on other uses of the ocean. Ocean transportation and fishing would not be affected by the dumping of waste over small areas, especially if the waste quickly disperses and settles.

b. Disposal by Ocean Outfall

Ocean outfall is another method of ocean disposal. This method involves the use of a pipeline which would run from the shore to the ocean floor. This could be an appropriate disposal method for slurry water or treated water, as well as for nodule wastes. Since the Hawaiian Islands are of volcanic origin, a geologic continental shelf is absent and the shoreline drops off sharply. This means that a pipeline two or three miles in length would reach significant depths. Discharges would be near or at the ocean floor and there would be no dispersal of waste through the water column, as is the case in surface dumping.[398]

An ocean outfall would be regulated under the FWPCA.[399] Under the FWPCA, it is a national goal to eliminate the discharge of pollutants into navigable waters by 1985.[400] The FWPCA established the National Pollution Discharge Elimination System (NPDES) which sets effluent limitations.[401] An effluent limitation is defined as "any restriction established by a state or the Administrator on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean,[402] including schedules of compliance."[403] The dis-

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[397] Most of the world's fish live above the continental shelves in comparatively shallow waters. More than 90 percent of the world's catch of fish is taken within 200 miles of coastlines. R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES 116 (1979). Disposal sites which are beyond 200 miles are thus not likely to have an impact on commercial fishing.

[398] PUNA/KOHALA REPORT, *supra* note 5, at 47.

[399] FWPCA, *supra* note 108.

[400] The declaration of goals and policy for the FWPCA includes the following:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
>
> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited; . . .

Id. § 1251.

[401] *Id.* § 1342.

[402] The Marine Protection Act, *supra* note 384, was designed to regulate the disposal of

charge of any pollutant by any person is unlawful under the FWPCA[404] unless it is brought within an effluent limitation and authorized by an NPDES permit.

The FWPCA provides for initial administration of the NPDES program by the federal government, followed by the delegation of federal responsibility to those states with the capacity to administer their own programs.[405] The NPDES program in Hawaii has been delegated to the State of Hawaii Department of Health. The issuance of NPDES permits is governed by the provisions of Hawaii's Public Health Regulations, which describe the information required on applications, the public hearing process and the bases for issuance of NPDES permits.[406]

Under the FWPCA, a manganese nodule processing plant would be a "new source" and therefore would have to meet new source standards.[407] A new source is "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance . . . which will be applicable to such source, if such standard is thereafter promulgated. . . ."[408] A "standard of performance" is defined to be:

> [A] standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.[409]

National standards of performance are mandated for a list of different sources including "nonferrous metals manufacturing."[410] After a category is specified in the list of sources, the EPA must propose and publish regulations establishing federal standards of performance for new sources within that category.[411]

Since a manganese nodule processing plant will be a new source in op-

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materials transported for dumping into ocean waters. The Marine Protection Act can be viewed as an extension into the high seas of the regulatory goals of the FWPCA. However, this extension is complicated by the fact that there is overlap and conflict between the Marine Protection Act and the FWPCA in their ocean jurisdiction. *See* W. RODGERS, JR., *supra* note 38, at 496-98; Lettow, *The Control of Marine Pollution*, in FED. ENVT'L L. 655-58 (1974); and Zener, *The Federal Law of Water Pollution Control*, in FED. ENVT'L L. 682, 738-41 (1974).

[403] FWPCA, *supra* note 108, § 1362.11.

[404] *Id.* § 1311(a)(1).

[405] *Id.* § 1342.

[406] STATE OF HAWAII DEP'T OF HEALTH, PUBLIC HEALTH REG. Chapters 37 and 37-A.

[407] FWPCA, *supra* note 108, § 1316(a)(2).

[408] *Id.*

[409] *Id.* § 1316(a)(1).

[410] *Id.* § 1316(b)(1)(A).

[411] *Id.* § 1316(b)(1)(B).

eration after the 1985 "no discharge" goal set forth in the FWPCA, manganese nodule consortia will have the burden of persuading the government that the "no discharge" goal is technologically impossible or economically unfeasible to attain. While such arguments are relevant, it is not clear whether they will be able to overcome the statutory presumption favoring a halt to all discharges.[413]

One argument in favor of an ocean outfall may be that the environmental impact is less than the impact of either land disposal or ocean dumping.[413] If industry were to make such an argument, the government would need to balance the possible negative environmental impact of an outfall against the potential benefit to the people of Hawaii and the nation of establishing a manganese nodule processing plant. The National Environmental Policy Act[414] states at section 4331(a):

> The Congress . . . declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

As the federal courts have made clear,[415] "productive harmony" requires a balancing of costs and benefits. This view is echoed in Hawaii's State Environmental Policy.[416] State policy includes "creating opportunities for the residents of Hawaii to improve their quality of life through diverse economic activities which are stable and in balance with the physical and social environments."[417] Furthermore, it is a state guideline to "encourage industries in Hawaii which would be in harmony with our

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[413] W. RODGERS, JR., *supra* note 38, at 467.

[413] The role of the oceans in waste disposal has recently be re-evaluated. Experts at a workshop concluded in 1979 that "the waste capacity of U.S. coastal waters is not now fully used." PROCEEDINGS OF A WORKSHOP ON ASSIMILATIVE CAPACITY OF U.S. COASTAL WATERS FOR POLLUTANTS (E. Goldberg ed. 1979). The National Advisory Committee on Oceans and Atmosphere has stated that the Environmental Protection Agency should reverse its policy that no ocean dumping permit will be issued when there is a land-based alternative. NAT'L ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE, THE ROLE OF THE OCEAN IN A WASTE MANAGEMENT STRATEGY 3 (1981).

[414] NEPA, *supra* note 349.

[415] *See, e.g.*, Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

[416] HAWAII REV. STAT. § 344-1 (1976) states:

> The purpose of this chapter is to establish a state policy which will encourage productive and enjoyable harmony between man and his environment, promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and enrich the understanding of the ecological systems and natural resources important to the people of Hawaii.

[417] *Id.* § 344-3(2)(B).

environment."[418]

c. Disposal on Land

The Kawaihae/Kohala plan envisions disposal of manganese nodule processing waste on land. Such disposal would be regulated by both federal and state laws. The applicable federal law would be the Resource Conservation and Recovery Act of 1976.[419] The objectives of the Resource Conservation Act include "prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health"[420] and "regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment."[421]

It is unclear whether manganese nodule processing waste would be considered "hazardous waste" under the Resource Conservation Act. The Act defines "hazardous waste" as follows:

> (5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.[422]

It is unlikely that nodule waste would contribute to an increase in illness or mortality as contemplated by section 6903(5)(A) of the Act. It is possible, however, that improper storage could result in leaching which would, in turn, pose a potential hazard to the water supply and human health within the meaning of section 6903(5)(B).

The EPA has issued extensive regulations for the identification and handling of hazardous wastes.[423] To be classified as hazardous under these EPA regulations, the waste must: (1) fall within the definition of "solid waste"; (2) *not* fall within an exclusion to the "hazardous waste" classification; and (3) satisfy the criteria for being hazardous.

A solid waste is defined as "any garbage, refuse, sludge, or any other waste material" which is not excluded by subsequent definition.[424] The solid waste exclusions encompass domestic sewage, industrial wastewater

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[418] *Id.* § 344-4(5)(A).
[419] Resource Conservation Act, *supra* note 394.
[420] *Id.* § 6902(3).
[421] *Id.* § 6902(4).
[422] *Id.* § 6902(5).
[423] 40 C.F.R. §§ 260-265 (1981).
[424] *Id.* § 261.2(a).

regulated by the FWPCA, irrigation return flows, nuclear material and materials subjected to in-site mining techniques which are not removed from the ground during the extraction process.[425] Waste material from a manganese nodule processing plant probably would not fall within any of these exclusions, and therefore would be treated as solid waste under the regulations.

Although not all solid waste is classified as hazardous,[426] manganese nodule processing waste may not be excluded from such a classification. Processing wastes would be excluded from this classification only if an interim final amendment to the current regulations becomes final. This amendment to 40 C.F.R. section 261.4(b) would add an exclusion for "[s]olid waste from the extraction, beneficiation and processing of ores and minerals (including coal), including phosphate rock and overburden from the mining of uranium ore."[427]

Under the current regulations, a waste is hazardous if it is solid waste not excluded under 40 C.F.R. section 261.4(b) *and* it meets any of a list of criteria set forth in the regulations.[428] For example, under 40 C.F.R. sections 261.21-.24, waste is hazardous if it exhibits the characteristics of ignitibility, reactivity or extraction procedure toxicity. The regulations describe maximum concentrations for extraction procedure toxicity for arsenic, cadmium, lead, mercury and selenium,[429] all of which occur in manganese nodules in their natural state.[430] A solid waste may also be listed as hazardous waste if it contains arsenic, beryllium, cadmium, lead, mercury, selenium, thallium and their respective compounds.[431] All of these elements are found in manganese nodules in their natural state.[432]

Whether or not these factors would cause nodule wastes to be classified as "hazardous" depends upon the discretion of the Administrator of the EPA. The Administrator would not render a "hazardous" classification if he concluded that "the waste is not capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed."[433] To reach such a conclusion, the Administrator might consider any of a variety of factors, including the nature of the toxicity and the

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[425] *Id.* § 261.4(a).

[426] Under 40 C.F.R. § 261.4(b) (1981), solid waste is not hazardous if it is household waste, or if it is generated and returned to the soil as fertilizer during the growing and harvesting of crops or the raising of animals, or is mining overburden returned to the mine site, or is fly ash waste, bottom ash waste, slag waste, or drilling fluids associated with the exploration and production of fossil fuels. *Id.* § 261.4(b)(1)-(5).

[427] 45 Fed. Reg. 76618, 76620 (1980)(to be codified in 40 C.F.R. § 261.4(b)).

[428] 40 C.F.R. § 261.3(a)(2) (1981).

[429] *Id.* § 261.24(b).

[430] PUNA/KOHALA REPORT, *supra* note 5, at 203.

[431] 40 C.F.R. § 261.11(a)(3) (1981).

[432] PUNA/KOHALA REPORT, *supra* note 5, at 203.

[433] 40 C.F.R. § 261.11(a)(3) (1981).

concentration of the constituent, persistence of the constituent or any of its toxic degradation products, the degree to which the constituent or degradation product bioaccumulates in ecosystems, quantities of waste generated and the threat to human health and the environment.[434]

Thus, if the proposed final amendment to 40 C.F.R. section 261.4(b) does not become final, manganese nodule processing wastes may be classified as hazardous waste subject to EPA regulations because (1) it falls within the definition of solid waste; (2) it does not fall within an exclusion to the hazardous waste classification; and (3) it may satisfy the hazardous criteria, depending upon the concentration levels of its elements[435] or the determination of the EPA administrator.[436]

If processing wastes are classified as hazardous, the EPA will require the processing plant operators to prepare manifests before transporting the waste off site.[437] Also, the processing plant operators would be required to meet U.S. Department of Transportation regulations on packaging, labeling, marking and placarding.[438] The regulations further require recordkeeping, an annual report and the reporting of exceptions to the manifest system.[439] There are similar regulations affecting the transporters of hazardous waste,[440] and the owners and operators of hazardous waste treatment, storage and disposal facilities.[441]

State regulation of solid waste pollution is based on sections 342-51 to -54 of the H.R.S. and chapter 46 of the Public Health Regulations. The Director of the Department of Health is charged with the duty of preventing, controlling and abating solid waste pollution in Hawaii.[442] It is not clear whether nodule waste in slurry form, pumped to a slurry pond, would be considered solid waste under the H.R.S. definition:

> "Solid waste" means garbage, refuse, and other discarded solid materials, *including solid waste materials resulting from industrial and commercial operations,* and from community activities, but *does not include* solid or dissolved material in domestic sewage or other substances in water sources, such as silt, *dissolved or suspended solids in industrial waste water effluents,* dissolved materials in irrigation return flows, or other common water pollutants. This definition is also *intended to include* liquid waste materials such as waste oil, pesticide, paints, solvents, and *hazardous waste.*[443]

If nodule waste is considered "dissolved or suspended solids in indus-

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[434] *Id.*
[435] *Id.* § 261.24.
[436] *Id.* § 261.11(a)(3).
[437] *Id.* § 262.20(a).
[438] *Id.* §§ 262.30-.33.
[439] *Id.* §§ 262.40-.42.
[440] *Id.* § 263.
[441] *Id.* § 264.
[442] HAWAII REV. STAT. § 342-52 (1976).
[443] *Id.* § 342-51(1)(emphasis added).

trial waste water effluents," it would not be governed by solid waste regulations. Water pollution regulations would also be inapplicable because they deal primarily with discharges into rivers and the ocean, and here the slurries would be deposited, instead, into ponds designed to isolate the pollutants. However, nodule waste could be regulated as solid waste under existing state laws if it was considered "hazardous waste." Section 342-51(6) of the H.R.S. states: " 'Hazardous waste' includes, but is not limited to such items as plastics, explosives, acids, caustics, chemicals, poisons, drugs, asbestos fibers, pathogenic wastes from hospitals, sanitoriums, nursing homes, clinics, and veterinary hospitals, waste from slaughterhouses, poultry processing plants and the like."

The Department of Health might argue that nodule processing waste falls under the hazardous waste category of "acids" or "chemicals." Chapter 46 of the Public Health Regulations establishes a broader definition:

> "Hazardous waste" means any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms because such wastes are nondegradable or persistent in nature, or because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause or tend to cause detrimental cumulative effects.[444]

If trace metals are present in nodule waste in a form available to organisms, then nodule waste might fall within this definition of hazardous waste. The Department of Health may argue that these metals pose a hazard to human health because they may cause "detrimental cumulative effects."

If nodule waste is classified as hazardous under chapter 46, a permit would be required for all waste disposal facilities, and operating requirements would be imposed. These requirements would include "[t]he disposal of chemical wastes at a landfill . . . in a specially constructed trench or pit that is designed to retain the wastes and prevent infiltration into ground and surface waters."[445] Properly constructed containment ponds would satisfy this requirement.

d. Potential Commercial Uses

The objectives of the Resource Conservation Act are to promote the protection of health and the environment and to conserve valuable material and energy resources, by taking such steps as the recycling of solid wastes.[446] Similarly, Hawaii's solid waste pollution law emphasizes possible agriculture uses for recycled waste. The Director of the Department of Health is required to "encourage the recycling of solid wastes, including

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[444] STATE OF HAWAII DEP'T OF HEALTH, PUBLIC HEALTH REG. chapter 46, § 1(H).

[445] *Id.* § 4(B).

[446] Resource Conservation Act, *supra* note 394, § 1003.

animal wastes and industrial wastes, for agricultural purposes. The use of treated sludge effluent for fertilizer and other agricultural purposes shall also be encouraged."[447] The use of nodule waste as land fill or part of a fertilizer mix would thus fulfill federal and state legislative goals.

5. Comment

The development of a major new industry in Hawaii requires consideration of the potential negative effects of that industry upon the state's natural and social environment. These effects must be controlled, mitigated or eliminated. The above review of existing international, federal, state and local laws demonstrates that these laws provide comprehensive and adequate protection against harm to the natural environment. The only gap in the present regulatory regime is in state regulations regarding solid and liquid wastes. This gap may be filled by adopting new regulations, or by declaring that manganese nodule processing wastes are "hazardous."

There exists concern that a processing plant will consist of a smelter with tall smokestacks billowing black smoke.[448] This would not be allowed under the Federal Clean Air Act or state regulations, which require electrostatic precipitators or baghouses, proven effective in eliminating smoke and controlling particulates. Another concern is that ocean disposal will kill whales and dolphins and destroy the food chain.[449] This would not be allowed under the FWPCA and Marine Protection Act. Still another fear is that waste disposal on land could poison the water table. This is unlikely given the strict precautions which are required by the Resource Conservation Act to prevent such occurrences.

However, there are still two impediments to the establishment of a manganese nodule industry in Hawaii under the current regulatory regime. First, the regime is so complex and requires so many permits and procedural steps, that even a company proposing a clean, desirable industry may become impatient and decide to locate elsewhere.[450] For example, a company wishing to establish a processing plant on the Island of Hawaii could be required to obtain a federal EIS for work in the harbor, a state EIS to rezone land for the plant, a state EIS for construction in the conservation district and a county EIS for construction in the SMA. A dozen permits could be required from the Army Corps of Engineers, the U.S.

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[447] HAWAII REV. STAT. § 342-54 (1976).

[448] *See, e.g.*, Clark, *Fasi Levels Charge of "Smokestacking,"* Honolulu Advertiser, Aug. 7, 1978, § A at 3, col. 3; Matsuoka, *Big Isle Defends Manganese Plant*, Honolulu Star-Bulletin, Aug. 7, 1978, § A at 7, col. 1.

[449] *See, e.g.*, Reich, *Manganese Nodules—Dream Or Nightmare?*, Hawaii Tribune-Herald, May 8, 1978, at 4, col. 1.

[450] *See, e.g.*, Keith, *Manganese Nodule Mining Impact Uncertain*, Hawaii Tribune-Herald, June 2, 1978, at 4, col. 1.

Coast Guard, the State Department of Land and Natural Resources, the State Department of Health, and the County of Hawaii, not to mention possible proceedings before the State Land Use Commission.[451] The whole process could take a minimum of twenty months,[452] and perhaps much longer, before a company would know whether or not it could begin work. Much time is lost while one agency waits for another to issue a permit before acting upon its own permit application.[453] Substantive requirements and agency reviews should not be eliminated; rather, they should be coordinated and streamlined. Fortunately, the state and its counties have taken steps to improve permit procedures.[454] An early decision "on the merits" can protect the people of Hawaii while making Hawaii attractive as a potential site for clean industry.[455]

The second problem with the regulatory regime is that it focuses only upon threats to the natural environment—the flora and fauna, water, air and land. Because environmental laws and regulations are comprehensive and strict, no major negative environmental impacts of this kind are likely. Actually, the potential socio-economic impact upon the people of Hawaii is an area of greater concern. Puna and Kohala are rural areas

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[451] *See also* FEASIBILITY OF PROCESSING, *supra* note 326, at H-1 to H-5.

[452] *Id.* at H-2, H-3.

[453] *Id.* at H-4, H-5.

[454] In 1977, the Hawaii State Legislature passed Act 74 to establish a central permit-procedure coordinating agency in each county. The coordinating agency will maintain a repository of all laws, rules, regulations and permit requirements regarding land development projects within the county; study the feasibility of using a master application form for permits and procedures required for land development; maintain a file of all applications within the county; and attempt to schedule and coordinate hearings with those held by other agencies. The DPED Hawaii Coastal Zone Management Program and the University of Hawaii have sponsored studies and workshops to analyze current permit requirements and methods for improving the permit system. *See, e.g.*, HAWAII COASTAL ZONE MANAGEMENT PROGRAM, STATE OF HAWAII DEP'T OF PLAN. AND ECON. DEV. (DPED), RED TAPE V. GREEN LIGHT, A WORKSHOP ON GOVERNMENT PERMIT SIMPLIFICATION, COORDINATION AND STREAMLINING (1978). Hawaii's Governor George R. Ariyoshi has stated: "The growth in governmental red tape has been insidious. It has grown on every level—Federal, State, and County. It is now time to make the most earnest efforts to get rid of some of the red tape in a number of critical areas and give a glowing green light to worthy enterprises without compromising our environment, health, or safety." *See* AQUACULTURE PLANNING PROGRAM, DPED, PERMITS AND ENVIRONMENTAL REQUIREMENTS FOR AQUACULTURE IN HAWAII (1977). *See also* HAWAII COASTAL ZONE MANAGEMENT PROGRAM, DPED, PROBLEMS OF REGULATORY INEFFICIENCY AND ISSUES TO BE CONSIDERED IN REDUCING THEM, Tech. Supp. 15 (1980); HAWAII COASTAL ZONE MANAGEMENT PROGRAM, DPED, EFFORTS TOWARD A COORDINATED REGULATORY PROCESS FOR LAND DEVELOPMENT, Tech. Supp. 16 (1980); HAWAII COASTAL ZONE MANAGEMENT PROGRAM, DPED, A SURVEY OF STATES' EFFORTS TO IMPROVE LAND DEVELOPMENT REVIEW PROCEDURES, Tech. Supp. 17 (1980); and HAWAII COASTAL ZONE MANAGEMENT PROGRAM, DPED, ADMINISTRATIVE PROCEDURES REQUIRED FOR DEVELOPMENT PERMITS IN HAWAII, Tech.Supp. 18 (1980).

[455] A study conducted under the auspices of NOAA indicates that it can take from two years in Washington and Oregon to ten years in California to obtain necessary permits to establish a manganese nodule processing plant. Nossaman, Krueger & Marsh, AN ANALYSIS OF APPLICABLE LAW CONCERNING SEABED MINERAL PROCESSING IN CALIFORNIA, WASHINGTON, OREGON AND ALASKA (1980).

which could benefit from an expanded commercial base, accompanied by more jobs, increased per capita income and eventually, better public services.[456] These rural areas could also be affected, however, by a change in local population composition, a change in lifestyles and an increase in retail outlets, traffic and noise.[457] Socio-economic impacts would be strongly evident during the construction of a plant, when an influx of workers would create immediate pressures on housing and other services.[458] While an EIS can consider socio-economic impacts, the quality of life is more difficult to measure and agree upon than the quality of the air or water. Community planning and inter-governmental cooperation must supplement the regulatory regime to control, mitigate or eliminate negative social impacts. This means that the public must be informed and involved in the decision-making process. To this end, the state environmental policy urges all state agencies, when developing programs, to provide for the expansion of citizen participation in the decision-making process.[459]

VI. The Regulation of Fisheries

A. *Introduction*

Hawaii's fishing industry has grown little in the last thirty years. The industry employs approximately 1,600 people full time, and there is a total of 2,500 licensed commercial fishermen.[460] Most of the fishing is done within twenty miles of the main islands.[461] The total catch has fluctuated between twenty million pounds in 1965 and nine million pounds in 1969,[462] with an average catch of approximately thirteen million pounds per year. Of the thirty million pounds of seafood consumed in the state annually, twenty-three million are imported.[463] Thus, it is clear that the people of Hawaii could consume far more fish from the local industry.

There is no question that the fishery resource is large enough to support expanded state activity. The *Hawaii Fisheries Development Plan*,[464] published by the Department of Land and Natural Resources (DLNR), estimates that the fishery resource potential within Hawaiian waters ranges from seventy-four million to 117.5 million pounds per year, which amounts to 60.7 to 104.1 million pounds more per year than are now being caught. This estimate consists of forty-seven to seventy-one million

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[456] Puna/Kohala Report, *supra* note 5, at 157-58.
[457] *Id.* at 161.
[458] *Id.* at 164.
[459] Hawaii Rev. Stat. § 344-4 (1976).
[460] Fisheries Plan, *supra* note 5, at 11.
[461] *Id.* at 13.
[462] *Id.*
[463] *Id.* at xvii.
[464] *Id.*

pounds of open-ocean tunas and 13.7 to 33.1 million pounds of other species.[465]

With a fisheries development program in place, the 1990 catch could be increased by fifty million pounds, worth $30 million ex-vessel, with an increase in gross state income of $53 million.[466] By the year 2000, the increase could be eighty-six million pounds, worth $55 million ex-vessel,[467] with an increase in gross state income of $92 million. The value after processing the increased catch would be $62 million in 1990 and $107 million in 2000.[468] The constraints on development of such a program include institutional coordination,[469] harbor development,[470] other infrastructure,[471] marketing and product promotion[472] and fuel costs.[473]

The major concern with respect to expanding the present fisheries program is that conflicting federal-state jurisdicton over Hawaii's waters may present problems for the regulation of fisheries. Before this issue is addressed, however, an overview of international, federal and state laws affecting fisheries development in Hawaii will be presented.

B. Fisheries Conventions

The Convention on Fishing and Conservation of the Living Resources of the High Seas,[474] signed at Geneva in 1958, was one of four conventions adopted at the first United Nations Conference on the Law of the Sea. The preamble to the Convention notes that with the development of modern techniques for exploitation of living resources of the sea, there is a danger of over-exploitation and that due to the nature of the problems involved, international cooperation is necessary.

Article 1 of the Convention establishes for all States the right of their nationals to fish on the high seas, subject to treaty obligations and the interests and rights of coastal States.[475] The goal of conservation, set forth in article 2, is to ensure a supply of food for human consumption. To that end, "conservation of the living resources of the high seas" means "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food

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[465] *Id.* at 41.
[466] *Id.* at 28.
[467] *Id.*
[468] *Id.*
[469] *Id.* at xxi.
[470] *Id.* at xxi-xxii.
[471] *Id.* at xxii.
[472] *Id.* at xxii-xxiii.
[473] *Id.* at xxiv.
[474] Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.
[475] *Id.* art. 1(1).

and other marine products."[476]

The Convention provides that a State whose nationals are fishing in any area of the high seas, where others are not fishing, shall adopt conservation measures for its own nationals in that area.[477] Where the nationals of two or more States are involved, the Convention provides that those States shall enter into negotiations to reach an agreement on conservation measures for that area.[478]

Article 6 recognizes that "[a] coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea."[479] Thus a State whose nationals are fishing in an area of the high seas adjacent to a coastal State shall, at the request of the coastal State, enter into negotiations to obtain an agreement on the measures necessary to conserve the living resources of the high seas in that area.[480] If negotiations have not resulted in an agreement within six months,[481] a coastal State may adopt unilateral conservation measures for any stock of fish or other marine resource in any area of the high seas adjacent to its territorial sea. These unilateral measures will be valid as to other States if there is need for urgent application of conservation measures, the measures adopted are based on scientific findings, and the measures do not discriminate against foreign fishermen.[482] The Convention provides for the settlement of disputes by a special commission.[483]

Where fisheries are conducted by means of equipment embedded in the floor of the sea,[484] article 13 provides that a coastal State may regulate this type of fishery in the high seas adjacent to its territorial sea, where such fisheries have long been maintained by its nationals. Non-nationals are to be permitted to participate on an equal footing except where such fisheries have by long usage been the exclusive activity of the nationals of the coastal State.[485]

The Convention signed at Geneva in 1958 was followed by the European Fisheries Convention drafted in London in 1964, which entered into force in 1966.[486] Article 2 of this Convention provides that "[t]he coastal State has the exclusive right to fish and exclusive jurisdiction in matters

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[476] *Id.*

[477] *Id.*

[478] *Id.* art. 4(1).

[479] *Id.* art. 6(1).

[480]. *Id.* art. 6(4).

[481] *Id.* art. 6(1).

[482] *Id.* art. 7(2)(a)(c).

[483] *Id.* arts. 9-12.

[484] Such fisheries are defined as "those fisheries using gear with supporting members embedded in the sea floor, constructed on a site and left there to operate permanently or, if removed, restored each season at the same site." *Id.* art. 13(2).

[485] *Id.*

[486] Fisheries Convention (with Annexes), Mar. 9, 1964, 581 U.N.T.S. 57.

of fisheries within the belt of six miles measured from the baseline of the territorial sea."[487] However, the belt from six miles to twelve miles, up to the limit of the contiguous zone, receives different treatment. Under article 3, the right to fish in that belt of water is to be exercised only by the coastal State and other parties to the Convention whose fishing vessels have fished there habitually between January 1, 1953, and December 31, 1962.[488] Article 4 provides that the parties to the Convention who are allowed to continue fishing in the six-to-twelve mile zone shall not direct their fishing to "stocks of fish or fishing grounds substantially different from those which they have habitually exploited."[489] Further, it is the coastal State which has the power to regulate fisheries in the six-to-twelve mile zone, provided there is no discriminaton against parties to the Convention who are fishing there.[490] Article 11 allows a coastal State, with the approval of the other parties to the Convention, "to exclude particular areas from the full application of articles 3 and 4 in order to give preference to the local population if it is overwhelmingly dependent upon coastal fisheries."[491]

The Convention has two annexes. Annex I lists the coasts of the parties to which the Convention applies.[492] Annex II provides arbitration procedures.[493] Article 13 provides that, unless the parties agree to seek a solution by another method of peaceful settlement, any dispute arising between parties to the Convention concerning its interpretation or application shall, at the request of any of the parties, be submitted to arbitration in accordance with Annex II.[494]

C. Draft Convention on the Law of the Sea

The Draft Convention[495] addresses fisheries both within the proposed EEZ and on the high seas. As for the EEZ, article 56 provides coastal States with "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters. . . ."[496] Article 61 provides that "[t]he coastal State shall determine the allowable

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[487] *Id.* art. 2. Article 9 provides that fishermen of a party to the Convention who have habitually fished within six miles of shore are to be given a transitional period to adapt themselves to exclusion from that zone. The coastal State may allow continued fishing by fishermen of other parties to the Convention in the six-mile zone.

[488] *Id.*

[489] *Id.*

[490] *Id.*

[491] *Id.* art. 11.

[492] *Id.* Annex I.

[493] *Id.* Annex II.

[494] *Id.* art. 13.

[495] Draft Convention, *supra* note 48.

[496] *Id.* art. 56(1)(a).

catch of the living resources in its exclusive economic zone."[497]

The coastal State is charged with the responsibility of ensuring that the living resources within its zone are not endangered by over-exploitation.[498] Article 61 also provides that each coastal State should take measures "designed 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 economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns . . ."[499]

Focusing on the utilization of the living resources within the EEZ, article 62 prescribes that "[t]he coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to Article 61."[500] The coastal State shall determine its capacity to harvest the living resources in its EEZ, and if it does not have the capacity to harvest the allowable catch, the coastal State shall give other States access to the surplus.[501] In giving access to other States, the coastal State shall take into account all relevant factors, including the importance of the resource to the coastal State, the rights of land-locked States, the rights of States with special geographical characteristics, the requirements of developing States in the region and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone.[502]

Article 62 further authorizes coastal States to establish comprehensive fishing regulations.[503] This authorization is far-reaching and includes the licensing of fishermen, along with their vessels and equipment,[504] the fixing of catch quotas and determination of which species may be caught,[505] specifying fishing seasons and fishable areas and regulating the types, sizes and numbers of fishing vessels and gear.[506] The coastal States are also authorized to require that fishing vessels report catch and effort statistics,[507] to require that fisheries research programs be conducted,[508] to require that observers from the coastal State be placed on board vessels,[509] to assign terms and conditions relating to joint ventures[510] and to

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[497] *Id.* art. 61(1).
[498] *Id.* art. 61(2).
[499] *Id.* art. 61(3).
[500] *Id.* art. 62(1).
[501] *Id.* art. 62(2).
[502] *Id.* art. 62(3).
[503] *Id.* art. 62(4).
[504] *Id.* art. 62(4)(a).
[505] *Id.* art. 62(4)(b).
[506] *Id.* art. 62(4)(c).
[507] *Id.* art. 62(4)(e).
[508] *Id.* art. 62(4)(f).
[509] *Id.* art. 62(4)(g).
[510] *Id.* art. 62(4)(i).

establish requirements for the transfer of fisheries technology.[511]

Where stocks occur within the EEZ of two or more coastal States, or are highly migratory, articles 63 and 64 require cooperation, either directly or through regional organizations, to coordinate the conservation and development of such stocks. Article 66 gives to those States in whose rivers anadromous stocks originate, the prime interest in and responsibility for such stocks. As for catadromous species, article 67 provides that "[a] coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish."[512]

The right to fish on the high seas is preserved in article 116, subject to treaty obligations, the rights of coastal States, and regional agreements entered into for the management of common or migratory stocks. Under article 117, "[a]ll States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas." Article 119 provides that, in determining the allowable catch, States shall adopt measures which are designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield. These measures are to include marine mammals.[513]

D. Fishery Conservation and Management Act

While UNCLOS III was in session, the United States enacted the Fishery Conservation and Management Act of 1976,[514] creating a 200-mile fishery conservation and management zone.[515] In its findings, Congress stated that certain stocks of fish are threatened by extinction due to increasing fishing pressure and inadequate management and conservation controls; that commercial fishing is a major source of employment for our nation but that the economies of some American coastal areas have been damaged, in part, by the activities of massive foreign fishing fleets; and that international agreements have been ineffective in preventing the depletion of valuable fisheries.[516] Congress further found that if fisheries are placed under sound management, they can then be conserved and maintained to provide optimum yields on a continuing basis, and that a national program is necessary to accomplish this end.[517]

It is thus the purpose of the FCMA: (1) to establish a fishery conservation zone within which the United States will assume exclusive fishery

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[511] *Id.* art. 62(4)(j).
[512] *Id.* art. 67(1).
[513] *Id.* art. 120.
[514] FCMA, *supra* note 110.
[515] *Id.* § 1811.
[516] *Id.* § 1801(a)(2)-(a)(4).
[517] *Id.* § 1801(a).

management authority over all fish, except highly migratory species; (2) to support the implementation of international fishery agreements for the conservation and management of highly migratory species; (3) to promote domestic, commercial and recreational fishing; (4) to provide the preparation and implementation of fishery management plans; (5) to establish Regional Fishery Management Councils to prepare fishery management plans; and (6) to encourage the development of fisheries which are underutilized or not utilized by United States fishermen.[518]

The FCMA asserts exclusive fishery management authority over all fish within the 200-mile fishery conservation zone; all anadromous species throughout the migratory range of each such species beyond the fishery conservation zone, except when those species are within a foreign nation's territorial sea or recognized fishery zone; and all continental shelf fishery resources beyond the fishery conservation zone.[519] Fish are defined as "finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals, birds, and highly migratory species."[520] Anadromous species are defined as "species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters."[521] Continental shelf fishery resources are defined by listing thirty-two species of coral (colenterata), crab (crustacea), abalone, conch, quahog (mollusks) and sponges.[522]

Subchapter II relates to foreign fishing and international fishery agreements.[523] No foreign fishing is authorized in the zone unless: (1) it is authorized under an existing international fishery agreement or a new agreement which is consistent with the FCMA; (2) it is not prohibited by reciprocity; and (3) it is conducted under and in accordance with a valid

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[518] *Id.* § 1801(b). It is the policy of Congress under section 1801(c) of the FCMA:

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this Act; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

[519] *Id.* § 1812.

[520] *Id.* § 1802(b).

[521] *Id.* § 1802(1).

[522] *Id.* § 1802(4).

[523] *Id.* §§ 1821-1827.

FCMA permit.[524] The total allowable level of foreign fishing with respect to any fishery in the zone shall be "that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States."[525] Section 1821(e) describes the factors to be considered by the Secretary of State in making an allocation:

> (1) whether, and to what extent, the fishing vessels of such nations have traditionally engaged in fishing in such fishery;
> (2) whether such nations have cooperated with the United States in, and made substantial contributions to, fishery research and the identification of fishery resources;
> (3) whether such nations have cooperated with the United States in enforcement and with respect to the conservation and management of fishery resources; and
> (4) such other matters as the Secretary of State, in cooperation with the Secretary, deems appropriate.

Subchapter III establishes the national fishery management program.[526] A key element of the program is the forming of eight Regional Fishery Management Councils, including the Western Pacific Council, consisting of Hawaii, Guam and American Samoa.[527] This Council has eleven voting members, seven appointed by the Secretary of Commerce.[528] It is the function of each Council to prepare and submit to the Secretary of Commerce a fishery management plan with respect to each fishery within its geographical area of authority; prepare comments on any application for foreign fishing transmitted to it for comment; conduct public hearings regarding the development of fishery management plans; provide reports; and review assessments and specifications with respect to the optimum yield from, and the total allowable level of foreign fishing in, each fishery within its geographical area of authority.[529]

Section 1856 provides that the FCMA shall not be construed as extending or diminishing the jurisdiction or authority of any state within its boundaries. Under section 1856(a), "[n]o State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State." The federal government intends that the fishery management plans be paramount to state actions. Under section 1856(b), if any state takes any action which adversely affects the carrying out of a fishery management plan, the Secretary of Commerce may directly regulate the fishery within

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[524] *Id.* § 1821.
[525] *Id.* § 1821(d).
[526] *Id.* §§ 1851-1861.
[527] The geographical area of authority of this Council is "the Pacific Ocean seaward of Hawaii, American Samoa and Guam." *Id.* § 1852(a)(8).
[528] *Id.*
[529] *Id.* § 1852(h).

the boundaries of the state, pursuant to the fishery management plan in question. A state may subsequently apply for reinstatement of its authority over its fishery.[530]

Among the most notable features of the FCMA are its provisions for civil and criminal penalties for violations of the Act or its regulations.[531] The Secretary or his designate may set a civil penalty not to exceed $25,000 for each violation, with each day of a continuing violation constituting a separate offense.[532] A criminal offense is punishable by fine of not more than $50,000 or by imprisonment for not more than six months, or both. If a dangerous weapon is used and the threat of or actual bodily injury is caused to any officer enforcing the FCMA, the offense is punishable by a fine of not more than $100,000 or imprisonment for not more than ten years, or both.[533] Furthermore, pursuant to a civil proceeding, the fishing vessel involved in the violation may be subject to forfeiture to the United States.[534]

E. State Law

State laws regarding fishing are set forth generally in Hawaii Revised Statutes (H.R.S.) section 188. Laws affecting commercial fishing are set forth in H.R.S. section 189.

State law prohibits the use of explosives, electrofishing devices, chemicals and poison to catch fish.[535] The law also prohibits the use of firearms to take or kill any turtle, crustacean, mollusk, aquatic mammal or fish

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[530] Section 1856(b) of the FCMA, *supra* note 110, provides that:

(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with Section 554 of Title 5, United States Code, that—

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan; the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

[531] *Id.* §§ 1858-1860.

[532] *Id.*

[533] *Id.* § 1859.

[534] *Id.* § 1860.

[535] HAWAII REV. STAT. § 188-23 (1976 & Supp. 1981).

other than sharks in the waters of the state.[536] It is also unlawful to take or kill any crustacean, turtle or aquatic animal with a spear.[537] It is unlawful for any person to use fish nets or traps of any type with a stretched mesh of less than two inches, with the exception of persons engaged in sport fishing, who may use throw nets with stretched mesh of not less than one and one-half inches, pond owners, who may use nets of smaller mesh to take young mullet or pua for stocking their fish ponds, fishermen with commercial marine licenses catching nehu and other bait fish, persons taking shrimp, opae, opelu, makiawa or mikiawa, aquarium fish collectors and those taking akule.[538] Fishing in Honolulu Harbor, Hilo Bay and the waters of Waikiki is restricted.[539]

Consistent with the state's archipelagic claims, the H.R.S. authorizes the DLNR to regulate fisheries in the Northwestern Hawaiian Islands.[540] Section 188-37 provides:

> (a) The department of land and natural resources may adopt rules relating to the taking of marine life in the Northwestern Hawaiian Islands, where, in the judgment of the department the action will not deplete the stocks of marine life in the area; the rules may include open and closed seasons, size limits, methods and appliances, and establishment of permits for taking marine life.
> (b) Those islands, reefs, and shoals, as well as their respective appurtenant reefs and territorial waters, of the Hawaiian Islands chain beginning and including Nihoa Island to and including Kure Island shall be referred to as the Northwestern Hawaiian Islands.

Section 188-37(c) provides that the DLNR may issue permits to those persons with a valid commercial marine license who own or operate a vessel which the DLNR deems to be capable of fishing effectively within the Northwestern Hawaiian Islands.[541] The DLNR is authorized to limit the number of permits issued to fish in any particular area, whenever it deems it necessary, and such limitations are to be made on the basis of the order of applications received.[542] Further, the DLNR may approve of fishing gear which is not legal elsewhere in the state.[543]

Section 188-50 provides that "[i]t is unlawful for any person, except children below nine years of age, to fish, take or catch any introduced fresh water game fish without first obtaining a license." Licenses are issued by the DLNR, and expire on June 30 of each year.[544]

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[536] *Id.* § 188-25.
[537] *Id.*
[538] *Id.* § 188-29 (1976).
[539] *Id.* §§ 188-34 (1976), 188-35 (1976 & Supp. 1981).
[540] *Id.* § 188-37(a) (1976 & Supp. 1981).
[541] The fee for a Northwestern Hawaiian Islands fishing permit is $1. *Id.* § 188-37(c).
[542] *Id.*
[543] *Id.*
[544] *Id.* § 188-50 (1976).

Section 188-70 sets forth the penalties for violations of chapter 188. For a first conviction, the fine is not more than $500, or imprisonment of not more than thirty days, or both.[545] For a second conviction within five years of the first one, the fine is not less than $100, and for a third convictin, not less than $300, with the upper limit remaining at $500 or imprisonment of not more than thirty days, or both.[546] There are special penalties for those violating section 188-23, which prohibits the use of explosives, electrofishing devices and poisonous substances.[547] For a first conviction, the fine is not more than $1,000, or imprisonment of not more than one year, or both.[548] A second conviction within five years raises the minimum fine to $250 with a maximum of $1,000.[549] A third conviction raises the minimum fine to $500, while the maximum remains at $1,000.[550]

Under section 189-2, it is unlawful for any person to engage in any taking of marine life for commercial purposes in the waters of the state or to sell or offer for sale or to profit from any sale of marine life anywhere in the state, whether the marine life is caught or taken in the waters of the state or outside the waters of the state, without first obtaining a commercial marine license. "Marine life" means any type or species of salt-water fish, shellfish, mollusks, crustaceans, coral, or other marine animals, or seaweed or other marine plants.[551] "Commercial purpose" means the taking of marine life for profit or gain or as a means of livelihood, provided the marine life is taken in the waters of the state or sold or offered for sale anywhere in the state.[552]

Commercial marine licenses are issued by the DLNR, and expire on June 30 of each year.[553] The license fee is $10 for any person who has resided in the state for one year or longer, and $20 for all other persons.[554] Section 189-5 provides that it is unlawful for any person who has not been lawfully admitted to the United States to engage in taking marine life for commercial purposes in the waters of the state.

Under section 189-3, every commercial marine licensee who sells or offers to sell or profits from the sale of marine life anywhere in the state is required to provide the DLNR with a monthly report, covering the catch and any live, fresh or frozen bait used. This "monthly catch report"[555] is due ten days after the end of the month being reported; refusal to submit

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[545] *Id.* § 188-70(a)(1) (Supp. 1981).
[546] *Id.* § 188-70(a).
[547] *Id.* § 188-70(b).
[548] *Id.* § 188-70(b)(1).
[549] *Id.* § 188-70(b)(2).
[550] *Id.* § 188-70(b).
[551] *Id.* § 187-10 (1976).
[552] *Id.* § 187-4.
[553] *Id.* § 189-2 (Supp. 1981).
[554] *Id.*
[555] *Id.* § 189-3 (1976)(original italics).

the report is sufficient cause for the immediate cancellation of a commercial marine license.[556] The DLNR may issue a certificate of exemption to those fishermen whose monthly catch is insufficient to require a monthly catch report.[557] In addition to revocation, violation of the license and monthly catch report provisions is punishable by a fine of not less than $25 nor more than $500, or imprisonment of not less than five days nor more than thirty days, or both.[558]

A commercial marine dealer's report, required under section 189-10, must be filed by the tenth day of each month, and must show the weight, number and value of each of the species of marine life purchased, received or sold during the previous month.[559] A fish dealer violating the reporting provisions is subject to a fine of not more than $500, or imprisonment of not more than 100 days, or both.[560]

Under section 189-14, the DLNR may board any vessel used in taking marine life, or enter any place of business where marine life is sold, stored, processed, cooked, canned or cured, for purposes of investigation and inspection. The DLNR may inspect any and all books and records containing accounts of the marine life taken, bought or sold.[561] Any person refusing to permit inspection, or to produce any book or record, or interfering with an officer or agent of the DLNR, shall be fined not less than $25 nor more than $500, or imprisoned not less than five nor more than thirty days, or both.[562]

F. Federal-State Relations

The FCMA established a 200-mile fishery zone which begins at the seaward boundary of each coastal state and extends 200 nautical miles from the baseline from which the territorial sea is measured.[563] Since the federal government does not recognize Hawaii's archipelagic claims,[564] it interprets the fishery zone to begin three miles from each island, thus extending into the channels between Hawaii's islands. Hawaii has asserted that its seaward boundaries begin with archipelagic baselines.[565] This conflict has become important in the adoption of Fishery Management Plans (FMP) by the Western Pacific Regional Fishery Council. The Council has

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[556] *Id.*

[557] *Id.*

[558] *Id.* § 189-4.

[559] A "commercial marine dealer" means any person who sells marine life purchased directly from a commercial marine licensee, or any commercial marine licensee who sells marine life at retail. *Id.* § 187-5.

[560] *Id.* § 189-13.

[561] *Id.* § 189-14.

[562] *Id.*

[563] FCMA, *supra* note 110, § 1801.

[564] *See* note 76 *supra* and accompanying text.

[565] *See* note 75 *supra* and accompanying text.

completed plans on the spiny lobster and precious corals. These plans were submitted to the DPED's Hawaii Coastal Zone Management Program for review under the consistency requirements established by the federal Coastal Zone Management Act.[566] The DPED's review indicated that FMP regulations were not consistent with existing state regulations, and the FMP's were not consistent with the Hawaii Coastal Zone Management Program. In May, 1981, the DPED suggested that the precious coral FMP be modified to become consistent with state laws and regulations, or the promulgation of the FMP be delayed until either the state or federal regulations are amended to be made consistent.[567] State and federal officials formed an informal Consistency Review Task Force in December, 1981. As of this writing, the DPED has not yet found the FMP's to be consistent with the Hawaii Coastal Zone Management Program.

The consistency question is affected by both the jurisdictional issue and policy differences regarding the conservation or exploitation of marine resources. If state and federal regulations are different, then it will be important to know where state jurisdiction stops and federal jurisdiction begins in order to enforce each set of regulations. However, if the regulations are the same, then they can be enforced from Hawaii's shorelines out to 200 nautical miles, regardless of which government has title or jurisdiction within the channels. The Consistency Task Force is attempting to eliminate the major differences in state and federal regulations, so that the jurisdictional dispute will have no practical effect. In bringing about consistency in the regulations, there are differences in policy. For example, in order to allow the long-term development of fishery resources, Hawaii has set higher standards—larger minimum catch sizes—than the FMP's would require for spiny lobsters. On the other hand, the FMP for coral would establish a refuge, while state regulations do not. Administrative requirements also differ as to licensing, permits, seasons in which fishing is allowed and limitations on gear used. In the event of an impasse, the Western Pacific Regional Fishery Council can seek mediation.[568]

G. Comment

Fisheries conventions have moved from the general concern for conservation found in the 1958 convention on fishing, to the division of offshore waters and stricter control by coastal States found in the 1964 Fisheries Convention, to total control over all aspects of fishing within 200-mile zones as proposed in the Draft Convention. This can be viewed as part of

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[566] Coastal Zone Management Act, *supra* note 18, § 307(c)(3)(A).

[567] Letter from Hideto Kono, State of Hawaii Director of DPED, to Alan W. Ford, Regional Director, Southwest Region, National Marine Fisheries Service (May 6, 1981).

[568] 15 C.F.R. § 930.43.

a world trend toward the enclosure and development of ocean resources. In a world in which present food supplies cannot keep pace with demand, coastal States have moved to strengthen their control over the living resources along their coasts.

The United States has been a leader in this enclosure movement, first with the Truman Proclamation in 1945,[569] and more recently with the FCMA. Ironically, enclosure may be the wrong approach to the fisheries issue: enclosure works best where the resources are fixed, such as is the case with oil or manganese nodules.[570] With an immobile resource, the managing State can afford to exploit only part of the resource, saving some for later. In the case of fisheries, the living resource is mobile, and often moves beyond any one coastal State's jurisdiction. The incentive, then, is for each coastal State to overfish—to take as much fish as it can as the fish migrate through its EEZ.[571] Cooperative, joint agreements could regulate fisheries by following the fish wherever they go. While such international cooperative agreements are encouraged by the Draft Convention, the reality is that coastal States are unlikely to reduce their own fisheries if they can maintain or even increase their catch with the powers granted them in the Draft Convention.

The increased powers of coastal States under the Draft Convention could give the U.S. government greater powers in the Hawaiian Islands than are now asserted under the FCMA. This could be beneficial to Hawaii, because it could allow the expansion of Hawaii's fisheries in the Northwestern Hawaiian Islands. Expansion into the Northwestern Hawaiian Islands is critical to the state's fishery development plan. Short of a legal determination on the archipelagic claim, it is in Hawaii's interest to obtain management participation or delegated authority from the federal government to standardize the regulation of fisheries throughout the island chain. Although state statute allows the DLNR to issue licenses for Northwestern Hawaiian Island fisheries, the federal government has been reluctant to allow Hawaii's fishermen to operate from federally controlled islands in the chain.[572] Thus, while Hawaii looks to the Northwestern Hawaiian Islands as the area for economic expansion and development, the federal government may make it difficult for this expansion to take place. Jurisdiction of only three miles around each island or atoll is not sufficient jurisdiction to control the Northwestern Hawaiian Island fisheries; the federal 200-mile fishery zone is. As the law now stands, the expansion of Hawaii's fisheries is largely in federal government hands.

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[569] Proclamation on the Continental Shelf, *supra* note 187.

[570] *See generally* R. ECKERT, *supra* note 397.

[571] *Id.* at 118.

[572] *See, e.g.*, Altonn, *Tern Island Issue Nears a Solution*, Honolulu Star-Bulletin, Feb. 25, 1982, § D at 11, col. 1. For a detailed analysis of the state-federal conflict, see Comment, *supra* note 6.

VII. Conclusion

Although there are a considerable number of legal issues to be defined, examined and resolved, the only area in which the law is at present an obstacle to ocean resource development in Hawaii is in regard to manganese nodule mining. The uncertainty created by the eight-year UNCLOS III has resulted in a slowdown of activities by mining companies. The enactment of laws and promulgation of regulations for OTEC, however, occurred within only two years after Mini-OTEC was a success. This very rapid process has supported development. Fishery laws have increased control over the fishery resource within the 200-mile zone around Hawaii, allowing both conservation and the expansion of commercial fisheries in the interest of the United States and Hawaii. Thus, the present laws affecting ocean resource development are, on balance, favorable and supportive of a new economic future for Hawaii in which ocean industries will play a major role.

INDEX

1980-1981 HAWAII SUPREME COURT CASES

This index summarizes every published opinion of the Hawaii Supreme Court issued between June 23, 1980, and July 31, 1981, by topic. Note that in this section, "Court" refers to the Hawaii Supreme Court, while other courts are identified by name. This index also departs from *A Uniform System of Citation* by employing an abbreviated form for Hawaii Revised Statutes, "H.R.S."

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I. Administrative Law

A. Building Permits

In **Waikiki Resort Hotel, Inc. v. City & County of Honolulu,**[1] the Court affirmed a decision of the Building Board of Appeals to uphold the validity of a building permit that appellant sought to have revoked on the basis that it violated certain ordinances and an enabling statute. The Court held the permit valid on the following grounds: (1) No special permit was required under Honolulu Comprehensive Zoning Code, Honolulu, Hawaii, Rev. Ordinances § 21-2.71(c) (1978), because appellant

[1] 63 Hawaii 222, 624 P.2d 1353 (1981).

failed to prove that the main building as shown on the plans did not cross all common lot lines; (2) appellant fully complied with sprinkler system requirements of HONOLULU, HAWAII, ORDINANCE 4434 (Mar. 18, 1975) which included the exemption added by HONOLULU, HAWAII, ORDINANCE 4381 (Dec. 31, 1974), and appellant was willing to follow the requirements; (3) no special permit was required for construction under HONOLULU, HAWAII, ORDINANCE 4529 (Nov. 18, 1975), which established the interim shoreline protection district, since the permit was issued before the enactment of the ordinance; and (4) where an administrative agency is charged with the responsibility for carrying out a broadly worded statute such as HONOLULU, HAWAII, REV. ORDINANCES § 18-5.4(b) (1969), persuasive weight is accorded to administrative construction unless palpably erroneous. The Court found no such error in the Board's finding that apellee had complied with the guidelines established by § 18-5.4(b) and also found that where the required majority exists without the vote of a disqualified board member, his participation in the deliberation and voting would not invalidate the board's decision.

B. Intervention

The facts leading to **Life of the Land v. West Beach Development Corp.**[2] were as follows. The Land Use Commission had denied appellant intervention in a Commission hearing to consider a petition of appellee to reclassify lands belonging to appellee in Ewa, Oahu, from agricultural to urban. The Commission had published notice of the hearing but postponed it indefinitely and later published notice of the new date. Appellant filed a petition of intervention more than fifteen days from the time of the publication of the first notice but before the fifteen-day period for the second notice had run. The Court held that an indefinitely postponed hearing of the Commission is a "rescheduled hearing" under Land Use Commission Rule 1-4(1)(a), and therefore a new public notice of date, time and place was required. Appellant's filing was therefore timely under Land Use Commission Rule 6-7(2). The Court also found that appellant's filing for this appeal was timely since the thirty-day limitation period for the filing of a notice of appeal does not begin to run until after service of the duly signed written order upon appellant has been completed. HAWAII R. CIV. P. 72(b).

C. Judicial Review

In **Jordan v. Hamada,**[3] appellant had intervened in a Hawaii Public Employment Relations Board (HPERB) proceeding in which his union,

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[2] 63 Hawaii 529, 631 P.2d 588 (1981).
[3] 62 Hawaii 444, 616 P.2d 1368 (1980).

the Hawaii Government Employees Association (HGEA), had sought to increase its service fee. After HPERB granted the increase, appellant filed a timely notice of appeal naming only HGEA as the opposing party. The circuit court granted HGEA's motion to dismiss for failure to join an indispensable party, HPERB. The Court reversed, finding that the agency need not be expressly designated an appellee when judicial review of its decision is sought since legislative policy favors a broad right of appeal from agency decisions. H.R.S. § 91-14 (1976 & Supp. 1980). The Court also found that the definition of "appellee" under HAWAII R. CIV. P. 72 included the agency when a timely notice of appeal was filed, making the agency an *ipso facto* appellee, or when the agency was a party "needed for just adjudication" and could feasibility be joined *sua sponte*.

In **In re Hawaii Government Employees' Association,**[4] HGEA petitioned HPERB to clarify and amend the coverage of three state bargaining units to include new positions. The Public Employees Management Association of Hawaii (PEMAH) and seven PEMAH members sought to intervene, opposing the HGEA petition. HPERB denied PEMAH's motion to intervene, but conditionally allowed the intervention of the individuals. The circuit court dismissed on appeal. The Court reversed, holding: (1) Failure to designate HPERB as an appellee was not grounds for dismissal; (2) appeals of administrative decisions are governed by H.R.S. § 91-14(a) (1976), which does not require agency approval before the circuit court can take jurisdiction over interlocutory appeals; and (3) HPERB's denial, which ended the proceedings with regard to PEMAH, was a final order and not interlocutory. PEMAH was therefore entitled to appeal to the circuit court.

D. Rulemaking

In **Ainoa v. Unemployment Compensation Appeals Division,**[5] the Department of Labor and Industrial Relations denied unemployment insurance benefits to appellants-claimants because they were not "available for work" under H.R.S. § 383-29(a)(3) (1976) (amended 1981) as interpreted by the Department in unpublished internal statements. The Court reversed, ruling that the statements went beyond any definition given in prior court opinions and did not comply with the Hawaii Administrative Procedure Act (HAPA), H.R.S. ch. 91 (1976). The Court found the internal statements to be rules under H.R.S. § 91-1(4) (1976). Therefore the Department's adoption of these rules without complying with HAPA's rule-making provision, H.R.S. § 91-2(b) (1976), requiring publication of the rule, rendered the rules invalid. The Court also held that the Department's interpretation of the statute did not reflect its bare wording

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[4] 63 Hawaii 85, 621 P.2d 361 (1980).

[5] 62 Hawaii 286, 614 P.2d 380 (1980).

and that to allow each individual referee such broad interpretive powers would not determine eligibility in a consistent manner, giving the government the appearance of being arbitrary and capricious.

DeCambra v. Agsalud[6] presented facts and issues similar to *Ainoa* and the Court disposed of the case in similar fashion.

E. Welfare Assistance

In **Filipo v. Chang**,[7] the Court used the doctrine of equitable estoppel to hold the Department of Social Services and Housing (DSSH) obligated to pay additional welfare assistance to appellee for her unborn child. For twenty-three years, DSSH had made such payments to pregnant women pursuant to Public Welfare Manual 3241 (PWM 3241), but discontinued the practice after the State Legislature adopted the "flat grant" welfare system, which limited those eligible for public assistance to "persons" as defined by H.R.S. § 346-53 (1976 & Supp. 1980). The Court found that PWM 3241 had been adopted prior to HAPA and therefore was not required to comply with HAPA enactment regulations. Even assuming that it was invalid, equitable estoppel could be invoked against the government to prevent manifest injustice because the State had made such payments for over twenty years. The Court also ruled that the government's assertion of PWM 3241's invalidity was unconscionable since its own error had been the reason for noncompliance with HAPA. Lack of reliance by appellee on the State's representations did not bar her assertion of estoppel. The Court also affirmed the trial judge's denial of intervention or class certification of "all mothers and unborn children," stating that the trial court has broad discretion in deciding whether to certify a class.

II. Attorneys

A. Disbarment

In **Office of Disciplinary Counsel v. Smith**,[8] the Court explained that the disbarment of respondent for misappropriation of clients' funds was required in order to protect the public, to maintain the trust and confidence reposed in lawyers by their clients and to preserve the integrity of the judicial process. In one case, respondent misappropriated funds for his own purposes. In another case, he falsely represented that he was the executor of his deceased client's estate, opened fictitious bank accounts to receive funds from the estate's debtors, misappropriated certain of those funds for his own use and withheld information from the

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[6] 62 Hawaii 296, 613 P.2d 361 (1980).
[7] 62 Hawaii 626, 618 P.2d 295 (1980).
[8] 62 Hawaii 467, 617 P.2d 80 (1980).

probate court in an attempt to deceive the court. The Court determined that respondent's violation of the most basic rule of professional responsibility, to safeguard clients' funds, requires, in the absence of strong mitigating circumstances, the severest disciplinary sanction.

In **Office of Disciplinary Counsel v. Cashman,**[9] the Court again held that in the absence of strong mitigating circumstances, respondent's conduct in misappropriating the funds of his clients violated the most basic rule of professional responsibility and thus required disbarment. The Court noted that although respondent's misconduct occurred in California and not in Hawaii, that fact in no manner lessened the degree of responsibility which he bore as a member of the Hawaii bar; he therefore was fully accountable for his improper conduct in California.

B. Suspension From Practice

The Court rejected the recommendation of the disciplinary board for disbarment of respondent in **Office of Disciplinary Counsel v. Kagawa,**[10] and instead entered an order suspending respondent's license to engage in the practice of law for four years. Fifteen complaints were filed against respondent ranging from procrastination to inexcusable neglect as evidenced by his consistent failure to respond to his clients' inquiries and to meet court deadlines. The Court agreed with the disciplinary board that respondent's conduct warranted disciplinary action, but considered the board's recommended sanction of a complete disbarment unduly harsh given the existence of mitigating circumstances. First, respondent was not guilty of serious, unethical conduct such as wilful misappropriation, which would have warranted his disbarment. Second, he was going through the strain of a marital breakup during the period in which he neglected his work; this probably further exacerbated the problems in his office because his wife also worked as his personal secretary.

III. Civil Procedure

A. Appellate Procedure

In **MPM Hawaiian, Inc. v. Amigos, Inc.,**[11] the Court followed Hawaii R. Civ. P. 52 which states that conclusions of law based upon findings of fact by a trial court must be clearly erroneous to set aside its findings. Since the trial court's finding that appellees were relieved of their obligation to pay on appellant's promissory note was not clearly er-

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[9] 63 Hawaii 382, 629 P.2d 105 (1981).
[10] 63 Hawaii 150, 622 P.2d 115 (1981).
[11] 63 Hawaii 485, 630 P.2d 1075 (1981).

roneous, the judgment was affirmed.

In **State v. Corpus**,[12] the Court found that there is no statutory grant of authority to appeal to the Supreme Court from interlocutory orders of district courts in criminal cases. Defendants' appeals from the district court's interlocutory orders denying their motions to dismiss social gambling charges against them were therefore dismissed.

State v. Johnston[13] involved a motion by defendant to dismiss an indictment on the ground that independent counsel had not been present at the grand jury proceeding. Subsequent to the trial court's denial of the motion to dismiss but prior to conviction, defendant appealed the order denying his motion to dismiss. The Court raised the issue of defendant's right to appeal *sua sponte* on oral argument and held that the trial court's order denying the motion to dismiss was interlocutory and not a final judgment and therefore not subject to appeal under H.R.S. § 641-11 (Supp. 1980). The Court also noted that defendant had not objected to the trial court proceeding with the trial after he had filed his appeal. The Court therefore denied defendant's motion, finding no jurisdiction to hear the case.

B. Counterclaims

In **Pacific Concrete Federal Credit Union v. Kauanoe**,[14] creditor-appellee sued debtor-appellant for the outstanding balance due on loan notes. Appellant counterclaimed, alleging violations of the federal "Truth in Lending" Act (TILA), 15 U.S.C. § 1601 *et seq.* (1968). The trial court granted appellee's motion for summary judgment on the ground that the counterclaim was barred by the Act's statute of limitations, § 1640(e). The Court reversed, holding: (1) Since the affidavits attached to the motion for summary judgment indicating the amount due and owing were based on ledgers not attached to the affidavits as required by HAWAII R. CIV. P. 56(e), the information was inadmissible and a genuine issue remained as to the amounts due and owing; (2) a debtor's TILA counterclaim is not a set-off but is a recoupment defense and therefore is not subject to the statute of limitations; and (3) § 1640(h), which says that a debtor may deduct TILA liability from his debt only after the liability is determined by a court, does not bar all counterclaims or defenses under TILA but applies only where debtors try to unilaterally deduct from amounts owing because of alleged TILA violations. Because appellant did not attempt to deduct any debt amount, he was allowed his claims.

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[12] 62 Hawaii 297, 613 P.2d 362 (1980).

[13] 63 Hawaii 9, 619 P.2d 1076 (1980).

[14] 62 Hawaii 334, 614 P.2d 936 (1980).

C. Jurisdiction

In **Sherman v. Sawyer,**[15] a landord-tenant dispute, appellants alleged: (1) Wrongful withholding of appellants' security deposit; (2) contract breach on the lease for failure to return the deposit; (3) failure to notify appellants of a management change; and (4) an independent tort action for infliction of emotional distress. The trial court granted the appellees' motion to dismiss on the ground that it lacked jurisdiction over all causes of action. The Court held that the circuit court, pursuant to H.R.S. § 603-21.5 (1976), had jurisdiction over all civil actions unless precluded by statute or constitution. However, by the plain and unambiguous language of H.R.S. § 633-27 (1976 & Supp. 1980) (amended 1981), cases involving security deposits in residential landlord-tenant relationships were within the exclusive jurisdiction of the small claims division of the district court. Accordingly, the Court affirmed as to counts one and two, but reversed as to counts three and four. The Court stated that although the joinder policy behind HAWAII R. CIV. P. 18(a) is to allow courts the broadest scope of action, HAWAII R. CIV. P. 82 cannot be used to extend circuit court jurisdiction.

D. Res Judicata

Silver v. Queen's Hospital[16] began in 1968 when appellant filed suit alleging that appellees Queen's Hospital, St. Francis Hospital, Kuakini Hospital and three named doctors had engaged in a conspiracy to prevent him from practicing his profession by denying him staff privileges without good cause and without a hearing. At the same time, appellant also filed a separate suit containing similar charges against Castle Memorial Hospital, its administrator, staff, board of trustees and two of the named doctors in the first suit, in response to Castle Hospital's refusal to renew his staff privileges following a one-year probationary period. *Silver v. Castle Memorial Hospital*[17] (*Castle*). In April, 1970, the latter suit was decided in favor of defendants. Appellant appealed. While that appeal was pending, appellant filed suit in September, 1970, in federal district court, charging conspiracy and naming the Castle defendants and all of the defendants in the instant suit as defendants. In 1972, the Court issued its decision in *Castle*.

On the basis of the Hawaii Supreme Court's ruling, the federal district court granted certain defendants in the federal suit summary judgment on the grounds of *res judicata*. In 1973, the district court entered judgment for defendants, including appellees in this case. The Ninth Circuit

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[15] 63 Hawaii 55, 621 P.2d 346 (1980).

[16] 63 Hawaii 430, 629 P.2d 1116 (1981).

[17] 53 Hawaii 475, 497 P.2d 564 (1972), *cert. denied*, 409 U.S. 1048 (1972).

Court of Appeals affirmed.[18] While the federal suit was on appeal, the trial in the instant case commenced and a mistrial was declared. Prior to the commencement of a new trial, the U.S. Supreme Court denied appellant's petition for *certiorari* in the federal case. These developments prompted appellees in the instant case to renew their earlier motions for summary judgment on the basis that *res judicata* and collateral estoppel barred appellant's claims.

The trial court, after considering the records in *Castle* and in the federal case, found that the issues and facts sought to be litigated in the instant case had already been fully litigated in the prior cases and granted summary judgment for appellees. The Court affirmed, stating that the doctrine of *res judicata* had been properly applied since the *res judicata* effect of the final federal court judgment also applied to all state claims which could have been raised under pendent jurisdiction. Although the instant case was pending in the state court at the time appellant filed in federal court, when judgment on the merits was rendered in the federal case, it became *res judicata* to any similar suit no matter when originally filed.

The trial court had required Queen's Hospital to grant appellant a rehearing on his application for staff privileges because the hospital's failure to specify professional incompetence as a ground for denial of staff privileges in the required notice constituted a violation of due process. In following the standards laid down in *Castle*, the Court reversed the requirement of a rehearing and affirmed the trial court's refusal to grant appellant's request for an injunction on the grounds that the hospital's actions did not deny appellant due process as he understood the issues and was afforded full opportunity to litigate. Moreover, evidence of appellant's past personality conflicts, propensity for disruptive conduct and questions regarding his professional ethics and character were sufficient to justify the hospital's denial of staff privileges.

E. Statute of Limitations

In **Au v. Au**,[19] appellant had purchased a home from appellees upon representations that the residence did not leak. Soon after appellant bought the home, water leakage occurred. Appellant claimed fraudulent and negligent representation, breach of express warranty, breach of agreement of sale and unfair sales practices. The trial court applied the two-year statute of limitations, H.R.S. § 657-7 (1976), and dismissed all counts because the period had run. Appellant appealed, arguing that the applicable statute of limitations was the six-year period for fraudulent concealment under H.R.S. § 657-20 (1976). The Court reversed and held

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[18] 518 F.2d 555 (9th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

[19] 63 Hawaii 210, 626 P.2d 173 (1981).

that the proper standard to apply in determining the relevant limitations period is determined by the nature of the claim or right as alleged in the pleadings and where two or more causes of action arise from a single transaction, a different statute of limitations may apply to each claim. The Court found that the complaint failed to plead sufficient facts to establish a concealment claim and thus § 657-20 did not apply. Section 657-7 also did not apply because fraudulent representation is not a physical injury. Rather, the six-year general limitations period of H.R.S. § 657-1(4) (1976) controlled, since the action was personal in nature and fraudulent and negligent representation are not governed by a specific limitations period. Because the express warranty made by appellees related to the happening of a future event, the six-year contract limitations period provided by H.R.S. § 657-1(1) (Supp. 1980) did not begin to run until the happening of that event. Therefore, appellant's claims of misrepresentation and breach of warranty were timely filed. The breach of agreement of sale claim was dismissed for failure to state a claim for relief.

Appellees moved for partial reconsideration in **Au v. Au**[20] because the Court had applied § 657-1(4) *sua sponte*. On reconsideration, the Court held that it could consider legal theories not raised by the parties beforehand and would apply the longer limitations period where there was doubt as to which of two periods should apply.

Hun v. Center Properties[21] involved a suit for damages brought by widow and children against appellee seven years after husband's death. Appellee had not been decedent's employer. The trial court found all appellants' claims barred by the two-year statute of limitations. The Court affirmed in part and reversed in part, holding that where there is a choice between applying a statute and a common law right covering the same action, the statute should be applied. The Court found that appellants' allegations established a statutory right of action for wrongful death under H.R.S. § 663-3 (1976), but that appellants also had a common law right of action against appellee under H.R.S. § 386-8 (1976), as a jointly negligent third party. Since appellants' statutory cause of action prevailed over the common law one, the Court held their claim was one for wrongful death for which "persons entitled thereto" may claim damages, subject to a two-year limitations period, § 663-3. Under § 663-3, each claimant has an independent and separate claim for recovery; the right of each is not affected by the rights of the others. The Court retrospectively applied the 1972 amendment to § 663-3 to allow application of the general tolling provisions of H.R.S. § 657-13 (1976) to toll the statute of limitations and preserve the surviving children's rights of action until they reached the age of majority. Three of the seven appellants' claims were thus preserved because their claims had been timely filed after the disability of minority was removed.

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[20] 63 Hawaii 263, 626 P.2d 181 (1981).

[21] 63 Hawaii 273, 626 P.2d 182 (1981).

IV. COMMERCIAL LAW

A. *Corporate Violations of Public Health Regulations*

In **State v. Kailua Auto Wreckers, Inc.**,[32] the Court affirmed appellants' conviction for openly burning automobiles on seventeen different occasions in violation of State Public Health Regulation chapter 43, Air Pollution Control, § 7, Control of Open Burning, despite repeated oral and written warnings. Appellants were in the business of processing used cars for scrap metal and previously held a variance from the regulation. A request for an extension upon its expiration had been denied. At trial, appellants contended that the Department of Health discriminatorily enforced the open burning ban against them, thereby denying them equal protection of the law. The Court stated that to prove discriminatory enforcement, one must show intentional or purposeful discrimination by a pattern of selective enforcement or arbitrary standards. Appellants failed to prove this, and their conviction was upheld. The Court also allowed the imposition of personal liability on an unknowing corporate officer for his failure to exercise reasonable care to discover, remedy and prevent corporate violations of the open burning prohibition.

B. *Damages for Breach of Contract*

In **Chung v. Kaonohi Center Co.**,[33] the Court considered appellants' appeal from a jury award to appellees of damages for emotional distress and lost profits for appellants' breach of contract to lease concession space for a restaurant. The Court affirmed, holding that: (1) The trial court properly denied appellants' motion for a mistrial based upon improper testimony because when a trial court admonishes the jury to disregard an improper statement, it is presumed that the jury will do so; (2) damages for emotional distress and disappointment are recoverable for wanton or reckless breach of a commercial contract since the dispositive factor in allowing such damages is not the nature of the contract but rather the wanton or reckless nature of the breach; (3) the trial court properly allowed appellees' expert appraiser to establish future profits based on the actual income of another restaurant operating in the location appellees had contracted to lease, because that restaurant most nearly approximated appellees' proposed business and the incomes of other similar restaurants were also considered; (4) the evidence offered by appellees, including a clear explanation of differing valuation methods by the appraiser and vigorous cross-examination of the appraiser, provided the jury with sufficient data to reach a rational judgment as to the loss of

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[32] 62 Hawaii 222, 615 P.2d 730 (1980).

[33] 62 Hawaii 595, 618 P.2d 283 (1980).

future profits; and (5) the trial court did not err in submitting a special verdict form to the jury containing spaces for lost profits and emotional distress damages since appellants failed to support their contention that this inclusion would make the jury feel compelled to award these damages. The trial judge's instruction to the jury that damages could be awarded only for reasonably certain losses proximately resulting from the breach was sufficient to overcome any possible prejudice.

C. *Unfair Competition*

In **Island Tobacco Co. v. R.J. Reynolds Tobacco Co.**,[34] the Court reviewed interlocutory appeals by both plaintiff and defendants challenging the lower court's application of H.R.S. ch. 480 (1976) (amended 1981) (Monopolies; Restraint of Trade) and ch. 481 (1976) (Fair Trade Regulations). Plaintiff, a wholesaler of Reynolds products, alleged that: (1) Defendants R.J. Reynolds Tobacco Company ("Reynolds") and its wholly owned subsidiary, R.J. Reynolds Tobacco Company Hawaii ("Reynolds Hawaii"), conspired and engaged in unfair methods of competition and unfair business practices that injured the business and property of plaintiff; (2) Reynolds created or attempted to create a monopoly by wholesaling its products to retail merchants through Reynolds Hawaii in violation of H.R.S. § 480-9 (1976); and (3) Reynolds provided information to Reynolds Hawaii which allowed it to engage in below-cost sales in violation of H.R.S. § 481-3 (1976). The trial court awarded summary judgment to defendants on plaintiff's allegations of conspiracy to monopolize and fix prices on the basis that the parent and its subsidiary were a single business entity. Finding the claims of unfair practices and below-cost sales duplicative, the trial court granted plaintiff a partial summary judgment on its allegation of below-cost sales on the grounds that the one percent "markup" by Reynolds Hawaii was insufficient to cover its operating costs. Both parties appealed. The Court affirmed in part and reversed in part. It affirmed the finding of no conspiracy to restrain trade, holding that the Reynolds affiliates were a single entity for antitrust purposes, since a wholly owned subsidiary is controlled by its parent and not endowed with sufficient independence to render it capable of conspiring with its creator. The Court also affirmed the finding of no monopoly; Reynolds' position in the relevant market, the entire wholesale market for cigarettes on Oahu, did not constitute a monopoly nor give it the power to acquire such a monopoly. The Court reversed the finding in favor of plaintiff of fair trade violations by defendants for lack of evidence; plaintiff failed to present substantial proof of the actual cost to Reynolds of producing and marketing its product.

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[34] 63 Hawaii 289, 627 P.2d 260 (1981).

D. *Usurious Loans*

In **Dang v. F & S Land Development Corp.**,[25] the Court affirmed in part and reversed in part the judgment of the trial court in favor of appellees for monies due from an alleged joint venture to construct a warehouse. Appellees had advanced sums to appellants for the oral promise that they would receive double their investment in one year. The Court found no joint venture existed since the requisite intent, akin to that necessary to form a partnership, was lacking — apart from advancing the money, appellees did not participate in the project and no partnership agreements were executed. The Court also found the transactions to be usurious loans since usury may be found even in the absence of intent to violate the usury law if the agreement, performed according to its terms, would produce a higher rate of interest than that allowed by law. H.R.S. § 478-4 (1976).

V. Constitutional Law

A. *Age Discrimination*

In **Nagle v. Board of Education**,[26] the Court held that H.R.S. § 297-15 (1976), which mandates the retirement of public school teachers at age sixty-five, does not violate the equal protection and due process clauses of the Hawaii Constitution, Hawaii Const. art. I, § 5. The Court used the rational basis test to determine the constitutionality of the retirement statute. Examining two recent U.S. Supreme Court opinions, the Court agreed that age is not a suspect classification since the aged are not a politically or historically disadvantaged group, and because great deference should be extended to legislative decisions. The Court found that § 297-15 does not violate the equal protection clause because it has a rational relation to the following legitimate state interests: (1) Increasing employment positions for young teachers; (2) maintaining student discipline and quality teaching since the physical and mental skills demanded in teaching generally decline with age; and (3) the furthering of administrative convenience since the need for individualized hearings would be obviated.

In **Daoang v. Department of Education**,[27] the Court also found H.R.S. § 78-3 (1976), which mandates the retirement of all public employees at age 70, to not violate the equal protection and due process clauses of the Hawaii Constitution.

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[25] 62 Hawaii 583, 618 P.2d 276 (1980).
[26] 63 Hawaii 389, 629 P.2d 109 (1981).
[27] 63 Hawaii 501, 630 P.2d 629 (1981).

In **Levi v. University of Hawaii,**[28] a university professor challenged the University Board of Regent's retirement policy which set the mandatory retirement age for all university employees at sixty-five, notwithstanding the statutory statewide mandatory retirement age of seventy under H.R.S. § 78-3 (1976). The Court held that under HAWAII CONST. art. X, § 6, the Board's authority to set policy is subject to the legislature's power to enact laws of statewide concern; therefore, the state retirement age controlled over the Board's policy because retirement is a statewide concern.

B. Mootness

In **Wong v. Board of Regents,**[29] appellant, a University of Hawaii student, sought injunctive and declaratory relief to enjoin appellee from conducting a disciplinary action against him in accordance with the Student Conduct Committee Procedures. A complaint against appellant alleged that he had violated the University's Statement of Disruption by disrupting a University function. Appellant claimed that the Procedures and Statement were invalid because they had not been published as prescribed by the Hawaii Administrative Procedures Act, H.R.S. ch. 91 (1976) (HAPA). The circuit court granted summary judgment in favor of the University. On appeal, the Court remanded the case for dismissal, finding that appellant's injunctive request was moot because subsequent to the appeal, the University had agreed to terminate the disciplinary proceeding and to omit reference to the charges in appellant's school record, and also because appellant was no longer a student at the University. Likewise, appellant's request for a declaratory judgment was no longer viable because the University, since the appeal, had made its Statement comply with HAPA requirements. Finally, the Court held that the question presented was not likely to repeat itself, and was not "capable of repetition, yet evading review."

C. Power of Attorney General

In **Amemiya v. Sapienza,**[30] the Court affirmed a circuit court order which disqualified and enjoined appellant, the City Prosecuting Attorney, and his deputies from exercising their prosecutorial powers in a pending case involving a close associate. The intervention of the attorney general was supported by the Court's construction of H.R.S. § 28-2 (1976) and HONOLULU, HAWAII, CITY CHARTER art. VIII, § 8-105 (1978) as endorsing the attorney general as the chief legal officer of the state with the ulti-

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[28] 63 Hawaii 366, 628 P.2d 1026 (1981).
[29] 62 Hawaii 391, 616 P.2d 201 (1980).
[30] 63 Hawaii 424, 629 P.2d 1126 (1981).

mate responsibility for enforcing penal laws of statewide application and the public prosecutor as the primary authority responsible for criminal prosecutions within his county's jurisdiction. The Court found the attorney general empowered to supersede the public prosecutor in circumstances where compelling public interests so require.

D. Standing

In **Life of the Land v. Land Use Commission,**[31] appellee brought suit against appellants Land Use Commission and the class of owners of redistricted or reclassified lands represented by Castle & Cooke, Inc. Appellee claimed that the Commission's redistricting and reclassifying of land was done incorrectly. The two issues on appeal were: (1) Whether appellee had standing to sue; and (2) whether an action could be maintained against the class defendant. The Court granted appellee standing. Using the test of "injury in fact," the Court followed the federal trend to liberalize standing requirements and found appellee and its members to have standing since: (1) They would be affected by zoning changes even though they were neither owners nor adjoining owners of the land in controversy; and (2) H.R.S. § 91-7 (1976) allows interested persons to challenge agency rules. The Court declined to certify the class of all landowners on the grounds that the class representative did not adequately represent class interests as required by HAWAII R. CIV. P. 23(a). Castle & Cooke had different interests than other members of the class since some lands had been reclassified upwards and others downwards. Also, no facts were presented to show Castle & Cooke's ability to represent the class fairly.

Iuli v. Fasi[32] involved a suit by appellants against the mayor and others based on claims that contracts for operating and maintaining a public bus system fell within the statutory requirements for public bidding, which had not been conducted. Appellants asserted standing as taxpayers, and alleged that their taxes had been increased as a result of the existing bus contract. The Court held that appellants lacked standing, and stated that taxpayers have standing only if they meet the following requirements: (1) The government act must imperil the public interest; (2) there must be a loss of revenues resulting in an increase in taxes; and (3) the taxpayer must have demanded that the public official involved take appropriate action. Here, appellants did not show any public harm, the increase in revenues was speculative and they had not demanded that proper official take appropriate action.

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[31] 63 Hawaii 166, 623 P.2d 431 (1981).

[32] 62 Hawaii 180, 613 P.2d 653 (1980).

VI. Criminal Law and Procedure

A. Confrontation of Witnesses

In **State v. Bullen**,[33] defendant appealed his conviction for promoting a dangerous drug in the second degree, claiming that the trial court erred in denying his motion for production of a witness. The witness was a government informer who actively participated in the drug transaction for which defendant was being prosecuted. Prior to the trial, police officers had escorted the witness to the airport and supplied him with money. When questioned at the trial as to the whereabouts of the witness, one of the officers responded that he didn't know and "didn't really care." The Court reversed and remanded, holding: (1) Where the informer had actively participated in the crime charged and his testimony would be material on the issue of guilt and might be helpful to the defense, fairness dictates that his identity be disclosed by the government; (2) where the government employs an informer in its sponsored enterprise, it must be prepared to supply the defendant with information as to his whereabouts; and (3) where the government by its own conduct has rendered the witness unavailable to the defense, it must produce him or risk dismissal of the indictment.

The same government witness was involved in **State v. Stech**.[34] The trial court had denied defendant's motion for production of a witness because it had not been filed within the period set by the trial court for pretrial motions. The Court agreed that the motion should have been filed during this period but found that the trial court had abused its discretion in refusing to hear it since the motion had been filed four months before the trial and one day before the hearing on the motion in *Bullen* and defendant had asked that his motion be consolidated for hearing with the *Bullen* motion. The Court reversed and remanded for a new trial, at which time the government had to produce the missing witness or risk dismissal of the indictment.

In **State v. O'Daniel**,[35] the Court affirmed defendant's conviction of manslaughter holding that: (1) A prosecutor is not required to instruct the grand jury on the option to indict on a lesser included offense unless the evidence clearly establishes only the lesser offense; and (2) hearsay evidence is admissible before the grand jury if not deliberately used in place of better evidence to improve a case for indictment. The Court also held that a letter written by the deceased victim to a friend near the time of the shooting was admissible under the state of mind exception to the hearsay rule since it concerned the relationship of the accused and the victim and was relevant to intent. The admission of the letter did not

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[33] 63 Hawaii 27, 620 P.2d 728 (1980).
[34] 63 Hawaii 34, 620 P.2d 732 (1980).
[35] 62 Hawaii 518, 616 P.2d 1383 (1980).

violate defendant's right to confront witnesses since evidence admitted under an exception to the hearsay rule does not violate the right to confrontation, provided the statement is found to be reliable, and no indicia of unreliability are present.

State v. El'Ayache,[36] involved a conviction of defendant for theft in the first degree under H.R.S. § 708-831 (1976 & Supp. 1980) (amended 1981) (theft of property the value of which exceeds $200) for removing items of clothing valued at $273 from a clothing store. Prior to trial, defendant's attorney had entered into two stipulations with the State to the effect that two eye-witnesses, if called to the stand, would testify that they could identify defendant and each item of clothing taken, and that the price tags attached to the clothing totalled $273. At trial, the State's only witness testified as to the price of each item of clothing taken and the procedure for verifying the accuracy of the clothing price. On appeal, defendant argued that the stipulations prevented her from exercising her right of confrontation and cross-examination, and that she was deprived of effective assistance of counsel. The Court affirmed and held that the right of confrontation and cross-examination is not absolute, and may sometimes bow to the right of defense counsel to make an appropriate judgment on the trial tactics and procedure to be employed in defense of his client. The Court noted that the decision whether to call a witness or not in a criminal trial is normally a matter within the judgment of counsel and will rarely be second-guessed by judicial hindsight, and that defense counsel chose to concentrate his defense on the State's inability to prove that the value of the clothing exceeded $200, in an attempt to spare his client a felony conviction.

In **State v. Sugimoto,**[37] the Court affirmed defendant's convictions for robbery, burglary and rape, holding that the trial court properly denied defendant's motion for a mistrial based on the prosecutor's failure to notify the defense that co-defendants would testify as prosecution witnesses. HAWAII R. PENAL P. 16(b)(1)(i). Violation of Rule 16 does not require immediate declaration of a mistrial. HAWAII R. PENAL P. 16(e)(8)(i) provides that a trial court may enter such an order if it deems it just under the circumstances. The Court found that since the trial court fully inquired into surrounding circumstances and made every effort to allow defense questioning of the unlisted witnesses, defendant had not been surprised or prejudiced by the testimony. The Court also found that the trial court properly curtailed defense counsel's attempts to impeach a witness because a witness may not be questioned about his involvement with drugs solely to demonstrate that he is unreliable, and a deferred acceptance of guilty (DAG) plea is not a conviction which may be used to impeach a witness. H.R.S. § 853-1(d). Third, the Court held that the trial court properly admitted into evidence statements made by defendant to

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[36] 62 Hawaii 646, 618 P.2d 1142 (1980).

[37] 62 Hawaii 259, 614 P.2d 386 (1980).

the police without *Miranda*[38] warnings because *Miranda* requirements only apply when custodial interrogation occurs. Custodial interrogation is questioning by law enforcement officers after a person is in custody or otherwise deprived of his freedom in any significant manner. Here, the totality of circumstances indicated that defendant was not in custody at the time of questioning and so did not require *Miranda* warnings.

B. Definition of Offenses

In **State v. Schofill,**[39] defendant was indicted for promoting a dangerous drug in the first degree by knowingly distributing controlled substances. The trial court dismissed the indictment on the grounds that: (1) Incompetent and prejudicial evidence was presented to the grand jury by the State; and (2) the offense charged constituted a *de minimis* infraction as defined by H.R.S. § 702-236(1)(b)-(c) (1976). In reversing the dismissal, the Court held that even though the defendant never actually completed the transaction to sell cocaine to the undercover officer, his offer or agreement to sell fell within the definition of "distribute" under H.R.S. § 712-1240(11) (1976). The Court found that the crime of promoting a dangerous drug by distribution is complete where the accused has offered to sell the contraband with specific intent to sell, even though no actual delivery by the accused and chemical analysis by the State to determine the identity of the substance has occurred. Accordingly, the officer's testimony at the grand jury proceeding concerning the negotiations of the offer to sell and his personal identification of the substance as cocaine, was neither incompetent nor prejudicial. Finally, the Court noted that since promoting a dangerous drug in the first degree is a Class A felony, punishable by imprisonment for a period of 20 years, it can hardly be said to be a *de minimis* offense.

In **State v. Martin,**[40] defendant had been indicted for theft in the first degree for wrongfully obtaining public assistance monies, but that indictment was dismissed. Defendant was convicted, however, upon a second indictment and appealed, arguing that her offense was a continuing crime that had begun before the effective date of the statute under which she had been charged, H.R.S. § 708-83(1)(b) (1976), and therefore she should have been charged under prior existing law. The Court affirmed the conviction, holding that the State was not required to charge defendant under the prior law so long as all the essential elements of the crime had been committed subsequent to the effective date of the criminal statute. The Court also held that in this case: (1) Dismissal of the first indictment did not cause jeopardy to attach, and therefore did not preclude a

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[38] Miranda v. Ariz., 384 U.S. 436 (1966).
[39] 63 Hawaii 77, 621 P.2d 364 (1980).
[40] 62 Hawaii 364, 616 P.2d 193 (1980).

subsequent prosecution; (2) the State was not required to charge defendant under the specific welfare fraud statute rather than the general theft statute; (3) the taking of the defendant's handwriting samples under compulsion was not tantamount to an unreasonable search and seizure and therefore did not violate any of defendant's constitutional rights; and (4) evidence that the social security checks had been mailed to defendant at her address was sufficient to meet the burden of proof even though the State did not produce the cancelled checks themselves.

In **State v. Pryce**,[41] defendant was convicted for two counts of negligent homicide in the first degree arising from an automobile accident in which two people were killed. On appeal, defendant alleged that the statute under which he was charged, H.R.S. § 707-703 (1976), created only one offense regardless of the number of deaths resulting from his negligence. The Court affirmed the convictions, holding that § 707-703 was sufficiently clear in indicating that the legislative intent was to create a separate offense for each death caused by the operation of a vehicle in a negligent manner.

In **State v. Feliciano**,[42] defendant was indicted for attempted murder but was convicted of reckless endangering in the second degree. On appeal, the Court reversed the conviction and remanded the case for retrial. The Court found that the trial court had correctly instructed the jury that reckless endangering in the second degree is a lesser included offense of attempted murder under H.R.S. § 701-109(4)(a) (1976). However, the trial court's affirmative response to an inquiry of the jury whether reckless endangering included putting bystanders in jeopardy of bodily harm rendered the original instruction, which stated in part that a person commits the offense of reckless endangering if he engages in conduct which recklessly places another person in danger of death or serious bodily injury, vague and confusing and left an erroneous impression in the minds of the jurors. The Court held that on retrial defendant could not be retried for attempted murder but could only be retried for the offense of reckless endangering in the second degree, because a jury conviction on the lesser included offense of reckless endangering automatically acquitted defendant of the greater charge of attempted murder.

State v. Kupau,[43] involved an appeal of a conviction for harassment. At trial, the State had moved to amend the charges brought against defendant from assault in the third degree to harassment. The trial court denied the motion, ruling that harassment was a lesser included offense of assault in the third degree and convicted defendant pursuant to this ruling. The Court reversed, holding that harassment is not a lesser included offense of assault in the third degree since a lesser included offense cannot have a more culpable state of mind or a state of mind different from

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[41] 62 Hawaii 389, 615 P.2d 748 (1980).
[42] 62 Hawaii 637, 618 P.2d 306 (1980).
[43] 63 Hawaii 1, 620 P.2d 250 (1980).

that which is required for the charged offense, H.R.S. § 701-109(4) (1976).

Defendant appealed his conviction on two counts of attempted criminal coercion for threatening the complaining witness with bodily harm and property damage to secure payment of a debt in **State v. Brighter.**[44] The Court reversed and remanded, holding that the trial court erred in: (1) Allowing a jury instruction that relieved the State from its burden under H.R.S. § 707-724(1)(a)-(b) (1976) (current version at H.R.S. § 707-764(2) (Supp. 1981) (repealed 1979)) to prove that the complaining witness was not legally responsible for the alleged debt; (2) instructing the jury of the availability of the claim of right defense; and (3) refusing to give the defendant's requested instruction that in determining guilt for attempt of a crime, conduct should not be considered a substantial step unless strongly corroborative of the defendant's criminal intent.

In **State v. Kawazoye,**[45] defendants appealed their convictions under H.R.S. § 134-6 (1976) for carrying a loaded rifle on a public highway and H.R.S. § 134-51 (1976) for carrying a deadly weapon. The Court affirmed, holding that because all three defendants were in the vehicle when one of them was observed loading a rifle, all three were in the car when a shot was fired from the vehicle and were still together when the rifle was placed in the car's trunk, the trial court properly found that each of the defendants had acted intentionally, knowingly and recklessly within the meaning of H.R.S. § 702-204 (1976) and there was a reasonable inference that all three were acting in concert.

In **State v. Tavares,**[46] defendant was convicted of burglary and sentenced under H.R.S. § 706-606.5(1) (Supp. 1980) (amended 1981) as a repeat offender with a previous two-count burglary conviction counting as the first and second convictions required to invoke the statute. On appeal, the Court reversed and held that convictions on multiple counts of one indictment must be treated as only one conviction for purposes of the statute. The Court embraced the broader majority rule that in order to count towards habitual criminal status, each successive felony must be committed after the previous felony conviction.

In **State v. Han,**[47] defendant appealed his conviction for promoting pornography. Following *Miller v. California,*[48] the Court affirmed, holding that: (1) Material distributed by the defendant, which depicted deviate sexual activity such as anal intercourse in a patently offensive way, was "hard-core" pornography and utterly without redeeming social value and (2) it is not mandatory for the prosecution to introduce evidence addressed to Hawaii's community standards or to the absence of any social value when the materials themselves are placed in evidence.

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[44] 63 Hawaii 105, 621 P.2d 381 (1980).
[45] 63 Hawaii 147, 621 P.2d 384 (1981).
[46] 63 Hawaii 509, 630 P.2d 633 (1981).
[47] 63 Hawaii 418, 629 P.2d 1130 (1981).
[48] 403 U.S. 15 (1973).

C. Evidence

In **State v. Agnasan**,[49] defendant was convicted for exercising unauthorized control of a propelled vehicle under H.R.S. § 708-836 (1976). He appealed the trial court's denial of his motions to suppress evidence and to limit in limine the testimony of prosecution witnesses as to his involvement in other crimes. The Court affirmed the trial court's rulings, holding that: (1) Probable cause and exigent circumstances justified the warrantless search of the vehicle; and (2) the evidence of other crimes was admissible under either of the two tests for admissibility set out in *State v. Murphy*.[50] Under the first test, the "liberal approach," evidence of other crimes is admissible if found to be relevant and to have a tendency to establish the offense charged. Under the second test, the "restrictive approach," evidence of other crimes is not admissible unless it helps to establish intent, motive, absence of mistake or accident, identity or common scheme or plan.

Defendant was convicted of promoting a dangerous drug in the second degree in **State v. Sartain**.[51] At trial, defendant attempted to discredit the State's case by showing discrepancies between the amount of heroin actually purchased by the undercover officer, the amount defendant knew to be a "$100 paper" from one previous experience and the amount of heroin $100 could buy on the streets. On appeal, the Court found that the trial court did not abuse its discretion in ruling defendant's testimony as to these discrepancies inadmissible for lack of foundation, lack of personal knowledge and hearsay.

In **State v. Smith**,[52] the Court affirmed defendant's conviction of murder, finding that the trial court did not err in denying defendant's motion for judgment of acquittal. The Court held that the evidence in this case, even though circumstantial, when viewed in the light most favorable to the prosecution, was sufficient to allow a reasonable mind to conclude guilt beyond a reasonable doubt. Defendant was seen running from the scene of the murder and shotgun shells found at the scene matched those from his shotgun.

Defendant in **State v. Caraballo**[53] entered a timely oral notice of appeal as required by HAWAII R. CRIM. P. 37(c) (current version at HAWAII R. PENAL P. 37(c) (repealed 1977)) for his convictions of robbery and rape. Defendant then withdrew the notice of appeal. Several months later he learned that he had relied on erroneous information in withdrawing the notice and refiled for appeal. The Court held that despite the clear language of the ten-day rule, it would relax the rule where justice war-

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[49] 62 Hawaii 252, 614 P.2d 393 (1980).
[50] 59 Hawaii 1, 575 P.2d 448 (1978).
[51] 62 Hawaii 650, 618 P.2d 1144 (1980).
[52] 63 Hawaii 51, 621 P.2d 343 (1980).
[53] 62 Hawaii 309, 615 P.2d 91 (1980).

ranted and allowed the belated appeal. On appeal, the Court affirmed the conviction, holding that the trial court did not err in denying a motion for new trial based on newly discovered evidence because defendant failed to show that: (1) Due diligence was used to discover the new evidence before or at trial; (2) the evidence was material to the issues and not cumulative or offered solely for the purposes of impeachment; and (3) the evidence would probably change the result of a later trial. The Court also held that the trial court did not err in proceeding with the trial in defendant's absence since his absences from the courtroom were voluntary and any error that might have resulted from the court's proceeding in his absence was harmless. Therefore, defendant's constitutional right to be present at all stages of his trial was not violated.

In **State v. Okamura**,[54] defendant was convicted of bookmaking under H.R.S. § 712-1224(1)(a) (Supp. 1981), for knowingly possessing bookmaking records. In affirming the conviction, the Court held that it was not necessary to prove that the sporting events bet on actually occurred since "bookmaking" is defined in H.R.S. § 712-1220(2) (1976) as the acceptance of bets on future contingent events. The Court also held that defendant's contention that the statute was unconstitutionally vague was without merit since ordinary terms may be used to express ideas which find adequate interpretation in common usage and understanding.

Defendant Saya was convicted for murder while defendants Saya and Naeole were both convicted for carrying a firearm without a permit in **State v. Naeole**.[55] Both defendants appealed from the judgments and sentencing. The Court affirmed as to defendant Saya, holding that: (1) The trial court did not err in denying defendant's motion for new trial because although recantation of a witness' testimony may constitute grounds for a new trial, the trial court's determination was not wholly without support in the record or in the evidence; and (2) the trial court did not err in admitting a prior out-of-court photographic identification, since the photographic display had not been "impermissibly suggestive." The Court added that the police officer who had conducted the photographic lineup may also testify as to the identification, but only if the person who made the identification is present at trial, testifies to the identification and is subject to cross-examination. The Court overturned Naeole's conviction for carrying a pistol because evidence at trial was insufficient to establish that the gun he carried met the definition of "pistol" in H.R.S. § 134-9 (1976).

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[54] 63 Hawaii 342, 627 P.2d 282 (1981).
[55] 62 Hawaii 563, 617 P.2d 820 (1980).

D. Grand Jury

In **State v. Pulawa,**[56] defendant appealed his conviction of two counts of robbery in the second degree and one count of kidnapping. The Court affirmed and held that mere cautionary statements to a witness by the prosecutor before the grand jury that the witness was under oath and that any untrue statements made by the witness might subject him to prosecution for perjury and that the State would bring perjury charges against the witness if it felt that it had sufficient evidence to do so, did not constitute extreme misconduct and did not clearly infringe upon the grand jury's decision-making function. The Court also held that the prosecutor's use at trial of the phrase "mug photograph" in referring to a photograph of the defendant which had been used during his pretrial identification did not contribute to the verdict and therefore constituted harmless error. The Court distinguished *State v. Huihui*[57] on the grounds that, in this case, there was no problem concerning identification of the defendant as the guilty party and guilt beyond a reasonable doubt had been clearly established by ample evidence.

The prosecuting attorney appealed the trial court's denial of a motion to make the transcript of a grand jury investigation available to him in **In re Moe.**[58] The Court affirmed, finding that the trial court did not err in withholding the transcript, since the language of HAWAII R. CRIM. P. 6(e) (1960) (current version at HAWAII R. PENAL P. 6(e)(1) (1977)) recognizes that the disclosure of a matter occurring before the grand jury is within the discretion of the circuit court. It was therefore incumbent on the prosecutor to particularize his needs when requested to do so by the court in order for the court to weigh the needs of the prosecutor to obtain the transcript against the need for the grand jury process to remain confidential.

State v. Rodrigues[59] dealt with three consolidated appeals involving HAWAII CONST. art. I, § 11, which created the position of independent counsel to advise the grand jury. The defendants were indicted by a grand jury without independent counsel after the amendment was ratified by the voters but before the legislature provided for such counsel. The Court affirmed, holding that: (1) Art. I, § 11, was not self-executing because the appointment, term and compensation of the independent counsel was to be "as provided by law" and absent applicable constitutional or statutory provisions, subsequent legislation was required for its implementation; (2) the mere absence of independent counsel without more does not establish that the due process rights of an accused were violated; and (3) the record did not indicate any prejudicial prosecutorial miscon-

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[56] 62 Hawaii 209, 614 P.2d 373 (1980).
[57] 62 Hawaii 142, 612 P.2d 115 (1980).
[58] 62 Hawaii 613, 617 P.2d 1222 (1980).
[59] 63 Hawaii 412, 629 P.2d 1111 (1981).

duct during the grand jury proceedings.

E. Immunity from Prosecution

In **State v. Miyasaki,**[60] defendant was called before the grand jury to testify as to gambling activities which were already the basis of a pending criminal charge against him. He refused to respond to certain questions, asserting his privilege against self-incrimination, and was served a grant of use immunity pursuant to H.R.S. § 621C-3 (Supp. 1981). After further questioning, he again refused to respond, asserting his constitutional privilege, and was subsequently indicted for obstruction of justice. Defendant moved to dismiss the indictment on the grounds that § 621C-3 violated HAWAII CONST. art. I, § 8, which provides that no person shall be compelled in any criminal case to be a witness against himself. The motion was denied and defendant filed an interlocutory appeal. The Court reversed and dismissed the indictment, holding that use immunity fails to provide a defendant with sufficient protection from the improper use of compelled testimony, since the grantee of use immunity remains subject to prosecution through independently obtained evidence for the crimes about which he has been compelled to testify and is not maintained in substantially the same position as he was before being compelled to testify. The Court rejected the holding of the United States Supreme Court in *Kastigar v. United States,*[61] which upheld the constitutional validity of use immunity.

F. Insanity Defense

In **Thompson v. Yuen,**[62] defendant was acquitted of criminal trespass on the grounds of insanity but ordered committed to the state hospital pursuant to H.R.S. § 704-411(1)-(4) (1976). The Court affirmed the denial of conditional release, holding that commitment under the lesser standard of proof for involuntary commitment after acquittal on the grounds of insanity does not violate due process even though a higher standard is required for civil involuntary commitment under H.R.S. § 334-60(b)(4)(I) (Supp. 1981). The Court also held that the uncontested report of the sanity commission was more than sufficient to meet the State's burden of proof and that defense attorney's waiver of cross-examination of the doctors on the sanity commission was a matter of trial tactics and had not violated defendant's constitutional right to confrontation. Also, admission of the report did not violate the rule against hearsay because the rules of evidence in pre- and post-trial proceedings are greatly relaxed.

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[60] 62 Hawaii 269, 614 P.2d 915 (1980).
[61] 406 U.S. 441 (1972).
[62] 63 Hawaii 186, 623 P.2d 881 (1981).

State v. Summers[63] involved defendant's appeal of his conviction for carrying a firearm without a permit or license. The Court upheld the conviction, holding that the trial court did not err in denying defendant's pre-trial motion for judgment of acquittal on the grounds of mental irresponsibility under H.R.S. § 704-408 (Supp. 1980) and had properly submitted the question of defendant's sanity to the jury, since expert testimony adduced at the hearing on the motion was based on evidence which had to be assessed by the jury for its proper weight. The standards for passing on a motion for judgment of acquittal are the same whether the motion is made before or after trial. Defendant's post-trial motion for judgment of acquittal was therefore properly denied.

In **State v. Raitz**,[64] defendant appealed from the order of the circuit court which suspended criminal proceedings against him but committed him to the custody of the Director of Health because he appeared unfit to proceed. Defendant also petitioned for a writ of habeas corpus seeking his release. Affirming the order and dismissing the petition, the Court held that the statute authorizing commitment of a defendant found unfit to proceed "for so long as such unfitness shall endure" was constitutionally valid under the due process clause since it could be construed so as to contemplate a limited duration of confinement consistent with established precedent and the statute's purpose. Furthermore, under the commitment statute, a criminal defendant who is initially committed because of a lack of fitness to proceed may only be held for a reasonable period necessary to determine whether there is a substantial probability that he will regain fitness to proceed in the future. If it is determined that a defendant will probably be able to proceed soon, his continued confinement must be justified by progress toward recovery. If it is determined, however, that a substantial probability exists that a defendant will remain unfit to proceed, he must be released or be subjected to the standard civil commitment procedure.

G. Proper Procedure

Defendant was arrested for driving under the influence of intoxicating liquor in **State v. Moore**.[65] At the police station, he was advised of the provisions of Hawaii's implied consent law, H.R.S. §§ 286-151, -155 (1976). Defendant refused to sign the police form entitled "Advising Persons of the Requirements of the Implied Consent Law" and initially refused to allow any breath or blood test to determine the alcoholic content of his blood. Defendant's driving license was suspended for six months despite evidence that after his initial refusal, he requested to be tested on

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[63] 62 Hawaii 325, 614 P.2d 925 (1980).
[64] 63 Hawaii 64, 621 P.2d 352 (1980).
[65] 62 Hawaii 301, 614 P.2d 931 (1980).

eight separate occasions, the first time being within thirteen minutes of refusing to sign the Implied Consent Form. On appeal, the Court held that the implied consent law does not require an arrested person to refuse or consent to chemical testing of his blood by a written statement, and that defendant had the right to orally consent to such testing. The Court held that initial refusal to submit to testing may be cured by subsequent consent when: (1) The subsequent request for testing is made within a reasonable time of the first refusal; (2) the subsequent test would still be accurate; (3) testing equipment or facilities are still readily available; (4) honoring such a request will result in no substantial inconvenience or expense to police; and (5) the individual requesting the test has been in police custody and under observation for the whole time since arrest.

Defendant in **State v. Davis**[66] appealed his conviction for robbery. During the trial the judge had refused to allow defendant's alibi witness to testify. The Court affirmed. HAWAII R. PENAL P. 12.1 (notice-of-alibi rule) requires a defendant who intends to rely on an alibi defense to notify the prosecutor in writing and to file a copy of such notice with the trial court. The Court held that this did not violate due process or prejudice defendant because the Hawaii discovery mechanism provides for reciprocal discovery against the State. The trial court did not abuse its discretion in imposing a sanction for defendant's failure to comply with the rule.

In **State v. Carroll**,[67] defendant was arrested for setting fire to a school. The arresting police officer conducted a routine body search of defendant and found a cannister which he believed was nasal spray and returned it to defendant. During a custodial search at the police station, the cannister was found to contain mace. Defendant was then charged with possession of an obnoxious substance. He was tried and acquitted of the obnoxious substance charge. Later, at the trial on the property damage charge, defendant was granted his motion to dismiss on the grounds that the two offenses arose from a single episode, and therefore prosecution of the second offense was prohibited since he had already been prosecuted for an offense arising from the same episode. H.R.S. § 701-111(b) (1976). The Court reversed, holding that the test for singleness of an episode is whether the alleged conduct is so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge. The Court found that the two offenses arose at different times and places and under different circumstances because the arresting officer failed to recognize that the cannister contained mace at the time of the initial arrest.

Defendants in **State v. Russell**[68] were charged with obtaining money under fraudulent and false pretenses under the pre-1973 penal code. De-

[66] 63 Hawaii 191, 624 P.2d 376 (1981).
[67] 63 Hawaii 345, 627 P.2d 776 (1981).
[68] 62 Hawaii 474, 617 P.2d 84 (1980).

fendants had been absent from the State, and during their five-year absence before indictment, the new code became law. Under the old code, the statute of limitations was tolled while defendants were absent from the State. Under the new code, however, the limitations period is five years, even if defendants are absent from the State. Since defendants were out of the State for five years and twenty-four days, they argued that the State was barred from bringing indictment. Defendants also argued that since H.R.S. § 701-101(a) (1976) allowed defenses created by the new code to apply to old code offenses, the new statute of limitations should apply. The Court held, however, that the statute of limitations of the old code controlled, noted that exceptions to statutes are to be narrowly construed and that the tolling limitation was not intended to be a defense for crimes under the old code.

In **Lono v. Ariyoshi,**[69] the appellant challenged his transfer from the Hawaii State Prison to a mainland prison as a violation of his due process rights under the state and federal constitutions, the Rules and Regulations of the Corrections Division of the Department of Social Services and Housing (Rules) and the Hawaii Administrative Procedure Act (HAPA). The Court held that the appellant's claims were without merit, following United States Supreme Court cases to find that the procedures set forth in *Wolff v. McDonnell*[70] are triggered only when a state action infringes on a state prisoner's property or liberty interest; under *Meachum v. Fano,*[71] the only source of these interests is state law, and that a prisoner neither has a property nor a liberty interest in remaining at a particular prison absent other constitutional violations. *Montayne v. Haymes.*[72] The Court also found that the language in H.R.S. § 706-672 or Rule IV of the Rules did not confer a limit on the director's duty to select a place of confinement nor did they create a "liberty" interest because they did not contain standards governing the director's exercise of his discretion. As to the appellant's contention based on HAPA, the Court found that procedural rights under HAPA attached only to hearings involving a contested case wherein legal rights, duties or privileges of specific parties are determined. The transfer here did not involve a contested case and nothing in the constitutions or the statutes entitled the appellant to a hearing.

H. Rape

Defendant in **State v. Jones**[73] appealed his convictions of first degree rape and sodomy. The Court affirmed the convictions on three grounds:

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[69] 63 Hawaii 138, 621 P.2d 976 (1981).
[70] 418 U.S. 539 (1974).
[71] 427 U.S. 215 (1976).
[72] 427 U.S. 236 (1976).
[73] 62 Hawaii 572, 617 P.2d 1214 (1980).

(1) The statutory element of "forcible compulsion" was fulfilled by a showing of the complainant's "earnest resistance" and "reasonable fear" as judged by the circumstances; (2) a rational relationship between the complainant's past sexual experience and her capacity for truth and veracity must be established before such evidence will be admitted on the issue of general credibility; and (3) although the trial court is not required to issue cautionary instructions on credibility in a sexual assault case, it may do so in its own discretion. Here, evidence that defendant had demonstrated potential harm to complainant, along with his threats to her safety, obviated the necessity of a further showing of resistance on her part, even though examination of the complainant on the day of the incident revealed no trauma anywhere on her person.

In **State v. Iaukea**,[74] defendant appealed his conviction of first degree rape on the ground that the trial court's denial of his motion to adduce evidence of the rape victim's reputation for sexual promiscuity constituted reversible error. The Court affirmed, holding that strong evidence of force destroys the issue of consent sufficiently to render evidence of past behavior irrelevant. In this case, evidence that the victim's jaw had been broken in two places was sufficient to remove the issue of consent from the case, thereby eliminating the need for evidence of the victim's reputation.

I. Restitution/Compensation

Defendant in **State v. Murray**[75] was found guilty pursuant to a *nolo contendere* plea of assault in the first degree for shooting a fellow inmate. The trial court had directed defendant to repay the State $36,000 for medical expenses paid to the victim by the State, subject to defendant's ability to pay, and deductions of standard amounts for personal needs and necessities as determined by the rules of the institution "so as to not imperil [his] safety . . . and to allow [him] to survive." Defendant appealed the circuit court's denial of his motion to delete that portion of the sentence requiring him to pay restitution to the State. The Court vacated the sentence and remanded the case, holding that: (1) The State was a "victim" within the purview of the section authorizing a circuit court to compel the restitution of a victim; but (2) a court could not enforce criminal restitutions by exacting a prisoner's earnings under H.R.S. § 353-30 which prohibits garnishment of prison wages and § 353-28 which was amended in 1970 to abolish the department's prerogative to declare forfeitures of moneys earned to enforce prison discipline; and (3) the burden imposed on defendant was beyond his means and ability to pay. The Court recognized other alternatives for reparation from defendant, such

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[74] 62 Hawaii 420, 616 P.2d 219 (1980).

[75] 63 Hawaii 12, 621 P.2d 334 (1980).

as assets accumulated by inheritance or windfall or regular wages from private industry.

In **Application of Edmunson**,[76] the claimant requested compensation as the victim of an assault in the first degree, pursuant to the Criminal Injuries Compensation Act, H.R.S. ch. 351 (1976). The Criminal Injuries Compensation Commission had denied the claim based on its interpretation of the computation rule, H.R.S. § 351-62(a) (1976), and the claimant appealed. The statute allowed a maximum claim of $10,000, and directed the Commission to subtract any collateral benefits received by the claimant. Here the claimant had received at least $19,000 in collateral benefits. The Commission followed the method of computation directed by the statute before a 1972 amendment, and subtracted the $19,000 from the $10,000 limit, which left nothing for the claimant. The Court reversed and held that in light of the amendment which eliminated the previous computation method and the legislative intent to aid victims, the Commission should: (1) Determine the claimant's gross economic loss plus pain and suffering without regard to the $10,000 limit; (2) deduct from the figure all collateral benefits, except life insurance benefits; and (3) order an award based on the resulting figure up to the $10,000 limit. The Court noted that the Commission's interpretation of the statute would bring about the inequitable result that victims who are tragically injured by the criminal acts of others would receive compensation less than or equal to persons who are only slightly injured.

J. Right to Counsel

Eli v. State[77] dealt with an appeal of the circuit court's denial of defendant's petition for post-conviction relief under HAWAII R. PENAL P. 40. Defendant's petition claiming involuntariness of a guilty plea to second degree murder and ineffective counsel was based upon counsel's advice that defendant might receive a lighter sentence from the judge and that a favorable decision by the Hawaii Supreme Court on a double jeopardy claim would be unlikely. Counsel had failed to inform defendant of his right to petition the federal court for review. The Court took judicial notice of the verbatim record of the proceeding in which the guilty plea was entered and found that the strong likelihood of conviction for murder and the possibility of a life sentence without parole constituted a factual basis for the guilty plea, and that even though counsel had erroneously predicted a lighter sentence and failed to take every legal remedy, the plea was not involuntary. The action of counsel was not below the level of ordinary competence demanded of lawyers in criminal cases.

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[76] 63 Hawaii 254, 625 P.2d 372 (1981).

[77] 63 Hawaii 474, 630 P.2d 113 (1981).

Lono v. State[78] also dealt with a defendant's petition to the circuit court for post-conviction relief under HAWAII R. PENAL P. 40. Defendant petitioned thirteen years after his plea of guilty to two counts of murder had been entered "for personal reasons." The Court affirmed the lower court's denial of defendant's petition, holding that he was aware of the consequences of his plea and therefore was not denied effective assistance of counsel. The conclusion was based upon evidence which showed that defendant, his co-defendants and counsel got together to reach a package deal whereby the two younger co-defendants were allowed to plead to a lesser offense. This amounted to a showing of probable knowledge of what defendant's sentence would be, and taken in conjunction with the fact that the defendant heard the sentence given in open court and waited so long to contest it, constituted knowledge of the mandatory sentence of life imprisonment without parole.

Petitioner in **Medeiros v. State**[79] sought to exhume his juvenile record of a Family Court robbery conviction by filing a writ of *coram nobis*. The Family Court denied the petition and he appealed, contending he was unaware of his constitutional right to court-appointed counsel, the ramifications of the proceedings or the elements to be proven against him, and was at no time represented by an attorney. The Court affirmed the denial of the petition, holding that where the record sufficiently showed that the petitioner and his mother were advised of his right to a court-appointed attorney and that they understood the charges and their rights as explained by the Family Court, the petitioner failed to sustain his burden to show that his right to counsel was not voluntarily and intelligently waived. The Court noted that where there is a silent record or a record so minimal as to constitute a silent record, the burden of proving that defendant had waived his right to counsel is shifted to the State. In the absence of such a record, however, the petitioner has the burden of showing that no waiver occurred.

State v. Tarumoto[80] dealt with defendant's appeal of his misdemeanor theft conviction, based on his contention that he had been denied his right to counsel. The Court affirmed. Although recognizing that the constitutional right to counsel is an essential component of a fair trial, the Court held that appellant had voluntarily, knowingly and intelligently waived his right to counsel by not reporting to the Public Defender within the five weeks between his arraignment and trial. The record did not indicate that defendant verbally declined counsel. Instead, waiver was shown by unequivocal conduct that a deliberate and intentional rejection of an offer for counsel had been made.

In **State v. Antone**,[81] defendant appealed his convictions for rape and

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[78] 63 Hawaii 470, 629 P.2d 630 (1981).
[79] 63 Hawaii 162, 623 P.2d 86 (1981).
[80] 62 Hawaii 298, 614 P.2d 397 (1980).
[81] 62 Hawaii 346, 615 P.2d 101 (1980).

sodomy claiming that he had been denied effective assistance of counsel because of six alleged trial errors. The Court affirmed the convictions, holding that defendant failed to sustain his two-part burden to establish ineffective assistance of counsel by showing specific errors or omissions of defense counsel that reflected counsel's lack of skill, judgment or diligence, and that these errors or omissions resulted in either a withdrawal or substantial impairment of a potentially meritorious defense. The actions of defense counsel did not reflect a lack of skill, judgment or diligence by failing to object to: (1) A police detective's testimony of defendant's prior out-of-court statements where the record clearly established *Miranda*[82] warnings and a waiver; (2) the admission of the victim's clothing where an objection based on an insufficient chain of custody would not have been well taken; and (3) the victim's competency to testify at trial where such decision constituted a legitimate tactical choice. As to the remaining three allegations of error, the Court found that a substantial impairment or withdrawal of any potentially meritorious defense was not caused by counsel's cross-examination of a State witness which elicited the unfavorable results of three lie detector tests administered to defendant or by counsel's failure to object to testimonies regarding defendant's previous arrest on a different rape charge and four witnesses' hearsay testimonies of the victim's account of the rape because the judge in a jury-waived trial is presumed not to be influenced by incompetent evidence and the evidence did not rebut that presumption.

In **Stough v. State**,[83] defendant appealed the trial court's denial of post-conviction relief under HAWAII R. PENAL P. 40, claiming that his guilty plea and robbery conviction resulted from ineffective assistance of counsel and contending that his lawyer failed to assert his constitutional right to be free from unreasonable searches and seizures. The Court affirmed and found that a motion to suppress based on a possibly illegal arrest could have been filed, but its success and effect upon the trial were questionable in view of the unequivocal identification of the petitioner as the robber. Also, defense counsel's strategy was directed toward getting the lightest sentence possible. The Court concluded that petitioner failed to sustain his burden to show actual prejudice and ineffective counsel under the two-fold test of *Antone*. Counsel's representation was therefore not outside the range of competence demanded of attorneys in criminal cases.

Defendant in **State v. Masaniai**[84] appealed his conviction of three counts of robbery in the first degree. In affirming the conviction, the Court held that: (1) The trial court did not err in allowing defendant only two peremptory challenges under HAWAII R. PENAL P. 24(b), since defendant was not being charged with an offense punishable by life imprison-

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[82] Miranda v. Ariz., 384 U.S. 436 (1966).
[83] 62 Hawaii 621, 618 P.2d 301 (1980).
[84] 63 Hawaii 354, 628 P.2d 1018 (1981).

ment and therefore was not entitled to twelve peremptory challenges on the presumption that he would be found guilty of the charges and sentenced as a multiple offender; (2) the sixth amendment did not entitle defendant to assistance of counsel at a pre-indictment lineup; and (3) the lineup did not violate defendant's due process rights and the lineup identification was reliable, even though some participants wore wigs and false mustaches.

K. Search and Seizure

In **State v. Brighter**,[85] defendant appealed his convictions for promoting a detrimental drug on the ground that the trial court erred in denying his motion to suppress evidence obtained pursuant to two search warrants based on an earlier warrantless search of his home. The Court affirmed the convictions, holding that even if the first search was unconstitutional, the exclusionary rule did not apply because the subsequent search warrants were supported by knowledge of incriminating facts obtained from an independent source and sufficient probable cause to issue the warrants existed without the evidence obtained from the first search.

Defendant in **State v. Melear**[86] appealed his burglary conviction on the ground that the police had conducted an improper stop, arrest and search. The Court affirmed, holding that the trial court did not err in admitting evidence obtained from the investigatory stop because the stop had been reasonable under the circumstances and probable cause for the arrest and search had developed during the stop. The Court also found that a comment made by the prosecutor about the defendant's right not to take the witness stand did not justify a reversal since it did not, in the context of the entire trial, appear to be manifestly intended or of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.

State v. Elderts[87] dealt with defendant's appeal of the trial court's denial of his motion to suppress evidence found during a warrantless search. The Court held that the trial court did not err in its ruling because the police, in hot pursuit of the defendant, had probable cause to suspect that defendant had broken into the apartment and exigent circumstances existed to justify the search. The Court noted that "hot pursuit" is not an exception to the warrant requirement, but only a factor in determining whether, given probable cause, exigency exists to justify the warrantless search.

A defendant also appealed the trial court's denial of his motion to suppress evidence seized in a warrantless search in the case of **State v. Ros-**

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[85] 63 Hawaii 95, 621 P.2d 374 (1980).
[86] 63 Hawaii 488, 630 P.2d 619 (1981).
[87] 62 Hawaii 495, 617 P.2d 89 (1980).

borough.[88] Police had arrested defendant at the airport after receiving a tip from Los Angeles police that he was carrying marijuana, and conducted warrantless searches of his footlocker and body. Both searches turned up marijuana. The Court held the searches unreasonable since Honolulu police had had ample time to obtain a warrant and lacked exigent circumstances. The Court rejected the State's theories of "controlled delivery" and "reassertion of control" because Los Angeles police had not exercised actual or constructive seizure or control of the evidence.

In **State v. Kanda,**[89] defendants moved to suppress evidence of gambling records, contending that the affidavits used to procure the search warrants did not provide sufficient basis to establish probable cause. The Court agreed and held that the affidavits failed to set forth the underlying circumstances from which a trial court could determine that an informant's information was reliable.

In **State v. Kealoha,**[90] the Court interpreted for the first time the State constitutional requirement that a warrant particularly describe the things to be seized. Defendants appealed the trial court's denial of their motions to suppress evidence on the ground that a warrant authorizing a search for "articles of personal property tending to establish the identification of persons in control of the tent and premises" where the evidence was found was unconstitutionally vague. The Court reversed in part, holding that: (1) The language in the search warrant too closely resembled the wording of a general warrant and was unconstitutional; however, (2) the language could be severed from other parts of the warrant which met the particularity requirement.

Defendants in **State v. Dorson**[91] appealed their convictions of promoting a detrimental drug in the first degree. The Court found that the trial court erred in denying the motion to suppress evidence obtained from a warrantless seizure. Kona police had impounded defendant's house while awaiting the arrival of a search warrant from Hilo, 100 miles away. The Court ruled that: (1) The impoundment of the house and its contents constituted a seizure under the Fourth Amendment; (2) absent exigent circumstances, the police may not enter a private residence to search and seize without the consent of the occupants or a search warrant; (3) the mere fact that drugs may be easily hidden or removed is not an exigent circumstance; (4) while the smell of marijuana may establish probable cause, it is not an exigent circumstance; (5) the fact that the nearest judicial officer was 100 miles away is not an exigent circumstance; and (6) the fact that defendant was arrested while away from home was not an exigent circumstance because he had not called home to alert them to the probability of a search.

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[88] 62 Hawaii 238, 615 P.2d 84 (1980).
[89] 63 Hawaii 36, 620 P.2d 1072 (1980).
[90] 62 Hawaii 166, 613 P.2d 645 (1980).
[91] 62 Hawaii 377, 615 P.2d 740 (1980).

In **State v. Jenkins**,[93] the State appealed an order suppressing evidence of contraband drugs discovered by the police in a knapsack belonging to defendant during the legal search of an automobile. The Court affirmed, holding that the automobile exception to the warrant requirement under the Fourth Amendment and art. I, § 7, of the Hawaii Constitution did not extend to a search of the knapsack, which has a greater expectation of privacy than a car, and that the search could not be justified as a contemporaneous search incident to lawful arrest since such searches are permitted only for fruits of the crime, implements used to commit crime and weapons. Relying on *United States v. Chadwick*,[93] the Court reasoned that no exigent circumstances existed to justify the warrantless search under either exception where the officers had the knapsack within their exclusive control.

Defendant in **State v. Kuahuia**[94] appealed his conviction of a firearms violation, claiming that the trial court erred in denying his motion to suppress a rifle seized by police during an investigatory stop of a vehicle in which he was a passenger. The Court affirmed, holding that where an unidentified informant's tip is specific as to time and place, police observations tend to verify the information received and firearms are allegedly involved, the police are justified and duty-bound to make a temporary investigative stop. These facts distinguished this case from *State v. Joao*,[95] where the officer was without sufficient cause to stop defendant and, following the stop, ordered him out of his car to be frisked.

State v. Madamba[96] also involved an appeal from a denial of a motion to suppress a firearm recovered from a vehicle by police. Shortly after a fatal shooting, defendant had been seen by police picking up an identified suspect who appeared to be carrying a rifle case. Soon thereafter, officers stopped the automobile and ordered defendant out. A revolver was seen protruding from a case lying on the front seat of the automobile. The Court affirmed the conviction, holding that the officers properly ordered defendant out of the vehicle to conduct a self-protective search, given the information gathered and the attendant circumstances. Although the suspect was no longer with defendant when the car was stopped, the officers reasonably inferred that defendant was armed and presently dangerous. Police officers are not required to be absolutely certain that the person accosted is armed before self-protective action may be taken.

The State appealed a trial court's order granting defendant's motion to suppress a handgun found on his person in **State v. Lopes**.[97] Investigat-

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[93] 62 Hawaii 660, 619 P.2d 108 (1980).
[93] 433 U.S. 1 (1977).
[94] 62 Hawaii 464, 616 P.2d 1374 (1980).
[95] 55 Hawaii 601, 525 P.2d 580 (1974).
[96] 62 Hawaii 453, 617 P.2d 76 (1980).
[97] 63 Hawaii 160, 622 P.2d 122 (1981).

ing an anonymous report of a male individual in possession of a gun, an officer proceeded to frisk a group of ten men, including defendant. Defendant, who held the gun in his rear pocket, resisted the frisk. The Court affirmed, holding that there was nothing in defendant's conduct, reliable information or the attendant circumstances from which the officers could reasonably infer that defendant was armed and dangerous, and that while the tip justified a field interrogation, it could not be the basis for an investigative stop or search of a person.

In **State v. Ward,**[98] a police officer conducted a telescopic surveillance of an apartment without probable cause. As a result of this search, defendants were taken into custody and convicted for carrying firearms without permits. Defendants appealed, claiming a violation of their reasonable expectation of privacy in contravention of their Fourth Amendment and art. I, § 7, rights against unreasonable searches. The Court reversed the convictions, holding that a search by use of high-powered binoculars violated reasonable expectations of privacy where the activities were not visible to the naked eye. The Court also stated that "reasonable expectation of privacy" was to be liberally construed on a case-by-case basis. Under the circumstances in this case, the police should have obtained a search warrant.

In **State v. Knight,**[99] defendant appealed the lower court's denial of his motion to suppress evidence. During a helicopter search, police spotted a greenhouse with an opaque roof covered by a shade cloth, located in a remote area. Positioning themselves on an adjoining property, police determined through the use of binoculars that marijuana grew in the greenhouse. They then obtained search warrants and seized the drugs for which defendant was convicted. The Court reversed the conviction, holding that the use of the binoculars constituted an unconstitutional search, intruding on defendant's reasonable expectation of privacy. The search warrants were tainted under the principle of "fruits of the poisonous tree" and the evidence seized thereunder should have been suppressed.

Defendant in **State v. Ward**[100] appealed his conviction for carrying a firearm without a permit or license on the grounds that the firearms were unconstitutionally seized. Federal agents received specific information from a reliable informant as to the time and place of the sighting of two men armed with machine guns. Acting promptly on this information, the agents found defendant and observed him adjust a bulge under his arm that they thought to be a firearm. The subsequent frisk of defendant yielded a firearm. The Court affirmed the conviction, holding that although the right to stop and frisk does not automatically confer a right to frisk, a stop and frisk is justified where the specific conduct of the person, reliable information or attendant circumstances provide a reasonable in-

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[98] 62 Hawaii 509, 617 P.2d 568 (1980).
[99] 63 Hawaii 90, 621 P.2d 370 (1980).
[100] 62 Hawaii 459, 617 P.2d 565 (1980).

ference that the person is armed and presently dangerous.

L. Speedy Trial

State v. Estencion[101] involved an appeal by the State of a circuit court order dismissing a charge of second degree burglary with prejudice because of its failure to bring defendant to trial within six months of his arrest, in violation of HAWAII R. PENAL P. 48(b). The Court affirmed the dismissal, holding that the trial court did not abuse its discretion under Rule 48(c) in finding that the State had failed to demonstrate "good cause" for the delay in trying defendant. To eliminate confusion and provide a guide for trial courts in Hawaii, the Court adopted the following language of the Federal Speedy Trial Act as a requirement to Rule 48(b):

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and the circumstances of the case which led to a dismissal; and the impact of a reprosecution on the administration of justice.[102]

In **State v. Fair**,[103] defendant's motion to dismiss an indictment for promoting a detrimental drug was granted under HAWAII R. PENAL P. 48(b) because more than six months had elapsed from the date of arrest to the trial date. The State obtained a new indictment charging defendant with the same offense and defendant was granted another motion to dismiss under Rule 48(b) on the ground that the original date of arrest triggered the six month period. The State appealed and the Court reversed, holding that when a defendant succeeds in getting a charge dismissed but is reindicted for the same offense, the six month period begins to run from the date of the re-filing of the charge. The Court noted that since dismissals with or without prejudice are within the control of the courts, there was no reason to presume that this holding would enable prosecutors to violate Rule 48 by dismissing charges and reindicting whenever the six month period was in danger of running out.

Defendant in **State v. Gillis**[104] was arrested for two felony offenses and one misdemeanor offense. The State had promptly filed a complaint for the felonies in district court, but did not file a complaint for the misdemeanor at that time. After seven months, the State abandoned its attempt to prosecute the felonies as the chief prosecution witness could not be located, and then filed a complaint for the misdemeanor. Defendant filed a motion to dismiss under HAWAII R. PENAL P. 48(b) on the ground

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[101] 63 Hawaii 264, 625 P.2d 1040 (1981).
[102] 18 U.S.C. § 3162(a)(1) (1975).
[103] 63 Hawaii 314, 627 P.2d 277 (1981).
[104] 63 Hawaii 285, 626 P.2d 190 (1981).

that he was not brought to trial within six months after his arrest. The trial court denied the motion and defendant was convicted. The Court reversed, noting that since the State was having difficulty locating its principal witness, it could have secured a continuance under Rule 48(c)(4), and stated that the residual discretionary power of the trial court to exclude a period of delay for good cause under Rule 48(c)(8) was not to be used to excuse a lack of diligence on the part of the State to comply with that rule. The Court noted that the problem of securing the attendance of witnesses at trial was not an unanticipated circumstance within the meaning of Rule 48(c)(8).

State v. Soto[105] dealt with the State's appeal of the trial court's decision to dismiss two counts of a multiple count indictment under Rule 48(b) because more than six months had elapsed from the date of defendant's arrest. The State argued that under Rule 48(c)(1), the trial court, in computing the six month period, should have excluded certain periods of delay resulting from pretrial motions filed by defendant. The Court reversed the dismissal, holding that in computing the time within which the trial must commence, any pretrial motion concerning defendant tolled the running of the limitation period from the date of filing until the conclusion of the hearing or other disposition of such motion.

Defendants in **State v. Herrera**[106] appealed their convictions for rape, sodomy and robbery in the first degree. In affirming the convictions, the Court held that: (1) The trial court was free to conduct its own investigation and to take judicial notice of the schedule of criminal cases, congestion in the criminal division and the case reassignment policy in determining that delay of the trial was attributable to exceptional congestion in the trial docket; and (2) to hold that the use of an unloaded gun by a robber did not support a conviction of robbery in the first degree, as defined in H.R.S. § 708-840 (1976), would render the statute practically unenforceable and defeat its purpose.

In **State v. Lord**,[107] defendant appealed his convictions for criminal property damage, burglary, harassment and driving under the influence of intoxicating liquor on the grounds that the trial court improperly denied his motion to dismiss under Rule 48(c)(2). The Court affirmed the trial court's ruling, holding that exceptional circumstances in this case caused by the inordinate number of criminal indictments returned by the grand jury in a circuit which was assigned only two judges for all criminal and civil cases, permitted the trial court to exclude the period of delay resulting from congestion of the trial docket.

Defendant in **State v. Provard**[108] appealed his conviction for attempted theft in the first degree. Defendant was arrested with the help of

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[105] 63 Hawaii 317, 627 P.2d 279 (1981).
[106] 63 Hawaii 405, 629 P.2d 626 (1981).
[107] 63 Hawaii 270, 625 P.2d 1038 (1981).
[108] 63 Hawaii 536, 631 P.2d 181 (1981).

a police accomplice who sold two stolen typewriters to defendant while monitored by the police. Police entered the premises pursuant to a search warrant with guns drawn to make the arrest. Defendant was released without being charged a few hours later. Two months later, defendant was indicted for the same offense. Trial was not scheduled until seven months after the first arrest. The Court affirmed the conviction, holding that: (1) In computing the time in which trial must commence, if a defendant is released outright after his arrest but is subsequently charged with the same offense, the time begins to run from the date of the filing of the charge; (2) the trial court correctly left the issue of entrapment to the jury where the evidence was disputed and could not be ruled upon as a matter of law; and (3) the entry onto defendant's premises by police with drawn guns did not constitute an unreasonable execution of a search warrant where officers knew that defendant had access to firearms.

VII. PROPERTY

A. Charitable Exemption From Taxation

In **In re Central Union Church**,[109] the Court reversed the Tax Appeal Court's decision that fees derived by the Church from the operation of a retirement home were subject to general excise taxation under H.R.S. ch. 237 (1976) (amended 1981). The Court held that: (1) The operation of the retirement home was exempt from general excise taxation as a charitable activity conducted by an exempt organization; and (2) the sums received from residents of the retirement home were not derived from an activity of which the primary purpose was the production of income. In so holding, the Court reasoned that H.R.S. §§ 237-23(a)(6) and 237-23(b)(3) (Supp. 1980), which describe tax exempt activities by charitable organizations, should not be so stringently applied as to serve as a disincentive for religious and charitable organizations to engage in efforts to assist the elderly with their housing needs.

B. Eminent Domain

In **City & County of Honolulu v. Midkiff**,[110] appellant appealed the trial court's grant of summary judgment to the City & County of Honolulu (City) and the Trustees under the Will and of the Estate of Bernice Pauahi Bishop (Bishop Estate) in an eminent domain proceeding. The City had commenced an eminent domain proceeding against property owned by Bishop Estate and leased to appellant. Appellant alleged that the City lacked power to condemn his residential-zoned property for park

[109] 63 Hawaii 199, 624 P.2d 1346 (1981).
[110] 62 Hawaii 411, 616 P.2d 213 (1980).

use under the 1964 General Plan, and cross-claimed against Bishop Estate alleging that the condemnation clause in the lease terminating the tenant's interest in the premises upon condemnation was unconscionable and therefore invalid. The Court affirmed the judgment in favor of the City, holding that: (1) The City's adoption of the 1977 General Plan while the appeal was pending obviated consideration of the condemnation proceedings provisions under the 1964 General Plan because an appellate court will decide an appeal in accordance with the law that exists at the time the court renders its decision; (2) the condemnation of appellant's property for park use was consistent with the 1977 General Plan's objectives to expand and maintain Oahu's beach parks; and (3) the Comprehensive Zoning Code, HONOLULU, HAWAII REV. ORDINANCES § 21 (1978), also permitted park use for the property. The Court reversed the judgment in favor of Bishop Estate, holding that appellant had raised a factual issue as to whether the condemnation clause in its lease was unconscionable by arguing that the pre-printed lease was offered in a "take-it-or-leave-it" fashion.

Appellant in **City & County of Honolulu v. International Air Service Co.**[111] appealed a judgment awarding it $3,450,000 as just compensation in an eminent domain proceeding for the acquisition of beachfront land. Appellant asserted errors in evidentiary rulings. The Court affirmed, holding that the trial court did not abuse its discretion in: (1) Concluding that evidence of negotiated sales of comparable property to the City had probative value where there was a definite lack of comparable private sales and no evidence of compulsion surrounding the sale, and that the jury could consider it along with other indicia of market value without being misled; (2) not allowing appellant's president to testify as to the value of his land since he was not an expert in land appraisals in the relevant real estate market; (3) rejecting evidence of proposed future plans for the property where no proof was offered of a reasonable possibility that the plan would be executed; and (4) rejecting other speculative evidence intended to escalate the value of the property above those suggested by comparable transactions since the search for fair market value is not a contest of imagination and ingenuity.

State v. Kunimoto[112] involved an eminent domain proceeding to determine the fair market value of the condemned property. The trial court declared a mistrial upon the State's objection to the formula used by defendants' expert appraiser to estimate fair market value. Defendants had purchased the property four months prior to its condemnation under a Deposit, Receipt, Offer and Acceptance (DROA). To determine fair market value, defendants' expert compared the sale price with comparable sales prices, as had the State's expert, but included adjustments for increases in value from the DROA date. The State filed this interlocutory

[111] 63 Hawaii 322, 628 P.2d 192 (1981).
[112] 62 Hawaii 502, 617 P.2d 93 (1980).

appeal. The Court reversed, holding that the formula used by defendants' expert was foundational support for his opinion and therefore admissible into evidence and that any dissimilarity between experts' data goes to the weight of the evidence and is for the jury to resolve. The Court also found that the DROA date is not too speculative a date from which to base adjustments, since it is a legally binding contract.

C. Landlord and Tenant

In **Hawaiian Electric Co. v. DeSantos,**[113] the Court reversed the trial court's grant of summary judgment and writs of possession to appellee in an action to evict twenty-one month-to-month tenants from its property. The Court held that: (1) The landlord, appellee, was obligated to give the tenants ninety-day notice from the date it reissued the notice of anticipated demolition, not from the date of an earlier postponed notice, under H.R.S. § 521-71(a) (1980); (2) appellee was estopped from claiming that it was entitled to summary possession on ten-days notice under H.R.S. § 666-1 (1976) since it had been receiving rent and tax payments from its tenants for more than ten years when it filed for summary possession; and (3) a landlord's remedies against his tenant for failure to maintain the dwelling is governed by H.R.S. ch. 521 (1976) (amended 1981), and any conflict between chapters 666 and 521 should be determined pursuant to the latter chapter.

D. Mortgages

Appellee in **State Savings & Loan Association v. Kauaian Development Co.**[114] appealed the trial court's denial of its motion for a new trial following trial on remand pursuant to the Court's opinion in *State Savings & Loan Association v. Kauaian Development Co.*[115] In the first appeal, the Court found Kauaian Development Co. (KDCI) the owner of two distinct estates in land, a fee simple subject to a lease and a leasehold subject to the declaration under the Horizontal Property Regime Act, H.R.S. ch. 514 (1976 & Supp. 1980) (amended 1981). The issue on remand was whether the mortgage was sufficient to subject the individual condominium units to the mortgage lien. The Court partially reversed the trial court's denial of the motion for a new trial and held that: (1) The trial court had abused its discretion by reaching certain conclusions of law without support in the record; and (2) since the mortgage was made "subject to" the declaration without further explanation, the mortgage lien could reach only the fee interest of appellant in light of the

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[113] 63 Hawaii 110, 621 P.2d 971 (1980).
[114] 62 Hawaii 188, 613 P.2d 1315 (1980).
[115] 50 Hawaii 540, 445 P.2d 109 (1968).

fundamental rule that any ambiguity in a mortgage instrument should be construed against the party drafting it. Appellant also contended that a second lease which specifically required the lessee to pay the mortgage debt was substituted for the original lease in an amendment to the contracts of sale and therefore all purchasers were subject to the mortgage. The Court found that this amendment without amendment of the declaration violated the Horizontal Property Regime Act and that the purchasers had not been adequately notified of such an amendment, and rejected it as void.

E. Restrictive Covenants

In **McNamee v. Bishop Trust Co.**,[116] the Court affirmed the judgment of the trial court dismissing the complaint of appellants-lessees in favor of appellees-lessors. Appellants filed for declaratory and injunctive relief alleging arbitrary and unreasonable action by the managing committee of Wailupe Peninsula Community Association (WPCA). The committee, elected by WPCA members, had denied appellants' plans to build a second story addition to their existing one story home in pursuit of its purpose to "preserve Wailupe as an attractive residential district." The trial court upheld the committee's action, finding that the restrictive covenant requiring submission of plans and prior approval of the lessor was exercised reasonably and in good faith and was therefore enforceable where requests for second story additions were consistently and uniformly denied on the grounds that second story buildings tended to restrict privacy, were aesthetically offensive and that approval of one such building could lead to proliferation. The Court agreed, holding that a restrictive covenant requiring submission of plans and prior consent of the lessor before alteration or remodeling is valid and enforceable as long as the authority to consent or approve is exercised reasonably and in good faith.

F. Water and Water Courses

In 1973, a group of Hawaiian Homesteaders began a three-stage challenge of a contract between Kaluakoi Corporation (Kaluakoi) and the Board of Land and Natural Resources (Board) for the rental of excess transmission capacity in the Molokai irrigation system to transport water to Kaluakoi's proposed development in West Molokai. The first suit was brought in the United States District Court in *Molokai Homesteaders Cooperative Association v. Morton*.[117]

In **Ah Ho v. Cobb**,[118] the Court affirmed the trial court's denial of

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[116] 62 Hawaii 397, 616 P.2d 205 (1980).

[117] 356 F. Supp. 148 (D. Hawaii 1973), *aff'd*, 506 F.2d 572 (9th Cir. 1974).

[118] 62 Hawaii 546, 617 P.2d 1208 (1980).

injunctive and declaratory relief against appellees. It held that: (1) The contract was an internal management concern, not an agency ruling, and therefore did not have to comply with the requirements of the Hawaii Administrative Procedures Act, H.R.S. ch. 91 (1976); (2) State water was not being disposed of since the contract only rented excess water transmission capacity and therefore such action did not require the consent of homesteaders under H.R.S. § 174-20(2)-(3) (1976); and (3) a non-exclusive contractual right to use excess transmission capacity was not a disposition of public lands and therefore did not require a public auction under H.R.S. § 171-2 (1976) (amended 1981).

Molokai Homesteaders Cooperative Association v. Cobb[119] was the last in the series of challenges. The Court again affirmed the trial court decision, holding: (1) The language of H.R.S. § 175-2 (1976) empowers the Board to contract with distributors of water for domestic use; (2) the Board's failure to adopt guidelines pursuant to H.R.S. ch. 344 (1976) did not affect the validity of the agreement since the chapter only declares a policy and does not require the adoption of guidelines before ad hoc decisions are rendered; and (3) although no environmental impact statement was necessary because the Board's approval of the contract antedated the effective date of the relevant provisions of H.R.S. ch. 343 (1976 & Supp. 1980), the action was likely to have a "significant effect" upon the environment within the meaning of H.R.S. § 343-2(11) (1976) (current version at § 343-3(11) (Supp. 1981)) and would require the preparation of an environmental impact statement for present Board approval.

G. Zoning

In **Perry v. Planning Commission,**[120] the Court approved a Land Use Commission order approving the grant of a special land use permit by the Planning Commission for the use of agriculturally zoned land as a quarry. The Court held that: (1) H.R.S. § 205-6 (Supp. 1980) does not require a public hearing within 120 days of the application for a special use permit since the statute does not carry serious consequences for noncompliance; (2) the breach of a restriction in a special use permit does not cause the zoning to automatically revert to its former use, since the grant of a public privilege may not be conditioned upon a deprivation of constitutional protections; and (3) the permit was not invalid on the ground that it exceeded the scope of the application since appellees were afforded full opportunity to justify their positions during the course of the litigation and appellant understood the issue.

The Court affirmed the trial court's dismissal of the action on the mer-

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[119] 63 Hawaii 453, 629 P.2d 1134 (1981).

[120] 62 Hawaii 666, 619 P.2d 95 (1980).

its in **Nuuanu Neighborhood Association v. Department of Land Utilization.**[121] Appellants alleged that a proposed subdivision would adversely affect their property interests and the use and enjoyment of their adjacent land and sought injunctive relief contending that under the 1964 General Plan, the land was not legally zoned for residential use. The Court found this argument irrelevant since the 1964 General Plan had been repealed more than two years prior to the filing of the amended complaint. Even assuming the 1964 General Plan was still in force, the Court determined that the land was legally zoned for residential use.

Appellant in **State v. Maxwell**[122] was convicted of operating a hula studio in a residence which amounted to a unpermitted use or a special use without a permit, in violation of PERMANENT ORDINANCES OF THE COUNTY OF MAUI §§ 8-1.4(b)-(c) (1971) (current version at MAUI COUNTY CODE §§ 19.08.020 to .030 (1980)). On appeal, appellant contended that the ordinances were unconstitutional on several grounds. The Court upheld the conviction on the charge of operating a hula studio in a residence as a nonpermitted use, and found that there was sufficient evidence in the record to support the trial court's findings that the appellant had in fact conducted a hula studio, and that the ordinance was "manifestly clear" in prohibiting the operation of hula studios in a residential neighborhood. The Court reversed the conviction on the other charge, finding that the State had failed to prove that a hula studio constituted a "special use" under the ordinance. Finally, the Court found that although a religious use is not a "permitted" use under the ordinance, it may be applied for and granted by the commission. Since the appellant, however, had not applied for a religious use of her premises, her constitutional claim of a violation of her religious freedom was not ripe for consideration.

In **State v. Ching,**[123] the trial court imposed a fine on appellants for violating HONOLULU, HAWAII ORDINANCE 4573 § IV(C) (Apr. 1, 1976), which prohibits any business activity within a thirty-foot street/yard setback. The Court reversed, holding that the ordinance could not be used to charge anyone with a crime, since it did not include a penalty provision.

VIII. TORTS

A. Immunity of Court-Appointed Psychiatrists

In **Seibel v. Kemble,**[124] the Court held that court-appointed psychiatrists are entitled to the absolute immunity accorded judges and other

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[121] 63 Hawaii 444, 630 P.2d 107 (1981).
[122] 62 Hawaii 556, 617 P.2d 816 (1980).
[123] 62 Hawaii 656, 619 P.2d 93 (1980).
[124] 63 Hawaii 516, 631 P.2d 173 (1981).

judicial officers. Appellees were psychiatrists appointed by court order to serve on a sanity commission to examine and diagnose a man charged with rape, sodomy and kidnapping. After numerous hearings a judgment of acquittal was entered and the man was released on the condition that he continue treatment with appellee Kemble. Ten months later, he killed appellants' daughter. Appellants brought suit asserting that appellees' negligence proximately caused their daughter's death. The Court affirmed the trial court's grant of summary judgment for appellees, holding the grant of absolute immunity necessary to give court-appointed doctors, as arms or advisors to the court, the liberty to exercise their functions independently and without fear of consequences.

B. Insurance

The Court held in **Calibuso v. Pacific Insurance Co.**[125] that uninsured motorist coverages under a multiple-vehicle policy could be aggregated or "stacked" to allow recovery of the policy's stated liability limits multiplied by the number of vehicles insured under it. Decedent and her three passengers were killed when a vehicle owned by decedent and her husband was struck by a vehicle driven by an uninsured motorist. Decedent and her husband held a Pacific Insurance policy with an uninsured motorist endorsement covering three vehicles, including the one involved in the accident. An action was filed for a declaration on the scope of Pacific Insurance's liability under the uninsured motorist endorsement of the policy. The trial court ruled that the insurer's total liability was the product of the policy's stated liability limits ($20,000 per accident) multiplied by the number of vehicles covered (three), or $60,000. The Court relied on its prior cases permitting stacking to affirm the trial court's decision, rejecting defendant's argument that stacking should only be allowed to benefit the intended beneficiaries of the policy (the policyholder and his resident family) and that other injured passengers should be limited to the coverage applicable to the single vehicle involved in the accident. The Court observed that such a limitation on recovery by the passengers would be inconsistent with the purpose of the statute which is to provide widespread protection to those covered under the uninsured motorist endorsement. The dissent by Justice Menor asserted that aggregation of coverage should be allowed to the insured and resident relatives, but not any other persons in the vehicle since the policyholder had directly contracted for such aggregated protection while non-related passengers had not.

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[125] 62 Hawaii 424, 616 P.2d 1357 (1980).

C. Loaned Employees

In **Harter v. County of Hawaii,**[126] the County appealed a Labor and Industrial Relations Appeals Board decision that held the County responsible for compensation payment to a borrowed employee. The County had "leased" the services of a pilot and a helicopter from an independent business to support firefighting and other County functions. While aiding firefighters, appellee, a temporary replacement for the regular pilot of the leased helicopter, was seriously injured. The Court affirmed the Board's decision, holding that the County was a special employer since there was a transfer of control of the employee evidenced by the fact that he was permitted to fly missions only as directed by the proper County official. H.R.S. § 386-1 (1976).

D. Negligence

In **Namauu v. City & County of Honolulu,**[127] appellants charged appellees, the Hawaii and Honolulu County Police Departments, with negligence under H.R.S. § 334-53 (repealed 1976), alleging that their negligence in failing to capture an escapee from the State Mental Hospital proximately caused the death of their decedent. The Court affirmed the trial court's judgment on the pleadings in favor of the police, holding that § 334-53 merely authorized administrators of a psychiatric facility to call upon police to assist in transporting patients. It did not impose a duty to return an escaped patient to the hospital.

In **Brown v. Clark Equipment Co.,**[128] decedent was killed when a thirty-five-plus ton shovel loader manufactured by defendant Clark Equipment Co. (Clark) and operated by defendant Ward Foods (Ward) backed into her car while she was stopped in traffic. Plaintiffs appealed from a special jury verdict of no general damages to decedent's estate and from the verdict and judgment absolving Ward of any responsibility for the death of decedent. Defendant Clark appealed from the jury verdict of negligence and the judgment of liability. The Court found: (1) No substantial evidence to support the jury's verdict of no negligence on the part of Ward and therefore reversed the verdict as a question of law; (2) evidentiary support for the jury's verdict precluding recovery to decedent's estate for loss of future excess earnings and for pain and suffering and upheld this portion of the verdict; (3) evidentiary support for the jury's finding that Clark had negligently designed the loader, even though no expert testimony had been presented; (4) evidentiary support for the jury's finding that the negligent design of the loader was the proximate

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[126] 63 Hawaii 374, 628 P.2d 629 (1981).
[127] 62 Hawaii 358, 614 P.2d 943 (1980).
[128] 62 Hawaii 530, 618 P.2d 267 (1980).

cause of decedent's death; and (5) that the jury instruction on strict liability was correct in not requiring the jury to find the product "unreasonably dangerous" before it could find the manufacturer strictly liable for the defective condition of its product. The Court affirmed the judgment and damages against Clark, reversed the judgment absolving Ward and remanded the case for apportionment of liability as between the joint tortfeasors.

The Court in **Kim v. State**[129] affirmed the trial court's dismissal of the case pursuant to HAWAII R. CIV. P. 41(b), which permits the defendant in a non-jury trial to move for an involuntary dismissal after presentation of plaintiff's evidence. Appellant was a high school student who was beaten by a classmate in the classroom during school hours. He brought an action under the State Tort Liability Act, H.R.S. ch. 662 (1976 & Supp. 1981) alleging that the State's breach of its duty to supervise public school students in the classroom was the proximate cause of his injuries. The Court held that: (1) The trial court did not err in granting the motion for involuntary dismissal where the actions of the teacher were reasonable under the circumstances; and (2) the trial court did not err in excluding certain Department of Social Services and Housing records acknowledging the attacking student's propensity to inflict harm from evidence since such information was not privy to those charged with supervision of the students.

In **Waugh v. University of Hawaii**,[130] the Court affirmed the trial court's grant of appellee's motion to dismiss at the close of appellant's case. Appellant, a faculty member of the University of Hawaii, brought suit against the University, the Board of Regents and the chairman of his department for restitution for the loss of personal items from his office during his sabbatical leave. In the alternative, appellant sought promulgation of rules of practice by the University pursuant to the Hawaii Administrative Procedures Act (HAPA), H.R.S. ch. 91 (1976), and the right to pursue his claim under those new regulations. Additionally, appellant sought damages against the department chairman on a bailment and tort theory. The trial court dismissed the claims against the University and the Board of Regents, holding that the suit was barred by the applicable statute of limitations, and dismissed the bailment claim on the grounds that no enforceable contract of bailment existed. The Court affirmed, holding that: (1) Since the State has waived its sovereign immunity only with respect to actions brought under H.R.S. chs. 661 & 662 (1976 & Supp. 1980), suits against the State must be brought within the two-year statute of limitations specified within those chapters, and therefore appellant's claims were barred; (2) since appellant did not rely on any representations by the University in delaying the filing of suit, the doctrine of equitable estoppel was inapplicable; (3) there was no merit to appellant's

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[129] 62 Hawaii 483, 616 P.2d 1367 (1980).

[130] 63 Hawaii 117, 621 P.2d 957 (1980).

claim for the establishment of procedures under HAPA since the proposed rules would involve only the University community; (4) there could be no bailment claim where appellees did not have sufficient possession of the missing items; and (5) the department chairman owed no duty to safeguard appellant's personal effects, therefore, no claim of negligence could arise against him.

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