

WESTERN LEGAL HISTORY

THE JOURNAL OF THE
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

VOLUME 22, NUMBERS 1 & 2 2009

Western Legal History is published semiannually, in spring and fall, by the Ninth Judicial Circuit Historical Society, 125 S. Grand Avenue, Pasadena, California 91105, (626) 795-0266/fax (626) 229-7476. The journal explores, analyzes, and presents the history of law, the legal profession, and the courts—particularly the federal courts—in Alaska, Arizona, California, Hawai‘i, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

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ISSN 0896-2189

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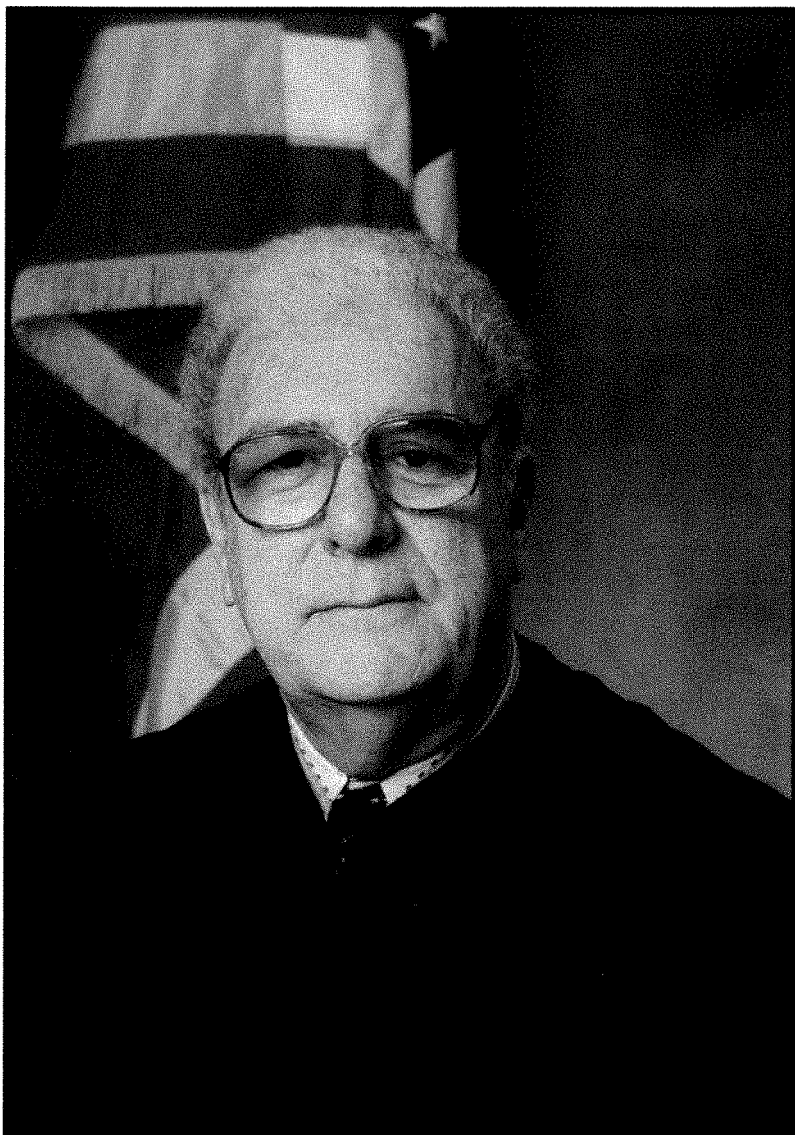
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WESTERN LEGAL HISTORY
VOLUME 22, NUMBERS 1 & 2
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Cover photo: The internment camp at Honouliuli was heavily patrolled and surrounded by barbed wire, and was called "Hell Valley" by the internees because of the intensely hot weather there. (Courtesy of Japanese American Relocation & Internment: The Hawai'i Experience Collection, Japanese Cultural Center of Hawai'i)



SAMUEL P. KING, 1916–2010

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U.S. District Judge Samuel Pailthorpe King, who served on the federal bench for nearly four decades, died in December 2010, at the age of 94.

Judge King served as one of the founding directors of the Ninth Judicial Circuit Historical Society and remained a director emeritus until his death. He had a great love of history. Biographies and volumes on American, Pacific, and world history made up a large part of his personal library of some six thousand books. His article on "The Federal Courts and the Annexation of Hawaii" appeared in an early issue of the society's journal, *Western Legal History* 2:1 (Winter/Spring 1989).

Sam King's life embodied history, especially the history of Hawai'i. Though born in China, where his father was stationed as a navy gunboat captain, he was primarily raised in Hawai'i, the home of his family on both sides. He was proud of his Hawaiian heritage and of his many ancestors who were prominent in the history of Hawai'i, including one who was appointed governor of Oahu by Kamehameha I, and his father, appointed more than a century later to serve as the governor of the Territory of Hawai'i by President Eisenhower. He left Hawai'i to attend Yale, where he received both undergraduate and law degrees, and to serve in the navy during World War II, but Hawai'i remained his home for the rest of his life.

After the war, he practiced law in Honolulu and was active in the movement to obtain statehood. He was appointed a state circuit judge in 1962 and helped to create a modern system for family law matters, becoming known as "the father of the family court." He ran for governor in 1970, but, as he put it, "I was lucky. I lost." That loss made him available for appointment in 1972 to the U.S. District Court for the District of Hawai'i. He served as that court's chief judge for ten years and maintained an active caseload until shortly before his death.

In his later years he played a leading role in disclosing the abuse of one of the nation's wealthiest charities, the Bernice Pauahi Bishop Estate, by its appointed trustees. "They treated it like a cookie jar," he was quoted by the *New York Times*. An article that he co-authored detailed the misconduct and led to removal of the trustees and reform of the trust. The article was later expanded into the book *Broken Trust*, which is reviewed in this issue.

Sam King was widely known for his good humor. During jury selection, a potential juror said she had to leave for Mau'i the next day. "Here today, gone to Mau'i," Judge King observed, a comment that soon appeared on tourists' t-shirts. When asked the secret of his long, happy marriage, he advised frequent use of these three magic words: "Let's eat out."

It is especially appropriate to recognize Judge King in this issue of *Western Legal History*, which includes the history of the Pacific Judicial Conference, for he was one of the moving forces behind that conference, then called the South Pacific Judicial Conference, in its early years. He had a deep understanding of Pacific states and often sat by designation with courts in other Pacific territories.

Sam King served the courts, the NJCHS, and his community with character and compassion, wisdom and wit. As a son of Hawai'i, he embodied the aloha spirit and a sense of what is right, known in the Hawaiian language as *pono*. We honor his memory.

Hon. Richard H. Clifton
U.S. Court of Appeals for the Ninth Circuit

PREFACE

For most historians and general readers, the term *western legal history* brings immediately to mind the legal developments and institutions associated with the U.S. territories and states of continental North America. Law and courts in the territorial phase of the region's development became the subject of important historical writing early in the twentieth century, initially under the influence of Frederick Jackson Turner and the "frontier school," and the subject was later invigorated with new attention to constitutional and legal dimensions by the work of such leading scholars as Clarence Carter, Francis Philbrick, Earl Pomeroy, Howard Lamar, and Kermit Hall. In the pages of *Western Legal History*, since its founding, there has been abundant writing published in both the Turnerian tradition—focused on the processes of westward expansion, community building, and democratic politics and governance—and the newer school of scholarship that is focused on courts, doctrinal legal development, and the "law and society" nexus.

The present symposium issue of this journal, on federal courts and law in the Pacific Ocean area, presents three articles in which the geographic scope of the legal history of the American West is extended to encompass the former island territories of the United States and of other colonial powers. The articles discuss both Hawai'i in its late territorial phase, during the World War II era when it was the mid-ocean launching point of America's Pacific war effort, and the other territorial units that today have attained status ranging from political independence and free association to commonwealth standing under the U.S. flag.

In the first article, the present authors offer new research on the treatment of Japanese-American citizens under the regime of martial law that the U.S. Army and the national government imposed on the Territory of Hawai'i during World War II. The Americans of Japanese ancestry living in Hawai'i escaped the fate of mass removal and incarceration that befell their counterpart population, citizens and aliens alike, on the West Coast of the mainland. However, one subgroup of that population in Hawai'i, the American-born citizens known as Kibei—individuals who had lived in Japan for part of their lives, for educational or other purposes, and who then returned to Hawai'i—suffered a harsher fate that represents a nearly forgotten dimension of army and intelligence policies in the war era. The cost to the Kibei was high, in terms of loss of constitutional and personal liberties, and only the intervention of district courts and the Ninth Circuit appellate court prevented an even higher cost from being exacted.

Judge Alfred T. Goodwin and Professor Jon M. Van Dyke, in the two articles following, document a very different aspect of federal law and courts in the legal history of the Pacific area territories. As their scholarship shows, the historic relationship of the U.S. Court of Appeals for the Ninth Circuit to the island communities and politics of the Pacific was of vital significance in the territories and has continued in full vigor in more recent years, beyond the era of the islands' governance under the United States or other colonial powers. Over time an important partnership evolved, and the Ninth Circuit's judges have been instrumental in promoting institutional ties and international judicial amity throughout the Pacific region in this modern era of post-colonial development.

Judge Goodwin, himself a key figure in this recent history, provides a full overview and analysis of both the judicial institutions in the former territories of the United States and the other colonial powers, and the continuing interrelationship of American judges and federal law to the post-colonial governments. Of particular interest, as he notes, is the continuing role of the Ninth Circuit's Pacific Islands Committee in advancing and helping to coordinate judicial interchange. Professor Van Dyke carries this story forward, fully documenting and analyzing the South Pacific Judicial Conference and its successor, the Pacific Judicial Conference. His article discusses the major issues that these conferences have addressed, the progress that has been made in advancing the key objectives of rule of law and judicial independence, and the role of individual judicial leaders (including, notably, from the United States, Justice Anthony Kennedy and Judges Goodwin, the late Samuel King, and J. Clifford Wallace) in shaping the agendas and the important process of dialogue that has emerged in the conference's history.

We are grateful to the journal's editor, Brad Williams, for inviting us to serve as guest editors and to include our own work in the present issue; and to members of the federal judiciary, especially Judges Goodwin, Richard Clifton, and King, for their personal interest in seeing this symposium come to publication.

Jane L. Scheiber and Harry N. Scheiber
Guest Editors

HAWAI'I'S KIBEI UNDER MARTIAL LAW: A HIDDEN CHAPTER IN THE HISTORY OF WORLD WAR II INTERNMENTS

HARRY N. SCHEIBER, JANE L. SCHEIBER,
AND BENJAMIN JONES

Only a few hours after the devastating Japanese attack on Pearl Harbor on December 7, 1941, the governor of the territory of Hawai'i, Joseph Poindexter, placed the entire population of the islands under martial law. He suspended the writ of habeas corpus and turned over his own powers as well as those normally exercised by the judicial officers of the territory to the U.S. Army commanding general, Walter C. Short. Fearing an imminent invasion by Japan as well as espionage and sabotage from Hawai'i's large ethnic Japanese population, Short announced a suspension of all normal constitutional protections. He also designated himself "military governor" and took charge of all aspects of governance of the territory, including closing

Harry N. Scheiber is the Riesenfeld Chair Professor of Law and History, School of Law, University of California, Berkeley, where he is also director of the Institute for Legal Research and heads the Sho Sato Program in Japanese and U.S. Law. He is former president and an honorary fellow of the American Society for Legal History. Jane L. Scheiber is a research associate in the Center for the Study of Law and Society, also at UC Berkeley Law, and was for many years assistant dean of the UC Berkeley College of Chemistry. As coauthors, they have written extensively on army rule in wartime Hawai'i and are now completing a book, *Bayonets in Paradise*, on that subject. Benjamin Jones earned the J.D. at Berkeley Law in May 2010 and is now an associate in the San Francisco office of O'Melveny and Myers LLP. He is former editor-in-chief of *The Berkeley Journal of International Law*.

the civilian courts and placing them under military control for purposes of private suits.

All civilian government operations were thus formally placed under the direction of the Office of the Military Governor (OMG). The army's chief legal officer in the territory, Colonel Thomas Green, assumed the title of "executive," and he was given wide discretion over nearly the whole range of governmental operations, including the supervision of policy implementation with respect to the population of Japanese descent. He exercised this control through a series of general orders that regulated virtually every aspect of civilian conduct.¹ The army created a military commission and established provost courts that would conduct trials of civilians charged with any misdemeanors, felonies, or violations of security regulations or general orders.

Only gradually, and piecemeal, over more than three-and-one-half years, were the elements of civilian governance restored. The army insisted on continuing its suspension of the writ of habeas corpus, however, almost until 1945—and even then, it reserved the authority to reinstitute martial law if it deemed war conditions warranted.² Never before in the nation's history had American citizens been held under a regime of martial law for so long.

The army thus took up the final responsibility for policies and their implementation to provide internal security for the islands, which were recognized as a site of vital strategic importance to any American military and naval operations in the Pacific. Of particular concern to both military and government

¹A provision for the governor to place the territory under martial law in "case of rebellion or invasion or imminent danger thereof" was contained in the Hawaiian Organic Act of 1900, establishing the territory of Hawai'i. Governor Poindexter would later testify that he was reluctant to declare martial law and had done so only at the request of General Short, who had insisted it was "absolutely essential" to the defense of the islands. Poindexter cited "the large Japanese population we have in Hawaii" as the main reason for martial law. *Honolulu Star-Bulletin*, May 4, 1946, and Pearl Harbor Report, Part 23, p. 820, quoted in J. Garner Anthony, *Hawaii Under Army Rule* (Stanford, CA, 1955), 9.

²For an overview and full documentation of the army's control of civilian affairs and its administration of justice through the provost courts, see Harry N. Scheiber and Jane L. Scheiber, "Bayonets in Paradise: A Half Century Retrospect on Martial Law in Hawaii, 1941–1946," *University of Hawai'i Law Review* 19 (1997). See also Harry N. Scheiber and Jane L. Scheiber, "Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941–1946," *Western Legal History* 3:2 (Summer/Fall 1990). In 1955, J. Garner Anthony, a leading figure of the Hawai'i bar, published *Hawaii Under Army Rule*, a basic source on legal, constitutional, and political issues of that era. (Anthony served as attorney general of the civilian government of Hawai'i during part of the war, and he was involved as counsel in the successful challenge to the legality of the army's wartime regime in the islands, in the case of *Duncan v. Kahanamoku* in the Supreme Court of the United States.) See note 11 *infra*.

officials alike was Hawai'i's community of nearly 158,000 residents of Japanese ancestry (including some 37,000 aliens who, by law, could not become citizens). Constituting approximately 37 percent of the population of the islands, the *Nikkei*³ were regarded as a potential security threat—as to both sabotage and espionage, and as to the possibility of their undermining defense in the event of a Japanese invasion. However, in stark contrast to the mainland, where the notorious policy of mass removal and internment was pursued in early 1942, in Hawai'i the army instituted only selective arrests and internments or other categories of incarceration.⁴ Approximately 10,000 *Nikkei* residents in the islands, including all *Kibei*,⁵ were identified and investigated, and hundreds of them were then picked up for interrogation and loyalty assessments by the military authorities. Since nearly 50,000 of the *Nikkei* were children under sixteen years of age, more than one in eleven ethnic Japanese adults were involved as subjects of security operations.⁶

³The term *Nikkei* refers to all persons of Japanese descent living outside Japan. Thus it includes both Japanese immigrants (*Issei*) and their descendants (*Nisei* and *Sansei*). See p. 7, *infra*.

⁴We are using *internment* to refer to incarceration, following detainment and hearings, in camps run by the army or the Department of Justice. Many of the Hawaiian *Nikkei* who were evacuated from Hawai'i in late 1942 and early 1943 were sent to the mainland relocation camps run by the War Relocation Authority; they were not internees (although some had just been paroled), they were not necessarily suspect, and indeed many of them accepted voluntary evacuation; nevertheless, they were, in fact, incarcerated. The historian Roger Daniels, the leading authority on the evacuation and internment, points out that "internment" of those alien enemies (however harsh a measure) was conducted under terms of a longstanding congressional enactment that provided for exactly the procedures and level of treatment given them in the evacuation (and in accord, largely, with international law). The citizens and dual citizens must, by contrast, be understood as being subjected to "incarceration," in violation of their rights, Daniels writes; they were prisoners, not "internees," taken into the centers and camps under what "was simply a lawless exercise of power by the executive branch," even though the policy that was followed was retroactively approved by Congress and the Supreme Court in the name of "military necessity." Daniels, "Incarceration of the Japanese Americans: A Sixty-Year Perspective," *The History Teacher* 35 (2002); see also Daniels, "Words Do Matter: A Note on Inappropriate Terminology and the Incarceration of Japanese Americans," in *Nikkei in the Pacific Northwest: Japanese Americans and Japanese Canadians in the Twentieth Century*, ed. Louis Fiset and Gail Nomura (Seattle, 2005), 183–207.

⁵See p. 4, *infra*. Office of the Chief of Military History, *United States Army Forces Middle Pacific and Predecessor Commands during World War II*, vol. 8, part 2, "Civil Affairs and Military Government," p. 16 (ms., microfilm copy in Hawai'i War Records Division, University of Hawai'i at Manoa Library, Honolulu).

⁶Estimates of number of children are from Samuel W. King article, *Honolulu Advertiser*, March 1941, quoted in Yukiko Kimura, *Issei: Japanese Immigrants in Hawaii* (Honolulu, 1988), 209.

Of the 10,000 so affected, approximately 2,000 were incarcerated, although not all were formally designated as internees. Roughly one-third of those who were sent to internment or relocation camps were American citizens, mostly Kibei—those persons of Japanese descent who were born on American soil and thus were American citizens, but who had been sent to Japan for at least part of their education.⁷ Somewhat less than half of the persons taken into custody were held by the army as internees, under authority of martial law, losing their freedom for the duration of the war; others were evacuated to mainland relocation centers and/or internment camps in the formal status of “evacuees” or “excluidees” rather than “internees.”⁸ All of them lived behind barbed wire fences, patrolled by armed guards and under surveillance from guard towers, in tents or in barracks with few comforts. They were deprived of liberty, privacy, their normal livelihoods, and often unification with their families.⁹

The history of the Hawaiian Nikkei internments and evacuations, like the larger history of martial law and army rule in Hawai‘i during World War II, for many years was given little attention by historians or legal scholars.¹⁰ This is not entirely surprising, given the momentous constitutional importance and social impact of the mass internments on the mainland’s West Coast, which was the focus of historical writing and legal analysis on internment policies. Indeed, the fact that there was no mass internment in Hawai‘i usually was mentioned by historians and legal scholars only to bolster the argument that mass internment on the mainland was unnecessary: the Hawai‘i experience proved, they contended, that ethnic Japanese posed no threat of subversion. (Ironically, these analyses sometimes failed to take account of the fact that in Hawai‘i, the entire civilian population was being controlled under martial law!)

⁷Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (Washington, DC, 1982), ch. 11, http://www.nps.gov/history/history/online_books/personal_justice_denied/chap11.htm; Gwenfread Allen, *Hawaii’s War Years* (Honolulu, 1950), 134.

⁸The difference between internment and evacuee status is explained below at pp. 32–33.

⁹The length of detention varied; some were incarcerated for the duration of the war, while others were released following hearings in 1943 and 1944. Some were permitted to leave the mainland centers in “released” status and to take up jobs and residence outside the western U.S. area under control of the Western Defense Command, where the army had conducted the mass exclusion program. Even those so released were kept under control of the WRA and the Hawaii Army Command, and they were not permitted to return to Hawai‘i until after the war’s end.

¹⁰See Scheiber and Scheiber, “Bayonets in Paradise,” 483–85.

Although the Japanese-American cases¹¹ have received sustained attention in the scholarly literature on the war, emergency powers, and military law, even researchers concerned with the constitutional history of World War II long showed almost no interest in the 1946 decision of the U.S. Supreme Court, *Duncan v. Kahanamoku*, which found army rule in wartime Hawai'i to have been illegal.¹² Indeed, so far as we have been able to tell, the case was long absent from any of the standard constitutional law case books.¹³ Similarly, for forty years after publication of Gardner Anthony's book in 1955, little attention was given to the army's administration of civil affairs in Hawai'i under its martial law regime. Hence the internments of Nikkei in wartime Hawai'i long remained a subject in the dimness of historical memory. Although recent research studies have lifted the veil on the subject of wartime army rule and the internments in Hawai'i,¹⁴ there are still aspects of security policy generally, and internments in particular, that remain in the shadows.

In the present study, we seek to cast new light on one such important aspect of army rule: the treatment of the Kibei of Hawai'i. The Kibei were regarded with particular suspicion by the military authorities and were therefore affected in some unique ways by the security policies of the army command and the intelligence services. It must be said at the outset that the army's record in governing the citizenry of Hawai'i, and its administration of justice in the provost courts, involved what appear in retrospect to have been unwarranted restrictions of liberty imposed on the entire population, not only on Nikkei.¹⁵ Hence the sweeping suspension of constitutional rights of all citizens in Hawai'i under military rule forms the essential

¹¹*Hirabayashi v. United States* 320 U.S. 81 (1943), *Korematsu v. United States* 323 U.S. 214 (1944), *Ex Parte Endo* 323 U.S. 283 (1944).

¹²*Duncan v. Kahanamoku* 327 U.S. 304 (1946).

¹³But see Elizabeth L. Hillman, Eugene R. Fidell, and Dwight H. Sullivan, eds., *Military Justice: Cases and Materials* (LexisNexis 2007 & Supp.) This book also contains an excerpt from Scheiber and Scheiber, "Bayonets in Paradise." The *Duncan* case is also discussed in William Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953*, vol. 12, *Holmes Devise History of the Supreme Court of the United States* (New York, 2006), which also cites Scheiber and Scheiber, "Bayonets in Paradise."

¹⁴See Scheiber and Scheiber, "Constitutional Liberty in World War II"; Scheiber and Scheiber, "Bayonets in Paradise"; Tetsuden Kashima, *Judgment without Trial: Japanese American Imprisonment during World War II* (Seattle, 2003); Gary Y. Okihiro, *Cane Fires: The Anti-Japanese Movement in Hawaii, 1865–1945* (Philadelphia, 1991); Greg Robinson, *A Tragedy of Democracy: Japanese Confinement in North America* (New York, 2009).

¹⁵This, of course, was also the view of the Supreme Court majority in *Duncan*.

background and context of the Kibei story.¹⁶ Whatever the hardships and sacrifices suffered by other civilians, however, the Kibei faced exceptional challenges: From the start of the war until V-J Day, they lived in constant jeopardy of evacuation, internment, or both. In fact, about one in ten of them was detained at some point during the war, compared to less than one in one hundred of the rest of the population of Japanese descent as a whole.¹⁷

We also seek to provide fresh insights for an understanding of the military bureaucracy's mentality—and especially the attitudes that led the army command to resist all efforts to moderate its perpetuation of this extraordinary suspension of civil liberties. This regime would deny to Kibei citizens, in particular, even a moderate semblance of procedural fairness. The minority of Kibei who professed loyalty to Japan in security interviews invariably were formally interned, but with what degree of evidence that they actually posed a security threat is highly questionable. The majority of Kibei taken into custody and eventually sent to the mainland can reliably be deemed, we think, the victims of racial prejudice, an overzealous (or overly cautious) security officialdom, and, in the last part of the war, the army's overriding concern to head off any legal challenge to its martial law regime.

THE NIKKEI IN HAWAIIAN SOCIETY

The issues posed for national security by the Japanese immigrants and their descendants in Hawai'i were very different from those on the American mainland, in part because there was less hostility toward them in the islands, in part because of the large numbers of ethnic Japanese in Hawai'i, and in part, as the military contended, because of the likelihood of an invasion by Japan and the opportunities for espionage and sabotage. Unlike in the continental United States, where people of Japanese descent comprised a miniscule proportion of the total population, they accounted for some 37 percent of the population in Hawai'i.¹⁸ They made up a significant percentage of the plantation labor force; and thousands were numbered among

¹⁶This assessment of unfairness in the operation of army justice is given full attention, *inter alia*, in Scheiber and Scheiber, "Bayonets in Paradise"; and in Anthony, *Hawaii Under Army Rule*.

¹⁷See *infra*, pp. 88–89.

¹⁸By comparison, there were approximately 127,000 ethnic Japanese on the U.S. mainland out of a total population of 132 million, or less than 0.1 percent.

the skilled and semi-skilled working force in the shipyards (which were vital to U.S. Navy operations), in transportation and other public utilities operations, in postal facilities, and in many other civilian government offices. There was also a substantial Nikkei presence in the trades, in retail and wholesale commerce, in education, and in elected political office. Furthermore, ethnic Japanese comprised nearly the entirety of the fishing fleet workers—a matter of particular concern to the military, who feared that men in fishing vessels could spy on naval operations. The Nikkei community thus obviously played a vital role in the Hawaiian economy.¹⁹

By 1940, the Issei, or first generation—those born in Japan and ineligible for citizenship—numbered about 37,000 and thus constituted nearly one-fourth of the Japanese population in Hawai'i.²⁰ Most of them were older, having come to Hawai'i to work on the sugar plantations in the years before the Immigration Act of 1924, which excluded "all aliens ineligible to citizenship." The majority of them remained culturally Japanese, and some spoke little or no English.

Far more numerous, some 121,000, or more than 75 percent of Hawai'i's Nikkei population, were the children and grandchildren of the Issei—the Nisei, or second generation, and Sansei, or third generation.²¹ By dint of their birth on American soil, they were citizens of the United States, although some of them had been registered with the Japanese consulate and thus held status as dual citizens under both U.S. and Japanese law.²² Many of the Nisei children attended Japanese language schools after regular school hours—if for no other reason than to be able to communicate better with their families. However, these schools were regarded with suspicion by the army and navy

¹⁹For a discussion of Japanese occupational structure, see Andrew W. Lind, *Hawaii's Japanese: An Experiment in Democracy* (Princeton, 1946), 17–18, and Okihiro, *Cane Fires*, 239. For a discussion of the role of Nikkei in education, see Dorothy Ochiai Hazama and Jane Okamoto Komeiji, *Okage Sama De: The Japanese in Hawai'i, 1885–1985* (Honolulu, 1986), 104–106.

²⁰The Naturalization Act of 1870 limited naturalization to whites and persons of African descent, thus excluding Asians. The U.S. Supreme Court in 1922 denied the petition of a Japanese-born U.S. resident, Takeo Ozawa, to become a citizen, ruling that he was not a white and upholding the law preventing the naturalization of Japanese. The ban remained in effect until 1952.

²¹The Sansei were too young to be considered a security risk.

²²According to Hazama and Komeiji, the proportion of Japanese-American births registered with the Japanese consulate declined from two-thirds in the late 1920s to one-tenth by 1937. *Okage Sama De*, 119.

intelligence services and the FBI, all of which viewed them as centers of pro-Japanese indoctrination.²³

Many of those who held dual citizenship were Kibei, a subset of the Nisei.²⁴ The word *Kibei* comes from *ki*, to return to, and *bei*, America. For economic or cultural reasons or both, the Kibeis' families had sent them back to Japan at some point in their younger years, to live temporarily with grandparents or other relatives (the duration of their residency in Japan varying considerably) and to receive schooling there. They had then returned to Hawai'i to rejoin their families and resume their lives in American society as best they could, some speaking little English and many of them ostracized by the larger group of much more Americanized Nisei.²⁵ A fact that would become important to the army's assessments of Kibei loyalty to the United States was that public education in Japan included both emperor worship and military training, and a small fraction of the Kibei actually had served in the military there.

The total number of Kibei in Hawai'i was estimated by OMG officers in November 1943 to be "over 3,000,"²⁶ but

²³In 1940, some 40,000 children, or 84 percent of ethnic Japanese children in the public schools, studied in 175 Japanese language schools after regular school hours. *Ibid.*, 119, 144.

²⁴We have been unable to ascertain the exact number of Kibei who may have returned to Hawai'i from Japan and then undertaken the prescribed legal measures for expatriation through formal renunciation of the Japanese citizenship that had attached to them either by their registration in Japanese schools or by registration at birth with the Japanese consulate in Hawai'i. A memorandum, "Factors to Be Considered in Investigations of Japanese Subjects," in file 5605, Hawaii War Records Division Collection, University of Hawai'i Library (hereinafter HWRD), a document apparently prepared for Naval Intelligence, dated February 25, 1943, refers to the fact that "expatriation was a lengthy, complicated process" so that "sheer ignorance and apathy" might well explain a Kibei's maintaining dual citizenship status.

²⁵See Kinuko Maehara, "To Okinawa and Back Again: Okinawan Kibei Nisei Identity in Hawaii" (M.S. thesis, University of Hawai'i, 2005). Although it pertains mainly to mainland Nikkei, see also Dorothy Swaine Thomas, "Some Social Aspects of Japanese-American Demography," *Proceedings of the American Philosophical Society* 94 (1950), 459–80, for an interesting discussion of social issues. See note 27, *infra*, for the results of Thomas' scholarship and of the University of California project she directed during the war.

²⁶Maj. Louis F. Springer, memorandum, "Interned American Citizens of Japanese Ancestry," 31 Dec. 1943, RG 494, box 39, National Archives.

other estimates run as high as 5,000.²⁷ Probably the great majority of them were male.²⁸ Despite their small numbers, they were regarded by both the FBI and the army and navy intelligence services as likely harboring disloyal sentiments and thus representing a significant danger to internal security.²⁹ For that reason, the Kibei would feel the full impact of martial law, including the dreaded fate of incarceration as internees in Hawai'i under jurisdiction of the military, or removal to the mainland in custody of first the army and then the War Relocation Authority (WRA), which ran the relocation centers.³⁰

²⁷It is difficult to know with any certainty the total number of Kibei, as they were not distinguished from other Nisei in the census records. The Office of the Chief of Military History estimates the number to be 5,000. Office of the Chief of Military History, *United States Army Forces Middle Pacific and Predecessor Commands during World War II*, vol. 10, part 8, Appendix 1, "Plans and Measures for the Control of Certain Elements of the Population," p. 5 (ms., microfilm copy in Hawai'i War Records Division, University of Hawai'i at Manoa Library, Honolulu). Extrapolating from data of a survey administered to a sample of internees in WRA centers, Eric Muller estimates that 13 percent of mainland Nisei were Kibei. Eric Muller, *American Inquisition: The Hunt for Japanese American Disloyalty in World War II* (Chapel Hill, NC, 2007), 153. Similarly, Dorothy Swaine Thomas estimated one in seven Nisei on the West Coast of the mainland was a Kibei. Thomas, *The Salvage* (Berkeley, CA, 1952), 16. One widely cited scholar, Andrew Lind, stated their numbers in Hawai'i to be six hundred, but this figure seems implausible. Lind, *Hawaii's Japanese*, 183. See also Robert L. Shivers, *Cooperation of the Various Racial Groups with Each Other and with the Constituted Authorities Before and After December 7, 1941* (Honolulu, 1946), 2.

²⁸The references to Kibei in the archival materials are primarily to males, although some families did join the Kibei in the mainland camps. Our analysis of the WRA database, "Japanese-American Internee Data File, 1942-1946, Record Group 210" (available from the National Archives at <http://www.archives.gov>) shows almost 10 percent of the Hawaiian Kibei who were in the WRA camps were female, some having received as many as eleven years of schooling in Japan. Some of them were single women, but most of them were married. The most common occupations for the women were teachers, seamstresses, clerks, and maids. The analysis was performed by selecting from the database all persons born in Hawai'i whose last known address was Hawai'i and who had received more than one year of schooling in Japan.

²⁹See *infra*, text at notes 142-44.

³⁰The War Relocation Authority was created by President Roosevelt on March 18, 1942 to "provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." Executive Order 9102, quoted in Dillon S. Myer, *Uprooted Americans: The Japanese Americans and the War Relocation Authority during World War II* (Tucson, 1971), Appendix C, 309. Initially designed for the evacuees from the West Coast of the mainland, the WRA subsequently received in its centers Nikkei from Hawai'i who were sent to the mainland as evacuees and excludées, as well as alien internees who were released from Department of Justice internment camps.

The diversity in legal status of citizenship within the Nikkei community in Hawai'i was not the only dimension of subgroup pluralism, for there were also significant social and cultural elements that posed some perplexities for the military and other officials charged with shaping security policy. There was a social distance, often a dramatic gulf, between the generations—especially between the Japanese-speaking Issei and the Nisei, who used mainly English in their daily activities and who were taking advantage of educational opportunities up to the college and university level, thereby already establishing a much-noted foothold in the professions, in the commercial sector, and in politics.³¹ Some of the Kibei, however, were fully literate only in Japanese, not even having command of the “pidgin” that was still widely spoken in the Asian-American and Native Hawaiian communities in the islands.³²

In addition, there were significant distinctions of social class. Poorly educated plantation workers, including large numbers of immigrants who had never learned English, lived very different lives from those who resided in the more urban areas. They inhabited a different social universe from the journalists, teachers, priests, truck farm owner-operators, and successful business people in the Nikkei communities in Honolulu, Hilo, or even the busier rural market towns that were connected in daily economic activity to urban nodes. Class distinctions were often compounded by affiliations based on region of origin in Japan, with the Okinawans especially being treated as a separate group.³³ All of these factors had to be considered by the military and intelligence officers responsible for security.

PRE-WAR PLANS FOR HAWAI'I'S NIKKEI

The idea that the ethnic Japanese population of Hawai'i was a potential threat to security had surfaced long before

³¹Americans of Japanese ancestry comprised 24.9 percent of registered voters and constituted 19 percent of the teachers in the territory of Hawai'i in 1938. Ernest K. Wakukawa, *A History of the Japanese People in Hawaii* (Honolulu, 1938), 368, 370.

³²Intelligence officers took note of this in memorandum, “Factors to Be Considered,” cited in n. 24, *supra*.

³³See Hazama and Komeiji, *Okage Sama De*, 73; Kimura, *Issei: Japanese Immigrants in Hawaii*; and Yasutaro Soga, *Life Behind Barbed Wire: The World War II Internment Memoirs of a Hawaii Issei* (Honolulu, 2008), *passim*. See also University of Hawai'i, Ethnic Studies Oral History Project, *Uchinanchu: An Oral History of Okinawans in Hawaii* (Honolulu, 1981).

the war broke out. In fact, it had long been an explicit premise of military planning and intelligence efforts in Hawai'i. In 1917, a naval officer in Pearl Harbor gave voice to a theme that would dominate U.S. military thinking right through the early years of World War II. The "greatest menace to our security," he said, "is the large proportion of the population of foreign birth who are very liable to turn against this country."³⁴ A comprehensive report, "The Japanese Situation in Relation to Our Military Problem," written by the commander of the army's Hawai'i Department in 1922, cited similar themes.³⁵

By the 1920s, the army was recommending that martial law be imposed for the defense of Oahu in case of a war with Japan, and the military and naval intelligence services were cooperating with the FBI to undertake a program of surveillance and to plan measures to be taken immediately against the population of Japanese descent in such an eventuality.³⁶ In 1932, the admiral commanding U.S. naval forces in Hawai'i asserted in a public address that residents of Japanese ancestry were "unassimilable," so that in the event of war with any "Oriental power . . . their loyalty could not be relied upon." Because of the numbers of Nikkei in Hawai'i's population, he declared his support for a commission government by appointed military and civilian officers, in place of the existing institutions of self-government.³⁷

As tensions with Japan grew worse throughout the 1930s and the Hawaiian Islands became an increasingly important strategic base for the United States, President Franklin D. Roosevelt himself, many members of Congress, and the top army and navy brass became increasingly concerned with the possibility of espionage and sabotage by Nikkei residents. This was a great danger, it was argued, because they could "blend in" so readily in the daily life of the islands' multiracial civilian society. General Short, in particular, "felt the most imminent danger to the army was the danger of sabotage, because of the known presence of large numbers of alien Japanese in Honolulu." Ironically, among the measures he took to act against sabotage was "bunching the

³⁴Quoted in Michael Slackman, *Target: Pearl Harbor* (Honolulu, 1950), 35.

³⁵Gary Y. Okihiro, *Cane Fires*, 118–21.

³⁶Okihiro, *Cane Fires*, 124–26; Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (Cambridge, MA, 2001), 54–55.

³⁷Rear Admiral Yates Stirling, Jr., statement to a federal commission on law enforcement in the Hawaiian Islands, 1932, quoted in Wakukawa, *A History of the Japanese People in Hawaii*, 362–64.

planes on the various fields on the Island, close together, so that they might be carefully guarded against possible subversive action by Japanese agents."³⁸ This action, of course, made the planes an easy target for the Japanese bombers on December 7.

The Office of Military Intelligence (OMI) and the Office of Naval Intelligence (ONI) intensified their surveillance programs in the years leading up to the war, and in 1939 the FBI sent Robert L. Shivers to Hawai'i as special agent in charge of the Honolulu FBI office. Shivers received from the OMI and ONI in early 1940 "the names and addresses of all persons whom they considered dangerous to the internal security of these islands and who should be picked up for custodial detention in the event of war."³⁹ The three agencies continued to cooperate in the months ahead, with the FBI investigating all names submitted by army and navy intelligence and preparing custodial detention memoranda where warranted.⁴⁰

Visiting Hawaii in August 1941, Assistant Attorney General Norman M. Littell reported, "The head of the FBI, military authorities, lawyers, judges and others confirmed that the great mass of the Japanese would not go back to Japan if they could; are fearful of Japanese intervention; and that only a small minority of them, who are being watched and are allegedly detectable, would be Japanese fifth columnists

³⁸Report by the secretary of the navy to the president, exhibit 49, U.S. Congress Joint Committee on Pearl Harbor Attack, Hearings, part 24, 1750. The order to group the planes was issued on November 27, 1941. W.F. Craven and J.L. Cate, eds., *The Army Air Forces during World War II: Plans and Early Operations, January 1939–August 1942*, vol. 1 (Chicago, 1948), 194; Samuel Eliot Morison, *History of United States Naval Operations in World War II: The Rising Sun in the Pacific, 1931–April 1942*, vol. 3 (1947; Urbana, IL, 2002), 123.

³⁹Shivers to FBI Director Hoover, 4 Dec. 1941, copy in the Japanese Cultural Center of Hawai'i, Honolulu (hereinafter JCCH), also available online at <http://www.internment.archives.com/archimg/d00254p001.png>.

⁴⁰Ibid. They were also given support in the investigatory effort by the "espionage bureau" of the Honolulu police, organized in January 1941 and composed of four Japanese-speaking officers who investigated security cases referred by the FBI. According to the bureau's chief (Capt. John A. Burns, then head of the vice squad, who in later years was to be elected governor of Hawai'i), Shivers requested that the police provide this assistance since the FBI office was short of personnel and funds sufficient to conduct all the investigatory work required. Their focus was to identify Nikkei and others who might pose a danger of conducting sabotage in the event of war with Japan. Stuart G. Brown, *John A. Burns Oral History Project, 1975–1976* (n.d., privately printed).



In a roundup of Hawaiian Japanese after the attack on Pearl Harbor, these men waited to be fingerprinted by the FBI at an immigration station in Honolulu, February 17, 1942. (Courtesy of the National Archives)

or representatives."⁴¹ Curtis B. Munson, an undercover agent whose report went to the White House, reached a similar conclusion in his report on Hawai'i just days before the Pearl Harbor attack. He stated that there was no "local Japanese" problem in Hawai'i. Most of the Issei were loyal to the United States and would be quiet should war break out, he reported. Munson added that 98 percent of the Nisei would be loyal, according to local FBI agents. He acknowledged that a few thousand aliens and citizens might be disloyal, but those who could be considered dangerous constituted a small fraction of that number and were known to the authorities, who could immediately apprehend them. He concluded that even if the Japanese fleet were to appear off Hawai'i, the "big majority

⁴¹Quoted in Kashima, *Judgment without Trial*, 69.

[of ethnic Japanese in Hawai'i] . . . would be neutral or even actively loyal."⁴²

By December 1, 1941, plans and arrangements had been completed for the apprehension of Japanese aliens as well as German and Italian aliens in the territory of Hawai'i in the event of war.⁴³ In a memo written just three days before the Pearl Harbor attack, FBI bureau chief Shivers outlined the plan that the three intelligence agencies had agreed on and that would soon be put into action:

Since there are over 41,000 Japanese aliens in the Territory of Hawaii, it is obvious that the War Department would not and could not seize approximately a tenth of the population of the Hawaiian Islands and place that number in concentration camps. Furthermore, there are approximately 115,000 American citizens of Japanese ancestry which makes a total of, in round figures, 155,000 people in the Territory of Hawaii of Japanese ancestry against a total population of 430,000. Therefore the seizure of Japanese aliens in Hawaii is a matter of *selectivity*. . . .

[I]t is the considered opinion of this office and the Office of Military Intelligence in Hawaii that if the

⁴²Curtis B. Munson, "Report on the Hawaiian Islands," p. 17, attached to memorandum, John Franklin Carter to FDR, 8 Dec. 1941, Carter file, Franklin D. Roosevelt Library, Hyde Park, N.Y. In a parallel report on the Japanese on the West Coast of the United States, Munson noted that the Nisei were 90 to 98 percent "loyal to the United States if the Japanese-educated element of the *Kibei* is excluded. . . . The *Kibei* are considered the most dangerous element and closer to the *Issei* with special reference to those who received their early education in Japan. It must be noted, however, that many of those who visited Japan subsequent to their early American education come back with added loyalty to the United States. In fact it is a saying that all a Nisei needs is a trip to Japan to make a loyal American out of him. The American educated Japanese is a boor in Japan and treated as a foreigner." Curtis B. Munson, "Japanese on the West Coast," Nov. 7, 1941, RG 210, box 573, National Archives, Committee on Wartime Relocation and Internment of Civilians, reel 3, reproduced at <http://home.comcast.net/~chtongyu/internment/generations.html>. Munson was a Canadian citizen recruited by the Washington journalist John Franklin Carter, who was charged by the president to employ a network of "amateur sleuths, private eyes and personal agents" outside the established intelligence organizations. Munson "provided data on the Vichy Fifth Column in Martinique" before being sent to the West Coast and Hawai'i to report on possible threats from the ethnic Japanese population. Jeffrey M. Dorwart, *Conflict of Duty: The U.S. Navy's Intelligence Dilemma, 1919-1945* (Annapolis, MD, 1983), 162, 168.

⁴³Shivers, memorandum to FBI Director Hoover, 17 Dec. 1941. Copy in JCCH. Plans included organizing thirteen squads of FBI agents, military intelligence officers, and police officers to effect the apprehension of those on the detention list. The squads averaged three men each, augmented as necessary.

leadership of the Japanese alien population is seized, that, of itself, will break the backbone of any Japanese alien resistance. . . . Those aliens who have been listed for custodial detention comprise the alien leadership in Hawaii in every branch of alien activity, namely: businessmen, consular agents, Japanese language school teachers and principals, Buddhist and Shinto priests, and others of no particular affiliation who by reason of their extreme nationalistic sentiments would be a danger to our security as well as others who have seen Japanese military service.⁴⁴

In designing these plans, Shivers went on, the commanding general of the Hawaiian Department and military intelligence sought "to preserve and maintain the respect of the alien populace in the constituted authorities and to maintain the loyalty of the vast majority of the second and third generation Japanese without alienating this group."⁴⁵

Thus, before the war actually began, those on the scene in Hawai'i who were responsible for the security of the islands recognized the loyalty of the majority of the ethnic Japanese population, and they had arranged to ensure that loyalty by apprehending and detaining the Japanese leadership—whether or not there was any evidence of disloyalty on the part of these individuals.

INITIAL SECURITY MEASURES AND INTERNMENTS

Even before the United States had formally declared war, the army and the FBI, working in cooperation with the local police, implemented the plan outlined days earlier. They conducted a series of sweeps in the afternoon and evening of December 7, and without presenting any charges or explanations or, in some cases, even warrants, they moved to arrest the persons on the

⁴⁴Shivers to FBI Director Hoover, 4 Dec. 1941. Italics added. Shivers' numbers differ slightly from official census data.

⁴⁵Ibid.

FBI custodial detention list.⁴⁶ Frequently suspects were not even given time to say goodbye to their families or to secure warm clothing. Yasutaro Soga, the editor of a Japanese-language newspaper, recounts his arrest:

While the evening dusk was gathering, a car with blue lights suddenly stopped in front of our yard. My son, Shigeo, went to the entrance hall to meet the visitors, three military policemen. They were six feet tall and young and wore MP armbands. They said they were taking me to the Immigration Office. I immediately answered, "All right." . . . I was escorted out of the house. My wife came with me as far as the entrance hall and whispered, "Please be careful not to catch a cold." I tried to say something but could not utter a word and silently went to the car. Two of the MPs sat in the front, and one sat beside me in the back with a pistol in his hand.⁴⁷

Similar stories can be found in an increasingly rich literature. For example, the grandson of a Kibei, Kubota, who owned a general store in a sugar plantation village on Oahu's north shore, writes,

It was Monday night, the day after Pearl Harbor, and there was a rattling knock at the front door. Two FBI agents presented themselves, showed identification, and took my grandfather in for questioning in Honolulu. No one knew what had happened or what was wrong. . . . My grandfather was suspected of espionage, of communicating with offshore Japanese submarines launched from the attack fleet days before war began. . . . Kubota was known to have sponsored and harbored Japanese nationals in his own home. He had a radio. He had wholesale access to firearms. Circumstances and an undertone of racial resentment had combined with wartime hysteria in the aftermath of the tragic

⁴⁶According to Kashima, the Justice Department urged the War Department to resubmit warrants for the secretary of war's signature "in order that there may be no question raised as to the validity of the arrests." Townsend to Amberg, special assistant to secretary of war, 9 Dec. 1941, quoted in Kashima, *Judgment without Trial*, 73. Because the provost marshal was unable to provide sufficient transportation, Shivers directed the FBI agents in some cases to use their personal automobiles. On Maui, Moloka'i, and Lana'i, where there were no FBI agents, the apprehensions were handled by military intelligence (G2). Shivers to FBI Director Hoover, 17 Dec. 1941.

⁴⁷Soga, *Life Behind Barbed Wire*, 25.

naval battle to cast suspicion on the loyalties of my grandfather and all other Japanese Americans. The FBI reached out and pulled hundreds of them in for questioning in dragnets cast throughout the West Coast and Hawai'i.

My grandfather was lucky, he'd be let go after only a few days. But others were not as fortunate. . . .⁴⁸

In many cases, the head of the family simply disappeared, and several weeks passed before his family learned he had been interned; in other cases, children were left unattended when both parents were interned.⁴⁹ The sweep teams searched homes and business properties; they regarded the possession of Japanese flags, patriotic literature, swords or other Japanese treasures, or even board games in the Japanese language as ample evidence to detain the owners. Firearms and radio sets were confiscated.⁵⁰

Apprehended in this initial sweep operation, as had been planned, were Japanese priests, officers of community social and charitable organizations, Japanese-language school teachers and principals (some of whom were Kibei), journalists, and others who held influential positions.⁵¹ Included were most of the 234 Japanese consular agents—"individuals of some influence in their local Japanese circles. . . . Generally their duties consisted of aiding Japanese individuals, taking the Japanese census, and filling out many forms required by the Japanese government of its Japanese nationals when they desired to transfer properties, claim estates in Japan, and other similar activities. They also aided in the registering of Japanese babies with

⁴⁸Garrett Hongo, *Volcano: A Memoir* (New York 1995), excerpted online at http://www.english.illinois.edu/maps/poets/g_l/hongo/volcano.htm.

⁴⁹Allen, *Hawaii's War Years*, 137.

⁵⁰Soon after December 7, the military governor formally banned possession by Nikkei of all such items, and searches of homes and business properties continued throughout the war years. The provost courts tried cases involving offenses under these prohibitions. Colonel George Bicknell, "Security Measures in Hawaii during World War II" (typescript), copy in Hawaii War Records Depository, University of Hawai'i Library. See also Okihiro, *Cane Fires*, 210–14. (The board games may still be seen in the RG 494, National Archives files of provost court evidentiary materials.)

⁵¹As of December 4, the detention list included 338 Japanese aliens and nine American citizens of Japanese ancestry. Shivers to FBI Director Hoover, 4 Dec. 1941.

the Consulate."⁵² Ironically, some of the individuals connected with the Japanese consulate, including several Christian ministers, had been helping dual citizens to expatriate from Japan.⁵³ Targeting the elite of the Nikkei community was explicitly designed as a way of undermining the strength of leadership in the various sectors of community life, and not coincidentally it had an intimidating effect on others because of the prominence of the people targeted. The FBI, local police, and military patrols also picked up specific persons, including a small number of German-Americans and Italian-Americans, who were not necessarily leaders of any sort but had been identified by investigations conducted before December 1941 as possibly holding disloyal views or as engaged in suspect activities.⁵⁴ Some persons taken into custody in the initial sweeps were, very simply, the victims of undocumented rumor or gossip that the army command decided to credit rather than risk overlooking a serious potential danger.⁵⁵

Immediately after Congress declared war on Japan, President Roosevelt issued proclamations that designated as "alien enemies" residents who were Japanese citizens. The constitutional and legal rights that these alien residents had enjoyed, as to both person and property, were suspended. On December 7 and 8, the president issued Proclamations 2525, 2526, and 2527, authorizing the attorney general and the secretary of war to take into custody all enemy aliens deemed dangerous to the safety of the United States. The FBI and the army command in Hawai'i

⁵²"Summary of FBI Efforts to Combat Activities Inimical to the United States in the Hawaiian Islands," January 5, 1942. RG 65 Hawaiian Islands, National Archives, 7. There initially was a controversy in the government over the consular agents. The federal district attorney, Angus Taylor, wanted them prosecuted en masse for violation of the foreign agents registration law, whereas the army and FBI resisted, only to intern them later. Taylor and Shivers discussed this history in testimony before the Roberts Commission. Shivers reported in his Roberts Commission testimony, as in his communications with FBI headquarters in Washington—and it was widely acknowledged—that before the Pearl Harbor attack the Japanese consulate had coordinated what in peacetime could be termed merely *intelligence gathering* (even though it involved observations of movements and defenses that any member of the public might see) but in war conditions would be termed instead *espionage*.

⁵³Reverend Yamada, "Struggling within a Struggle" (memoir of a Nisei Protestant minister's activities on Maui during the war period), 5–6, in JERS files, reel 171, Bancroft Library, University of California, Berkeley.

⁵⁴Karl R. Bendetson to assistant chief of staff, memorandum, "Evacuation of Dangerous Enemy Aliens from Hawaii," 30 Jan. 1942, in *American Concentration Camps: A Documentary History of the Relocation and Incarceration of Japanese Americans, 1942–1945*, vol. 8, *Japanese of Hawaii*, ed. Roger Daniels (New York, 1989), n.p.

⁵⁵See Emmons testimony, *infra*, p. 92.

interpreted this authorization as applicable, ad hoc, not only to aliens but to dual citizens as well, including, of course, all Kibei and other ethnic Japanese who were dual citizens. The authorization was subsequently formally amended specifically to include dual citizens.⁵⁶ Within a matter of days, the OMG and its legal staff had overseen the arrest and internment of citizens, including Kibei, treating them identically as they did alien enemies, as a prerogative that they exercised under the authority of martial law.⁵⁷

According to one observer, a Nisei Protestant minister on Maui, the enemy aliens who were interned were "resigned to the fact that it was war, and they could not help themselves as enemies of the United States." On the whole, he wrote, they were grateful for the fair treatment they received. However, the citizens and the younger set of aliens, this observer continued, were

quite resentful. Several of them asked why they were interned, what charges were brought against them. The American spirit of freedom, equality, of the right for a trial by jury, etc., gave them no peace of mind. The war situation was to them no excuse for internment without due process of law.⁵⁸

Such detention of Nisei citizens, especially the Kibei, was endorsed by Lt. Commander Kenneth Ringle of the Office of Naval Intelligence, a leading navy expert on the mainland Nikkei community. Asked to review the Munson Report, Ringle expressed his concurrence but went further in his suspicions of the Kibei, at least those on the West Coast:

[T]here are among the Japanese both alien and United States citizens, certain individuals, *either deliberately*

⁵⁶Adams (War Department) to commanding general, Fort Shafter, radiogram, 11 Dec. 1941, U.S. District Court case no. 730, exhibit C, RG 21, National Archives, San Bruno, CA.

⁵⁷By December 9, those arrested included 345 Issei, 22 Nisei, 74 German nationals, 11 Italian nationals, 19 citizens of German ancestry, and 2 citizens of Italian ancestry (Kashima, *Judgment without Trial*, 72). An Alien Enemy Property Administrator's Office was established, taking charge in 1942 of the holding and disposition of millions of dollars in land, businesses, and other property taken from the 120,000 who were sent away to the internment camps. (Myer, *Uprooted Americans*, 245–56.) In Hawai'i, because in most cases the families of those who were taken into custody or interned remained behind, so that they could maintain their homes and take care of possessions and often of businesses, the seizures of alien enemy property were of limited scope—though of great consequence, no doubt, to the few individuals who were affected.

⁵⁸Reverend Yamada, "Struggling within a Struggle," 7.

placed by the Japanese government or actuated by a fanatical loyalty to that country who would act as saboteurs or agents. This number is estimated to be less than three per cent of the total, or about 300 in the entire United States. . . .

[T]he most potentially dangerous element of all are those American citizens of Japanese ancestry who have spent the formative years of their lives, from 10 to 20, in Japan and have returned to the United States to claim their legal American citizenship within the last few years. These people are essentially and inherently Japanese and may have been deliberately sent back to the United States by the Japanese government to act as agents. In spite of their legal citizenship and the protection afforded them by the Bill of Rights, they should be looked upon as enemy aliens and many of them placed in custodial detention.⁵⁹

In fact, the majority of the Nikkei eventually interned by the army in Hawai'i were taken into custody in this initial period after the Pearl Harbor attack. Whereas new arrests and internments, especially of the Issei, were relatively fewer after that first effort, the Kibei were an exception to the general pattern: much later in the war, they would be subjected to comprehensive surveillance and a new wave of security measures, including evacuation to the mainland (a policy that involved removal and transfer of many Kibei already being held in an internment camp on Oahu). Indeed, this new wave of actions against them did not even begin until several months after the June 1942 Battle of Midway, when U.S. forces decisively destroyed Japan's capacity to bring its forces within range to invade the Hawaiian Islands. Yet the allegation that the Kibei posed a serious security threat did not lose force after that event—and it continued to be a working premise of the army command even after the combat zone had shifted westward thousands of miles away from Hawai'i.⁶⁰

On December 17, ten days after the attack on Pearl Harbor, Lt. General Delos C. Emmons replaced the disgraced General Short as commanding general of the Hawaiian Department. He thus became responsible for the defense of the territory as well as the oversight of martial law. It would soon become

⁵⁹U.S. Department of the Navy, Ringle Report on Japanese Internment, serial no. 01742316 30, December 1941, <http://www.history.navy.mil/library/online/jap%20intern.htm> (emphasis added). For a discussion of Ringle's background and activities, see Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* (Seattle, 1988), 183, 210–13.

⁶⁰See *infra*, text at notes 97 and 98.

apparent that Emmons did not share the views of President Roosevelt or some of his top military advisers in Washington regarding the loyalty of those of Japanese ancestry. In his first public statement to the people of Hawai'i, published in the *Honolulu Star Bulletin* on December 22, 1941, he deplored the "fear and suspicion on the part of employers" that had led to the dismissal of Japanese workers. He warned that "additional investigation and apprehensions will be made and possibly additional suspects will be placed in custodial detention," but "these people are not prisoners of war and will not be treated as such. . . . There is no intention on the part of the Federal authorities to operate mass concentration camps. No person, be he citizen or alien, need worry, provided he is not connected with subversive elements."⁶¹

Yet it was precisely "concentration camps" that were being considered in Washington.⁶² As early as December 19, Secretary of the Navy Frank Knox urged that both aliens and citizens of Japanese ancestry should be removed from Oahu. Secretary of War Stimson, however, recommended that only enemy aliens be removed, and President Roosevelt concurred.⁶³ On January 10, at Knox's urging, the War Department queried Emmons about the "practicability of concentration of local Japanese nationals" on an island other than Oahu.⁶⁴ Emmons replied that "[m]ost families contain alien parents or grandparents mixed with young citizens and numerous small children"; that "there are as many dangerous elements among the [Japanese-Ameri-

⁶¹*Honolulu Star Bulletin*, Dec. 22, 1941, quoted in Yukiko Kimura, *Issei: Japanese Immigrants in Hawaii* (Honolulu, 1988), 222; Also, *Honolulu Advertiser*, Dec. 22, 1941, pp. 1 and 6, quoted in CWRIC, *Personal Justice Denied*.

⁶²See text at notes 73, 100, and 105. The term *concentration camp* was generally used by the military and the administration in Washington in the prewar years and during the war to connote what later came to be called *internment camps*. Beginning with the later years of the war, the term has taken on a more specific association with the Nazi forced labor and death camps. Secretary of the Interior Ickes commented in 1946, "As a member of President Roosevelt's administration, I saw the United States Army give way to mass hysteria over the Japanese. . . . Crowded into cars like cattle, these hapless people were hurried away to hastily constructed and thoroughly inadequate concentration camps, with soldiers with nervous muskets on guard, in the great American desert. We gave the fancy name of 'relocation centers' to these dust bowls, but they were concentration camps nonetheless." *Washington Evening Star*, Sept. 23, 1946. NB: In his opinion for the Ninth Circuit in the *Abo* case, Judge Denman specifically compared the layout of the facilities at the Tule Lake camp, including the gun turrets and barbed wire, to the Nazi camps. *McGrath v. Abo et al.*, 186F. 2d 766 (1951).

⁶³CWRIC, *Personal Justice Denied*, n.p.; Kashima, *Judgment without Trial*, 76.

⁶⁴Provost Marshal General's Office to commanding general, Hawaiian Dept., radiogram, 10 Jan. 1942, in Daniels, ed., *American Concentration Camps*.

can] *citizens* as among the aliens"; and that only "wholesale evacuation of all Japanese and many others" could protect the flow of information. Such an evacuation would be "dangerous and highly impractical" and would result in shortages of shipping and of labor. He further stated, "Any evacuation plan would have serious repercussions on loyalty of citizens of Japanese ancestry." If the War Department nevertheless decided on evacuation, Emmons urged that it be to the mainland.⁶⁵

General Emmons did not ignore or rebuff entirely, however, the pressures for special measures against the ethnic Japanese population. Concerning the fate of the four hundred Nikkei already being held as internees by the army only five weeks after the air assault, Emmons requested that his authority to remove them to the mainland "should be approved at once and broadened to include any suspected Japanese who are now in confinement or who may be apprehended in the future."⁶⁶

On January 17, Emmons was granted this authorization,⁶⁷ but still he dragged his feet. While conceding that it would be "desirable for health, supply and security reasons to evacuate as many Japanese as practical, and as soon as practical," he again cited labor shortages and urged that priority be given to evacuating some 20,000 women and children, other than Japanese, and the approximately 500 Japanese aliens by then interned. Second priority was to go to "as many Japanese with their families as can be transported." Until a large reinforcement of army troops could be sent, Emmons warned, it was "absolutely necessary" that no publicity be given to plans for evacuation or other security action; but "in the event of an assault on Oahu prior to evacuation of large numbers of Japanese," he continued, "plans are ready to immobilize all Japanese in place."⁶⁸

Emmons insisted that his command must have full discretion as to which individuals or groups should be evacuated. He specified further that he wanted that authority to make selections "*without regard to nationality or citizenship*, [though]

⁶⁵Emmons to adjutant general, radiogram, 11 Jan. 1942, in Daniels, ed., *American Concentration Camps*. Emphasis added.

⁶⁶Ibid. It is likely that Emmons reached these conclusions based on briefings from Col. Thomas Green, who had been appointed executive for the OMG and had prepared the martial law regime in detail during 1941, before Pearl Harbor, and from the FBI and intelligence service heads. See Scheiber and Scheiber, "Bayonets in Paradise," *passim*, for a discussion of Green's role.

⁶⁷Adams to CG, Hawaiian Dept., 17 Jan. 1942, in Daniels, ed., *American Concentration Camps*.

⁶⁸Emmons to adjutant general, radiogram 2071, 4 Feb. 1942, in Daniels, ed., *American Concentration Camps*.

giving normal priority of evacuation to aliens."⁶⁹ His reference to authority to treat citizens in the same way as aliens was an ominous portent for the Kibei population at large, not only the small number already picked up and being held as internees—as it was ominous, too, for German-American and Italian-American citizens who had been arrested and interned along with the ethnic Japanese.⁷⁰

While assigning high priority to security measures specifically targeted at the Nikkei population—citizens and aliens alike—Emmons succeeded in turning aside the pressures to remove all Hawaiian residents of Japanese descent to Moloka'i or some other location remote from Honolulu. These pressures were coming repeatedly from the navy, the White House, segments of the civilian population, and even some of his army superiors. Army and navy officers in the islands, no less than the civilian leadership in Washington, were deeply fearful—not without good reason, as captured Japanese war plans documents would later reveal—that the air attack on Honolulu would be followed by an invasion force launched from a Japanese carrier fleet.⁷¹ Hence the focus of much of the secret radio traffic between the army command in Hawai'i and the War Department concerned the invasion threat.

An immediate augmentation of the army forces on the islands was needed, Emmons stated, not only to repulse an invasion force but also to deal with "any Japanese civilian uprising combined with organized sabotage. . . ." These latter dangers, he radioed, "will most likely occur simultaneously, particularly if [the Japanese] population thinks attack will be successful."⁷²

On February 12, 1942, General George C. Marshall, army chief of staff, recommended that "[a]ll Japanese residents of the Hawaiian Islands (whether U.S. citizens or aliens) be transported to the U.S. mainland and placed under guard at a concentration camp in such locality as is most suitable."⁷³ A few days later, Knox personally urged on President Roosevelt the need

⁶⁹Ibid. (it. ad.)

⁷⁰The number of Nikkei interned is cited as 402 by Maj. K.E. Bendetson, memorandum for the assistant chief of staff, War Plans Division, 30 Jan. 1942, in Daniels, ed., *American Concentration Camps*. At least 25 of the 402 were American citizens.

⁷¹John J. Stephan, *Hawaii Under the Rising Sun: Japan's Plans for Conquest after Pearl Harbor* (Honolulu, 1984).

⁷²Emmons to adjutant general, radiogram no. 21669, Feb. 1942, in Daniels, ed., *American Concentration Camps*.

⁷³Quoted in Robinson, *By Order of the President*, p. 148.

for mass evacuation of Hawai'i's Japanese. Roosevelt replied on February 26,

Like you, I have long felt that most of the Japanese should be removed from Oahu to one of the other islands. . . . I do not worry about the constitutional question—first, because of my recent order [Executive Order 9066] and, second, because Hawaii is under martial law. The whole matter is one of immediate and present war emergency.⁷⁴

Roosevelt authorized Knox and Stimson to make the necessary arrangements. Within a week, however, Stimson had concluded that mass evacuation was impractical, and Emmons was left to decide on whom to evacuate, with the number 20,000 being accepted by the president.⁷⁵

Emmons would remain steadfast in his opposition to any mass removal and internment policy comparable to what the army instituted on the West Coast of the mainland under Executive Order 9066, confirmed by congressional legislation. It was not until February 20, 1942, that an initial group of 172 internees being held at Sand Island were sent to camps on the mainland.⁷⁶

THE INTERNMENTS

The several hundred enemy-alien residents, foreign-born citizens, and Kibei who had been identified as possible security risks and incarcerated from December 1941 through February 1942 were subjected to hastily convened army-supervised hearings. After being arrested, usually by the FBI but many by

⁷⁴President to the secretary of the navy, memorandum, 26 Feb. 1942, PSF confidential file, FDR papers, Franklin D. Roosevelt Library, Hyde Park, N.Y. Executive Order 9066, signed February 19, authorized the exclusion of persons from prescribed military areas and their removal to relocation centers. Roosevelt had also met the previous month with Supreme Court Justice Owen Roberts, chair of Roosevelt's commission to inquire into the circumstances leading to the Pearl Harbor disaster; although there is no record of their conversation, Roberts had made it clear to Secretary of War Stimson that the Japanese population in Hawai'i constituted a "menace." The Roberts Commission report, made public January 24, did not contain such language, but the media's discussion of the report inflamed anti-Japanese fervor. Robinson, *By Order of the President*, 95–98.

⁷⁵Robinson, *By Order of the President*, 151; Stetson Conn, Rose C. Engelman, and Byron Fairchild, *Guarding the United States and Its Outposts* (Washington, DC, 2000), 210.

⁷⁶Kashima, *Judgment without Trial*, 78; Soga, *Life Behind Barbed Wire*, 226.

the police or the army, most of the suspects were taken into custody by the military authorities at the Immigration and Naturalization Service (INS) immigration station in Honolulu, where they were temporarily detained. Others were locked up in the Kalaheo Stockade and county jails in Kaua'i, at the Kilauea Military Camp on the Big Island of Hawai'i, or at an internment camp in Haiku, Maui.⁷⁷

They were then sent before hearing boards—first a board of intelligence officers from the army, navy, and FBI, and then a review board that included three Caucasian civilians and two army officers.⁷⁸ At the hearings, the detainees were not informed of the specific charges against them. They also had no right to examine the evidence against them (which usually included a summary of FBI investigative findings) and had limited access to legal counsel. They were questioned about friends and relatives in Japan, any participation in Japanese consular activities or social events, and whether they had made donations of money, food, or clothing to Japan. The hearings varied considerably in scope and could last fifteen to twenty minutes or several days, during which time many detainees were unable to contact their families or even to obtain basic necessities for comfort. The provost marshal's office set forth general guidelines for the hearing boards that emphasized "CITIZENSHIP, LOYALTY, and the INTERNEE'S ACTIVITIES. . . . Keep in mind that these hearings are informal; that the Internee is not heard as a matter of his rights and that it is desired that these records be expedited."⁷⁹

It is little wonder, then, that many of the detainees felt that the hearings were, at best, pro forma. One Hawaiian Kibei recalled,

[The] FBI asked me to go with them to the Department of Immigration for a little while to answer a few questions. When we reached the Department of Immigration building I was put behind bars for several weeks and no questions were asked of me. We had our meals out in the yard enclosed by walls under armed guards with their rifles drawn. All the time I was there I was not told why I was being held behind bars and neither the FBI nor

⁷⁷CWIRC, *Personal Justice Denied*; Roland Kotani, *The Japanese in Hawaii: A Century of Struggle* (The Official Program Booklet of the Oahu Kanyaku Imin Centennial Committee, 1985), 91; Allen, *Hawaii's War Years*, 136; Japanese Cultural Center of Hawai'i, *Never Again: Executive Order 9066 to Honouliuli*, program commemorating the 65th anniversary of Honouliuli, March 2, 2008 (pamphlet), 7.

⁷⁸Kashima, *Judgment without Trial*, 73–74.

⁷⁹Quoted in Allen, *Hawaii's War Years*, 135.

the Immigration officer asked me any questions. After this I was sent to Sand Island and remained there for six months. It was during my stay at Sand Island [that] the FBI [took] me to the Federal Building where the FBI and military officers question[ed] me. They put their guns on the table in plain view, like a threat. I felt they were interrogating me as though I were a spy—but I was not. The FBI and military officers told me that since America was at war with Japan and because I was raised in Okinawa, Japan and regardless that I was an American citizen, I was an internee (P.O.W.)⁸⁰

Another internee testified,

The hearings were in reality, merely individual interrogation of suspected "bad Japs." The officer asked several pointed questions which required a yes/no answer. If I answered affirmatively when asked whether I am loyal to the United States, they would accuse me of being a liar. But if I had said no, then I would be thrown in jail. I felt there was no way I could be considered a loyal American.⁸¹

Many of those who were interned would subsequently complain at their loyalty hearings of the way they were detained and interrogated, with their protestations of loyalty being disregarded.⁸² Not a single one of the internees was found guilty of overt acts against U.S. laws, no one was investigated for sabotage, and only a few were suspected of espionage. Rather, the internees were judged "on personalities and their utterances, criminal and credit records, and probably nationalistic sympathies."⁸³ Those who were not released or paroled were moved to Sand Island, near Pearl Harbor. There the prisoners were held, in extremely primitive facilities, under tight security, under a regime of discipline that reinforced with intimidating rules the fears that came with not knowing how long they

⁸⁰Testimony by Mitsunobu Miyahira in CWIRC, *Personal Justice Denied*.

⁸¹Testimony of Kwantoku Goya, in *ibid*.

⁸²"Summaries of the Activities of Persons of Japanese Ancestry, since Arriving on the Mainland after Evacuation from Hawaii, Who Are Now Residing at the Tule Lake Center, Newell, California," July 2, 1945. RG 210, box 280, folder 39.034, National Archives. See also *infra*, pp. 51 ff.

⁸³U.S. Congress, Joint Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st and 2^d sess., 1946, part 35, p. 570, quoted in Allen, *Hawaii's War Years*, 134.

would be held, where they might be sent, or, as some testified they thought, whether they were to be killed.⁸⁴

As of February 8, 1942, the army thus held in internments in Hawai'i 518 citizens and enemy aliens.⁸⁵ Kibei and other Nikkei were held in Hawai'i, in legal status designated as "internees" under army control as an exercise of martial law policies. On February 21, 1942, the army began sending the Sand Island internees to the mainland. Included in the initial transport were 156 Issei and 16 Nisei, along with 26 German and Italian aliens and citizens.⁸⁶

Army officers at the OMG were soon made to realize that the military regime lacked formal legal authority to remove citizens; there was nothing comparable to what the president and Congress had given to the Western Defense Command to empower it to carry out the mass removal and internments from the West Coast mainland states. On March 3, 1942, Colonel Archer Lerch, deputy provost marshal general, therefore advised the adjutant general,

It is believed advisable that hereafter no United States citizens be transferred to the Mainland. Legal status of internees under martial law probably cannot be successfully questioned so long as individuals are detained in Territory. Legality of detention of citizens under internment order issued in Hawaii questionable when internees transferred to Mainland.⁸⁷

A month later, Secretary of War Stimson wrote in his diary,

As the thing stands at present, a number of them have been arrested in Hawaii without very much evidence of disloyalty, have been shipped to the United States, and are interned there. McCloy and I are both agreed that this was contrary to law; that while we have a perfect right to move them away from defenses for

⁸⁴Soga, *Life Behind Barbed Wire*, passim. The internees were housed in tents that they had to erect themselves for the first six months, until barracks were completed. JCCH, "Never Again," 7.

⁸⁵Headquarters Hawaiian Dept. to adjutant general, 8 Feb. 1942 in Daniels, ed., *American Concentration Camps*.

⁸⁶Provost marshal general to chief of staff, War Department, 28 Feb. 1942, RG XXX, Kashima, *Judgment without Trial*, 78.

⁸⁷Lerch to adjutant general, 3 March 1942, in Daniels, ed., *American Concentration Camps*.

the purpose of protecting our war effort, that does not carry with it the right to imprison them without convincing evidence.⁸⁸

Only through its general authority under martial law in the islands did the army have the legal power to intern citizens or dual citizens in Hawai'i. The Nisei were, consequently, returned from the mainland to the Sand Island Detention Station in August 1942.⁸⁹ Thus, although some Nisei citizens or dual citizens were transported to the mainland in the first year of the war, once the Department of Justice, in 1942, refused to accept citizens, only aliens were sent formally as "internees" thereafter.⁹⁰ Nisei internees, including Kibei, would be held in the territory of Hawai'i, most of them at Sand Island, until March 1943, when most of the Kibei still in custody there would be transferred to a newly opened internment camp that was hastily built at Honouliuli, near the town of Ewa.⁹¹ Honouliuli, like Sand Island, was heavily patrolled and ringed with barbed wire, but the internees were allowed family visits twice per month.⁹² However, as we shall see below, Kibei and other Nisei continued to be transferred to the mainland, "released" into the custody of the War Relocation Authority rather than as internees in the Justice Department camps, but incarcerated nonetheless.⁹³ Internees requesting repatriation to Japan were subsequently transferred to the Tule Lake camp.⁹⁴

Meanwhile, in the fall of 1942, military intelligence officers began investigating all Kibei in the islands who had not yet been arrested or detained. Said one young Kibei who subsequently volunteered for military service,

⁸⁸Stimson diary, April 7, 1942, quoted in CWIRC, *Personal Justice Denied*.

⁸⁹CWIRC, *Personal Justice Denied*.

⁹⁰U.S. Army, *History of the U.S. Army MIDPAC*, quoted in Allen, *Hawaii's War Years*, 138.

⁹¹See, for example, William Gordon, "WWII Internment Camp Revisited," *Honolulu Advertiser*, <http://the.honoluluadvertiser.com/article/2008/Mar/03/ln/hawaii803030363.html> (includes video of the return of a small group of survivors of the internment to the site, being surveyed for designation as a park or monument). The internees called the camp "Hell Valley" because of the intense heat that characterized the weather in the local area. Ibid. Some Japanese prisoners of war were also held there.

⁹²JCCH, "Never Again," 11.

⁹³See section "Evacuation," *infra*.

⁹⁴For a discussion of the Tule Lake camp, see *infra*, pp. 54 ff.



Most of the Kibei still in custody at Sand Island in 1943 were transferred to the newly opened internment camp at Honouliuli (above), near the town of Ewa. (Courtesy of Japanese American Relocation & Internment: The Hawai'i Experience Collection, Japanese Cultural Center of Hawai'i. Photograph by R.H. Lodge)

I was really surprised they knew so much. I mean, I was only a sixteen-year-old young punk that just came back from Okinawa two years before the war. And why they were keeping dossier on me, I don't know. Because I didn't do anything, outrageous things in the two-year period. Somehow, they keep track of me, I guess. They know some of the things I don't remember, I forgot. That really shake me.⁹⁵

Those who were arrested were subjected to intensive questioning; they were asked, for example, if they would follow orders to bomb the Imperial Palace with the emperor there or, in the case of a Japanese invasion on the beach, if they would shoot toward the beachhead or toward the defending American soldiers. The military officers in charge rendered judgments that appear to have been arbitrary in

⁹⁵Interview of Takejiro Higa, "The Hawai'i Nisei Story: Americans of Japanese Ancestry During WWII," Center for Oral History, University of Hawai'i, 2006, <http://nisei.hawaii.edu>.

many cases, deciding to intern one Kibei while releasing another with a virtually identical personal history. For example, among the adverse factors reported in the case of one suspect who was interned was "subject is a kibei with all the characteristics of the type"—a characterization that was neither detailed nor clarified.⁹⁶ Although the decisive U.S. naval victory in the Battle of Midway virtually eliminated the likelihood of a Japanese invasion of Hawai'i, the military still regarded the Kibei as a particular threat. Because of their "possible relationship with certain Japanese authorities" before they returned home to Hawai'i, said one intelligence official, they are "necessarily suspicious" and "their mission [sic] in the United States is not clear and must be regarded with suspicion."⁹⁷ Despite such suspicions, the searches of Kibei homes on the islands of Oahu, Maui, and Hawai'i failed to produce any evidence of a dangerous anti-American character.⁹⁸ Nevertheless, the pressures to evacuate the Kibei and other allegedly dangerous Nikkei from Hawai'i continued.

THE EVACUATION POLICY: DECEMBER 1942 TO MARCH 1943

As noted above, the first transfers of Hawaiian internees, including both aliens and citizens, to the mainland began in February 1942. A second ship bearing 166 internees departed on March 19 and a third with 109 internees on May 23.⁹⁹ Despite the concerns of the adjutant general's office, or perhaps ignorant of these concerns, the U.S. joint chiefs of staff and the president recommended on March 13 that "such Japanese residents of the Hawaiian Islands (*either United States citizens or aliens*) as are considered by appropriate authority in the Hawaiian Islands to constitute a source of danger be transported to the U.S. mainland and placed under guard in concentration camps." Conceding that Emmons should have the final authority, General Dwight D. Eisenhower, assistant chief of staff, wrote, "Only, repeat only, those persons ordered interned

⁹⁶Kashima, *Judgment without Trial*, 82.

⁹⁷E.J. Crane, HQ, Maui Service Command, Oct. 27, 1942, quoted in Kashima, *Judgment without Trial*, 81.

⁹⁸Kashima, *Judgment without Trial*, 82.

⁹⁹Soga, *Life Behind Barbed Wire*, 226.

by you will be evacuated."¹⁰⁰ In his reply, Emmons said that it was impossible to state definitely the number of Japanese to be interned and sent to the mainland, as continuing investigations were necessary to clarify the status of the suspects. His "[p]resent estimate of Japanese to be evacuated and interned was 1,500 men and 50 women. . . . However, circumstances may arise at any time making it advisable to raise this estimate to much larger figures."¹⁰¹

Assistant Secretary of the Army John McCloy¹⁰² visited Hawai'i in March 1942 and came away convinced that both the army and the navy officers on the scene in Hawai'i were justifiably opposed to mass evacuation of the Nikkei. He further acknowledged that any such mass evacuation to either an outlying island or the mainland was impractical because of the lack of shipping, the importance of the Japanese labor force, the lack of facilities on the mainland, and "the political repercussions on the West Coast and in the United States generally to the introduction of 150,000 more Japanese."¹⁰³ McCloy publicly stated for the Honolulu newspapers of March 27 and 28 that mass evacuation of the ethnic Japanese was impractical and was not contemplated, and by April 3, McCloy and the army's Operations Division seemed to accept Emmons' recommendation for evacuating the 1,500 men considered dangerous.¹⁰⁴

Neither Secretary of the Navy Knox nor the president himself, however, was willing to abandon the idea of large-scale evacuations. On April 20, Knox again advocated "taking all of the Japs out of Oahu and putting them in a concentration camp on some other island."¹⁰⁵ A month later, McCloy wrote to General Emmons, "Both the President and the Secretary of the Navy continuously refer to the desirability of moving Japanese from the Island of Oahu to some other Island rather than to bring any numbers of them to the United States." McCloy was

¹⁰⁰Eisenhower for adjutant general for dispatch to commanding general, Hawaiian Department, memorandum, 18 March 1942, in Daniels, ed., *American Concentration Camps*. Italics added.

¹⁰¹Emmons reply quoted in memorandum from Eisenhower to Asst. Secretary of War McCloy, 3 April 1942, in Daniels, ed., *American Concentration Camps*.

¹⁰²Following the Pearl Harbor attack, Secretary of War Stimson put McCloy in charge of the "security problem" in Hawai'i and on the West Coast. In this capacity, McCloy had direct authority over Hawai'i and the Office of the Military Governor. He was a principal architect of the plan to intern the mainland Nikkei.

¹⁰³McCloy for Gen. Eisenhower, memorandum, 28 March 1942, quoted in Conn et al., *Guarding the United States*, 211.

¹⁰⁴OPD for ASW, memorandum, 3 April 1942, quoted in Conn et al., *Guarding the United States*, 211.

¹⁰⁵Quoted in Conn et al., *Guarding the United States*, 211.

resisting any such change because of the difficulties involved. "However," he wrote, "the matter has not come to rest and the thought now is that if the number that were to be moved were to be limited, say, 10,000 or 15,000, the practicability of moving them to Hawaii [the Big Island] would be apparent. . . . I feel I should send you warning that this subject may crop up again and that you might be thinking of it."¹⁰⁶ Emmons remained unswayed. "I think we can counteract any such suggestions by logic when the time comes," he replied to McCloy.¹⁰⁷

Nevertheless, Emmons and his staff did begin working on plans that would remove some additional Nikkei from the Territory of Hawai'i. In late June, Emmons proposed that those who constituted an economic drain on the war effort, as well as families of internees already on the mainland, be *voluntarily* evacuated to the mainland.¹⁰⁸ The War Department assured Emmons that it had now abandoned the idea of mass evacuations of aliens and citizens of Japanese extraction. "It is realized, however, that there are certain groups of Japanese in Hawaii who are either believed to be dangerous or are most likely to become so during any period of invasion or immediate threat of invasion." Thus, Emmons was told, the War Relocation Authority had made provision for up to 15,000 evacuees from Hawai'i in relocation centers on the mainland. "These centers are not, repeat not, internment camps but instead are resettlement areas with housing facilities and opportunities to work provided by the government."¹⁰⁹

On July 17, in a memorandum rescinding the policy of evacuation approved by the president in March, the War Department made explicit the distinction between internment and the relocation centers:

No United States citizen of any derivation whatsoever, either naturalized or native-born, now residing in Hawaii, and considered . . . to constitute a source of danger to our national security, will be transferred to the continental United States for internment. Such individuals will be

¹⁰⁶McCloy to Emmons, 18 May 1942, in Daniels, ed., *American Concentration Camps*.

¹⁰⁷Emmons to McCloy, 15 June 1942, in Daniels, ed., *American Concentration Camps*.

¹⁰⁸Conn et al., *Guarding the United States*, 212. Italics added.

¹⁰⁹Thomas Handy, memorandum for War Department for transmittal to Emmons, 27 June 1942, in Daniels, ed., *American Concentration Camps*. See *infra*, pp. 35–40, for further discussion.

interned in the Hawaiian Islands under authority vested in the Military Governor.¹¹⁰

At the same time, Emmons was authorized to evacuate to WRA facilities (not for internment) "up to 15,000 persons, in family groups, from among the United States citizens of Japanese ancestry who may be considered as potentially dangerous to national security."¹¹¹

Emmons continued to refine his plans into the fall months, maintaining his focus on the families of internees and those who were a drain on the economy.¹¹² In October he wrote that he wished the evacuation to be "ostensibly on a voluntary basis." Apparently concerned about the welfare of the evacuees, he requested information on the availability of schools and hospitals, the type of employment that would be available, and the type of shelter and location of the relocation centers.¹¹³ A few days later, Emmons was authorized to proceed with an evacuation of up to 3,000 for the present, although a total of 15,000 was approved for the long run. He was assured by General Marshall that he had full authority as military governor and by presidential order to evacuate "any alien or citizen Japanese you deem potentially dangerous." However, Marshall deemed it "undesirable and unnecessary" to make the evacuation voluntary.¹¹⁴

The OMG never conceived of the evacuation policy as a first step for mass internments or removals. In formal terms, the program as announced was intended to transfer out of Hawai'i, in a series of removals, groups of individuals selected for evacuation "who are either non-productive [to the wartime economy] or who are potentially dangerous in the Islands but

¹¹⁰J.R. Deane, general staff, to McCloy, 17 July 1942, in Daniels, ed., *American Concentration Camps*.

¹¹¹*Ibid.*

¹¹²Conn et al., *Guarding the United States*, 214.

¹¹³Emmons, paraphrase of radiogram dated Oct. 2, 1942, in Daniels, ed. *American Concentration Camps*.

¹¹⁴Marshall, paraphrase of secret War Department radiogram, Oct. 7, 1942, in Daniels, ed., *American Concentration Camps*.

not dangerous on the Mainland."¹¹⁵ On the mainland, it was explained, the people removed would no longer be able to conduct espionage or engage in sabotage near the sites of sensitive military and naval operations such as were located in Hawai'i.

The initial detailed evacuation plan, dated December 1, 1942, anticipated that some 3,250 persons would be evacuated. The largest group selected for evacuation was fishermen (mostly Issei), now banned by the military from going out on the water lest they conduct surveillance for the enemy. Because the fishermen had specialized skills, not adaptable to other employment in the islands, OMG staff feared that they would need public relief and thus become a financial burden for the military government. This group, including families (with an average of six children), would number an estimated 2,000; thus it was nearly two-thirds of the projected total of 3,250 to be evacuated.¹¹⁶ The second largest group in the plan was to be composed of Kibei and their "small families," for a total of 475. The Kibei, who were U.S. citizens, had been detained and then interned in Hawai'i; they were included in the broad category of security risks.

Voluntary (or non-voluntary, as you wish) relocation of citizen internees and their families has been, in most cases, after a conference between the internee and his wife resulting in their joint decision to be evacuated. The internee's case is then considered in view of the recommendation for release on the mainland before evacuation by this office.¹¹⁷

¹¹⁵This quotation as to the program's intentions and details is taken from a December 1942 report written by Edwin Arnold, who was sent by the War Relocation Authority to Hawai'i: Edwin G. Arnold, special assistant to the director, to Dillon S. Myer, War Relocation Authority, memorandum, 16 Dec. 1942, RG 210, entry 17, box 3. The report attaches a memorandum from Captain Blake of the Contact Office of the Military Intelligence Division of army headquarters in Honolulu to Lt. Col. Bicknell, "Review of Evacuee Transfer," 1 Dec. 1942. According to Arnold, Blake and Bicknell, along with Col. Fielder, were responsible for the evacuation policy. Emmons insisted that no Nikkei sent to the mainland should be permitted to repatriate to Japan, since if returned to Japan they could become a source of sensitive intelligence for the Japanese military on Hawai'i-based operations. Secretary Stimson accepted this position, to the discomfiture of State Department officials who had counted on using repatriation as a means of effecting exchanges for American citizens being held in Japan and caught by the outbreak of war. P. Scott Corbett, *Quiet Passages: The Exchange of Civilians between the United States and Japan during the Second World War* (Kent, OH, 1987), 83-85.

¹¹⁶Blake to Bicknell, memorandum, "Review of Evacuee Transfer," 1 Dec. 1942, RG 210, entry 17, box 3, National Archives.

¹¹⁷Ibid.

Among the others targeted for evacuation were a small number of individual Kibei and 225 aliens who had requested repatriation to Japan; all Japanese aliens (legally, alien enemies) who were interned in Hawai'i and their families; and the families of selected Japanese aliens who had previously been removed and were interned on the mainland. The families, in both these latter categories, were formally designated "voluntary evacuees."¹¹⁸

The evacuations based on this plan began in November 1942. Actual evacuations, however, fell far short of the initial goal of 3,250, though not so much with regard to the Kibei who had been targeted. Although it lasted only a few months, the evacuation program did transfer to the mainland "313 persons formerly interned in the territory of Hawaii, who together with their families and 26 other family units, numbering 1,040 in all, were evacuated in late 1942 and early 1943."¹¹⁹ Of those transferred, 88 percent were Nisei citizens, 356 of whom were adult men, including Kibei.¹²⁰ The program ended in March 1943, when the evacuations were abruptly halted.¹²¹

The evacuation to the mainland was, according to one army official, "primarily for the purpose of removing non-productive and undesirable Japanese and their families from the Islands" and "largely a token evacuation to satisfy certain interests which have strongly advocated movement of Japanese from the Hawaiian Islands."¹²² At a later time, during late 1944 and into 1945, the OMG would inaugurate a similar removal program, but with a different legal template and under the rubric *exclusion* rather than *evacuation*.¹²³

¹¹⁸Ibid.

¹¹⁹Richardson to commander in chief, Pacific Ocean Area, draft memorandum, "Return of Hawaiian Evacuees to Homeland," 18 March 1945, RG 494, entry 11, box 32, National Archives. Michi Weglyn states that a total of 1,037 were evacuated, including 912 citizens. Michi Mishiura Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (1976; Seattle, 1996), 88.

¹²⁰The evacuees included 493 children under the age of nineteen and 217 adult women. Of the women, 137 were Nisei, including 21 single women. WRA, Department of the Interior, *The Evacuated People: A Quantitative Description* (Washington, DC, n.d.), 206.

¹²¹Ibid.

¹²²McFadden to Bendetsen, memorandum, 19 Nov. 1942, quoted in CWRIC, *Personal Justice Denied*.

¹²³This later program, which had the same intent and much the same practical impact on Kibei and their families, is discussed below, pp. 71–73.

The Hawaiian internees, mainly Kibei,¹²⁴ who chose evacuation to the mainland rather than continued internment, had been promised they would be released, and, as an army official later stated, they were "under the impression that [they] . . . would be free of all restrictions except as to residence within the west coast area." The summaries of their files read, in most cases, "Released from internment at the time of his departure from the territory of Hawaii to the Mainland of the United States"—hence the name "gangplank" releases.¹²⁵ Before being released from internment, each internee had to sign a waiver of the right to sue the government for detention.¹²⁶ According to one account,

I was coerced—intimidated—into signing that statement. I was told that if I didn't sign, I would again lose my freedom.¹²⁷

According to an interview with another Hawaiian Kibei,

One day a Caucasian who talked fluent Japanese came into the [Sand Island] center and told them that they had good news for them. He said the citizens could evacuate to the mainland with their families and that they would be free over here . . . and would get employment. Most of them anticipated doing some farm work. Women and children were told they would be united with their husbands who were interned on the mainland.¹²⁸

The evacuees must indeed have been shocked, given these assurances, when they arrived at the mainland WRA centers at

¹²⁴Records in the WRA database show that 324 Kibei were held in WRA centers. See n. 28, *supra*.

¹²⁵Stanley D. Arnold to commanding general, Western Defense Command, Third Report, Captain Arnold, 7 May 1945. For a description of Arnold's assignment to review the security measures involving Hawaiian Nikkei, see pp. 76–77.

¹²⁶Weglyn, *Years of Infamy*, 88. According to Allen, five individuals brought suit for false imprisonment, but none was a Nikkei. Allen, *Hawaii's War Years*, 137. The authors have also found references to such waivers in other detention cases, notably that of Hans Zimmerman, who refused to sign one and initiated habeas proceedings; in that instance, the army backed down and withdrew its demand for the waiver. Scheiber and Scheiber, "Bayonets in Paradise," 568.

¹²⁷Hank Sato, "Honouliuli Camp," *Honolulu Star Bulletin*, March 18, 1976, quoted in Kashima, *Judgment without Trial*, 85.

¹²⁸"Interview with a Hawaiian Kibei," by Edgar C. McEvoy, Jerome Community Analyst Report No. 113, Sept. 8, 1943, RG 210, National Archives, quoted in Weglyn, *Years of Infamy*, 88–89.

Jerome, Arkansas, or Topaz, Utah, to find themselves in enclosures surrounded by barbed wire and armed guards, with work permits strictly controlled by the authorities and leave to work outside the camps limited to those who passed a security clearance. As the War Relocation Authority subsequently reported in regard to one such evacuee,

At the hearing he stated when they shipped him from detention in Hawaii to the Mainland, he understood they were to be free and was trying to find out at time of registration why he was placed in a camp.¹²⁹

One prominent critic of the entire internment policy has called the Hawaiian evacuation "a surrealistic tale of chicanery and duress, deplorable for its official use of mendacity to abrogate the rights of ordinary citizens blameless of wrongdoing."¹³⁰

The policy for reuniting internees with their families, no matter how well intended, was a mixed picture in its implementation. The families were typically shipped out from Honolulu to the mainland weeks, often months, after the internees had been taken away; and there are many stories of family members who were taken, first in the crowded holds of ships and then on darkened railroad cars and transported, hapless itinerants, from camp to camp on the mainland, a step behind the internees' transfers among camps in the South and the North-western states. Actual family reunification was seldom quickly achieved, and the uncertainties of their fate created painful anxiety for the people so affected.¹³¹

Stringent as the evacuation policy was, especially for the Kibei and their relatives, the army's program did not satisfy the top naval intelligence officers in Hawai'i, nor did it appease others pressing for a stronger policy of removals. Although the persistent demands for a mass internment from Secretary of the Navy Knox had been successfully turned aside by the army, the navy's security and intelligence staffs in Hawai'i remained

¹²⁹War Relocation Authority, "Summaries of the Activities of Persons of Japanese Ancestry, since Arriving on the Mainland after Evacuation from Hawaii, Who Are Not Residing at Tule Lake Center, Newell, California, April 24, 1945." RG 210, box 280, folder 39.034A, National Archives.

¹³⁰Weglyn, *Years of Infamy*, 88.

¹³¹Recollections of former internees and evacuees in oral histories archived in the JCCH; and letters from internees, evacuees, and family members asking for the army's or elected officials' permission to rejoin their family members. The Hawaii Command records also contain correspondence from families seeking reunification with loved ones in the camps, or incarcerated persons seeking early return to their families in Hawai'i.

intransigent in their views. Their position was illustrated in stark form when in late 1943 navy intelligence recommended the evacuation of "thousands and thousands" of Nikkei from three major coastal areas of Oahu in which important naval logistic and operational activities were centered.¹³² This idea was scorned by the OMG's chief intelligence officer, who warned that if the navy's local security officer were permitted any control over policy, "[t]he minute he moves in, three years of effort to promote racial harmony, economic status quo, and domestic tranquility will go by the boards."¹³³

There is every indication, however, that the OMG intended to continue to expand the evacuation program on a modest and gradual basis. Thus it is necessary to ask why so many fewer persons were evacuated than had been planned, and why the program ended so suddenly. The answer seems to lie in part in Emmons' concerns that the Hawaiian evacuees be separated from any Japanese aliens in the camps who were about to be repatriated, and in part in inter-bureaucracy conflicts that owed much to the heavy-handed manner in which the OMG implemented the evacuation procedure—especially with regard to a firestorm of criticism that it drew from Dillon Myer, director of the War Relocation Authority, and his staff.

BUREAUCRATIC CLASHES

An initial problem arose from General Emmons' insistence that Hawaiian evacuees be segregated from Japanese aliens awaiting repatriation in mainland relocation centers or in the camps. Because some of the evacuees had been employed in war-related construction projects prior to their departure, or even simply because they had observed these projects, Emmons and the OMG planners worried that evacuees would divulge sensitive information that could reach the Japanese military. Emmons' demand for separation involved management complexities for the WRA. Furthermore, it irritated WRA Director Myer, who in December 1942 requested of the Department of the Interior that WRA not be required to accept any more Hawaiian evacuees until the OMG clarified whether these evacuees could be permitted to be held in contact with others (even in their own removal groups) who might be scheduled for

¹³²Col. Kenneth Fielder to OMG, memorandum, 21 Nov. 1943, describing the navy intelligence officer's recommendations, RG 494, entry 11, box 35, National Archives.

¹³³*Ibid.*

transfer or released on parole from the relocation centers. As early as November 1942, military officials were suggesting that separate camps might have to be constructed on the mainland for Hawaiian evacuees, but this idea apparently gained little traction because of the costs involved and the delays in timing of evacuations.¹³⁴ In January 1943, the adjutant general notified Emmons that any further evacuations would require the OMG's express approval and must be in accordance with War Department policy.¹³⁵

Meanwhile, relocation center officials were complaining internally that the Hawaiian evacuation was creating problems within their organization.¹³⁶ A letter addressed to Assistant Secretary of War John McCloy from Myer stated,

Our experience at Jerome, where the Hawaiian evacuees are located, has not been good. They have proved to be unwilling workers and about half of them have answered no to the loyalty question number 28 in the selective service registration form. They definitely are not the kind of people who should be scattered among the West Coast evacuees.¹³⁷

The relocation centers were becoming overcrowded, and the newly arrived evacuees from Hawai'i were running into friction with the mainland Nikkei internees who were already being held in these facilities. Legal issues also remained troubling: The WRA lacked formal authority to place Kibei in internment camps or to effect their parole, since, as noted earlier, the evacuees were in custody under authority only of martial law and therefore remained the legal and administrative responsibility of the OMG in Hawai'i. Moreover, the WRA officials had come to the conclusion that evacuation had less to do with protecting Hawai'i's military security than with the OMG unburdening itself at the expense of mainland authorities. Myer and others registered increasingly urgent complaints about the program.

¹³⁴Colonel William Scobey to Dillon S. Myer, director, War Relocation Authority, memorandum, 31 Dec. 1942, RG 210, entry 17, box 3, National Archives.

¹³⁵Adjutant general to General Richardson, OMG, memorandum, 23 Jan. 1943, RG 494, entry 22, box 147, National Archives.

¹³⁶Jerome Relocation Center to Charles Ernst, project director at Central Utah Relocation Center, memorandum, 26 Feb. 1943, RG 210, entry 17, box 3, National Archives.

¹³⁷Myer to McCloy, 27 Feb. 1943, in Daniels, ed., *American Concentration Camps*.

On February 27, Myer requested that McCloy ask Emmons to suspend further evacuations to the mainland.¹³⁸

By the end of March 1943, the bureaucratic tensions that were mounting so dramatically finally forced the OMG to halt the evacuation program. It was officially suspended on April 2, unless the number of internees exceeded Hawai'i's capacity for housing them.¹³⁹ (Eight voluntary evacuees from Hawai'i—family members seeking to reunite with spouses or parents taken to the mainland earlier—entered the WRA centers between May 1943 and September 1944.)¹⁴⁰ So the army legal staff and the security officials in Hawai'i went back to the drawing board in their offices at Iolani Palace to reconsider the policies for removal of internees and for internal security control. As before, the Kibei—being citizens, hence potentially a source of litigation that could undermine the army's powerful hold on both security and general civilian affairs—remained the focus of attention for the OMG and its legal officers.

RACIAL PROFILING, INTERROGATION BY STEREOTYPE, AND LOYALTY

The need for security and defense of the islands—and hence the corollary need for selective internments—remained paramount in the thinking of the OMG throughout the war. Having initially decided that detention, internment, and evacuation of residents of Japanese ancestry would be selective, Emmons (and later his successor, Robert C. Richardson) and the OMG staff had had to determine how best to make that selection. Thus, from the earliest days of the war, the basis for determining the loyalty of the Nikkei—and the potential security risk they posed—became a central, complex, and highly controversial issue for security policy.

The intelligence officers of the army, navy, and civilian security apparatus had all recognized the importance of citizenship

¹³⁸Myer to McCloy, 27 Feb. 1943, in Daniels, ed., *American Concentration Camps*.

¹³⁹Conn et al., *Guarding the United States*, 214.

¹⁴⁰WRA, *The Evacuated People*, 206. The reduced, but apparently unwelcome, flow of new evacuees throughout 1943 led Dillon Myer of the WRA to complain to the OMG in 1944 that "[a]t the present time, we find it very undesirable to accept additional residents at the Tule Lake Segregation Center" and to request that Morrison dissuade voluntary evacuees from applying to join their family members in mainland relocation centers. Dillon S. Myer, director, War Relocation Authority, to Brigadier General William R.C. Morrison, memorandum, 20 Jan. 1944, RG 494, entry 22, box 148, National Archives.

status as well as other factors of diversity in Hawai'i's Nikkei community as a social (and legal) reality, relevant to security policy. They therefore sought to design policies that would take account of the unique characteristics of each subgroup. Dealing with this challenge, the bureaucracy—consisting in the islands entirely of Caucasians, none of whom had expert knowledge of Japanese culture—devised an elaborately rationalized template for what today is termed *profiling*. A nuanced interrogatory protocol would eventually be formulated, based on experience in handling Nikkei who were taken into custody in the initial weeks of the war, in December 1941 and early 1942.¹⁴¹

The army was assigned final responsibility for security and internments under martial law, augmented by an interservice agreement on unified command. As we have seen, in handling loyalty suspects the OMG relied on interrogation sessions with intelligence officers, followed by interviews before a mixed military-civilian loyalty board; this board recommended to the commanding general, for every suspect who was taken into custody, whether to order internment on security grounds.¹⁴² But from the start, in both investigative processes and their interrogations in custody, the Kibei had to bear a greater burden than was borne by others if they were to avoid internment. This was evidenced by the deeply prejudiced profile that was applied to them by administrators, officers conducting arrests, interrogators, and review board personnel.¹⁴³ Hence in the reports of interrogations and board proceedings, when a subject was described as "a typical Kibei," it was a shorthand way of saying that this person was not to be trusted—was at worst disloyal and possibly actively subversive, at best "potentially disloyal." This last phrase was applied routinely, capturing many undoubtedly innocent and loyal suspects in the web of incarceration and evacuation and/or internment.

In a review and analysis of interrogations that had been conducted in the first twelve months of the war, a navy intelligence report declared that "every individual of Japanese

¹⁴¹Although it does not deal specifically with Hawai'i, a detailed discussion of attempts to determine the loyalty of the Nikkei can be found in Muller, *American Inquisition*. Defining *loyalty* is a challenging exercise in any event, whatever the target group under suspicion; and in fact, on the mainland, the authorities in charge of internment used professional psychologists to classify evidences of loyalty and disloyalty in what became an elaborate pseudo-scientific exercise, the impact of which, Muller shows, carried over to the postwar period of loyalty oaths and McCarthyism. See also note 280, *infra*.

¹⁴²See *supra*, section on internments.

¹⁴³Discussed more fully *infra*, pp. 45–47.

ancestry in Hawai'i has been exposed to some Japanese influence," so that a distinction must be recognized between actions by an individual and an "exposure to influences over which he had no control."¹⁴⁴ Judicious evaluation of the factors bearing on loyalty had not always been carried out in the interrogations previously conducted, the authors of the report had found. Among factors to be considered were the following:

- *Family relationships*: The report counseled that while loyalty to family was a strong sentiment among Japanese, circumstances could vary greatly in individual cases.
- *Length of time spent in Japan*: "Motives should be determined," and an individual who made repeated return trips to Japan should be subjected to closer scrutiny than one who had one long period of residence there. Location, too, was important: "Did [the individual] live in strong centers of Japanese nationalism, or was he in a more isolated spot, somewhat removed from this influence?"
- *Education*: The report advised that a person's "current reading habits" and efforts at "self-education," possibly offsetting the influence of Japanese schooling, should be a matter of inquiry.
- *Citizenship*: That a person took the necessary steps to expatriate and renounce Japanese citizenship would be "a strong point," but there were many reasons why a subject might not have taken the complex steps needed to renounce.¹⁴⁵
- *Registration of subject's child(ren) with consul general*: If the subject registered his or her children with the Japanese consulate, thus giving them dual citizenship, it was reason for suspicion. Yet, the memorandum pointed out, a grandparent or midwife may have registered a child without the parent's consent or knowledge.
- *Religion*: The religious beliefs of suspects, the authors of the memorandum had discovered, were a common source of misunderstanding and unfairness to subjects

¹⁴⁴Memorandum, Feb. 25, 1943, 1, Naval Intelligence manual, archived in RG 389, entry 480, box 1722 (lacking cover page but identified by internal reference as issued in February 1943, and by cross-references thereto from the later revision), cited in this article, *infra*, at note 147.

¹⁴⁵It is ironic that some of the men who had helped with expatriation—a program highly unpopular with the Japanese government—through the consulate were among the first to be picked up immediately after the Pearl Harbor raid.

on the part of investigators. More specifically, "numerous cases" were found

in which the agent has listed as an unfavorable factor that "Subject is a Buddhist." . . . The sect to which the individual belongs should be determined. Some Buddhist sects have no more in common with each other than Jehovah's Witnesses and the Presbyterian Church. However, the individual's religion should be considered an adverse point if he is a member of the Izuma . . . [or other] nationalistic Japanese sects.

- *Membership in cultural, sports, or other organizations:* Again, the authors made clear that in many loyalty proceedings the relationship of the suspect to an organization—with a role in soliciting donations for it being considered very different from the lower-rated status of "halfhearted dues-payer"—had not been investigated with sufficient refinement. Many of the organizations had been identified by the ONI as suspect for being overtly pro-Japanese or subversive.¹⁴⁶
- *Financial interests:* The inheritance laws of Japan, it was pointed out, required Japanese citizenship if an eldest son were to be heir to property; there were various Japanese currency and banking rules that tied an investor's stake to the Japanese yen; and bonds paying interest in dollars had been sold widely in Hawai'i. Heavy investments in Japanese government or industry bonds would mean the investor "would have little financial interest in a United States victory" in the war. Other types of financial relationships, it was averred, had to be considered individually.
- *Other issues:* The report considered various other factors that had figured in interrogations and loyalty proceedings. On the negative side, the report included a subject's having a record of extending hospitality to visiting Japanese naval or diplomatic personnel, attending receptions for such visitors, or any record of service as a consular assistant for purposes of handling registration of births or other documents. On the positive side, the authors considered evidence of support for the American war effort through purchase of bonds,

¹⁴⁶The Japanese Cultural Center of Hawai'i collections contain copies of the extensive, detailed reports prepared by the Office of Naval Intelligence (with evaluations in varying depth of alleged disloyal or suspect activities) about the islands' various Japanese organizations.

participation in volunteer activities supportive of the troops, and the like, as indicating loyalty to the United States. Here again, the tone was cautionary: the authors were obviously concerned by the glib and uncritical way in which various past activities and associations of suspects had been labeled "disloyal" or a basis for the designation *potentially disloyal*.

- *Attitudes toward the Emperor*: The report gave this issue extended attention. The memorandum averred that "differentiation should be made between veneration, respect, and loyalty." The attitude of an individual "may have some religious quality, may be purely political, or may be completely objective. Apathy is frequent; hate has seldom if ever, been encountered."

The cautionary tone and relatively moderate content of this navy document are noteworthy on two counts. First, the authors advised intelligence personnel to take a measured, balanced view of the background and beliefs of subjects being investigated or questioned. Second, inferred or explicitly stated in the text is the fact that actual practice had not conformed to these standards and that serious errors of judgment had been made. The authors made it clear that misjudgments and unfairness had resulted in serious injustices to individuals.

Several months later, the navy intelligence office in Hawai'i assumed a very different posture, however, on the question of interrogation protocol and the criteria for evaluating the factors that had been singled out in the earlier publication. This shift in attitude was revealed in a new manual issued by Naval Intelligence, taking a much harsher line in its guidance for investigators and interrogators.¹⁴⁷ The new document left no doubt about its intention on that score, explicitly declaring that the February document "is hereby superseded and cancelled." Now the emphasis was given to the premise that positive evidences of loyalty associated with a suspect should be discounted for a variety of reasons. Whereas the earlier document had systematically expressed caveats about assumptions that could easily be made too hastily and with unfair results, the new manual set forth its recommendations in the template of a racial and cultural stereotype of the Japanese that suggested the high likelihood of a Kibei suspect's being disloyal to the United

¹⁴⁷Manual prepared for persons attached to the District Intelligence Office, Fourteenth Naval District, RG389, entry 480, box 1722, National Archives. The manual bears no date, but its internal references to the earlier manual and to events and memoranda make it likely that it was issued in August 1943 [hereinafter cited as "Navy DIO manual, Aug. 1943"].

States and dangerous to security. Although the new manual did reprint a key passage from the earlier memorandum, counseling that there was no more reality in the concept of a "typical Kibei" than of that of a "typical American," the substantive content of the document ran counter to the notion that stereotyping be abandoned.

The new manual's analysis of Kibei culture and disloyalty is especially illuminating with regard to the invocation of stereotypes by intelligence and security officers more generally.¹⁴⁸ The manual contains, for example, lengthy quotations from a book published in 1907, *Japan: An Attempt at Interpretation*, by Lafcadio Hearn, the Irish-American humorist and ethnographic writer. Cited by the manual's authors as the source of "one of the clearest expositions of the Japanese social structure and psychological pattern," Hearn is quoted to the effect that "the extraordinary capacity of the Japanese for communal organization, is the strongest possible evidence of their unfitness for any modern democratic form of government." The manual's authors also rely on Hearn for a long discussion of the patriarchal structure of the Japanese family and for assertions as to the allegedly unwavering deference of Japanese youth to their elders. "Most of the characteristics of the Japanese family recorded by Hearn have been noted among the Japanese of Hawaii," the manual states. (However, the manual does acknowledge the increasing disintegration of Japanese family patterns, particularly in the urban areas, and a certain degree of role reversal between the Nisei and their Issei parents after the beginning of the war.)

Restricting its attention to those Kibei who spent three or more years in Japan following their twelfth birthday, the manual states that, on the whole,

Kibei will display far more pro-Japanese sentiment than will other Nisei. It is of interest to note that the Japanese community itself considers the Kibei to be the most dangerous class in their midst.

The manual also asserts that the District Intelligence Office of the navy considered those Kibei with long periods of residence in Japan to be "dangerous to the internal security of the United States," having received "most, if not all, of their formal education in Japan, with the concomitant indoctrination of Emperor

¹⁴⁸In fact, transcripts of various interrogations that led to internment decisions that we have examined in the course of this research are riddled with stereotyping of precisely the sort that the navy's manual expresses.

worship and other phases of Japanese nationalism." Family ties, significant period of residency, educational experience, and other aspects of their former residence in Japan, according to the manual, should serve as evidentiary support for a presumption of disloyalty. "Protestations of loyalty to the United States made by Japanese," according to the manual, "should be weighed in the light of the speaker's background and tested by the motives he may have for making such statements."¹⁴⁹

In accord with the manual's bias and instructions, the Kibei were routinely viewed as likely to be conflicted in loyalty by the duties traditionally owed to family and the Japanese state. Accordingly, loyalty interrogation protocol, as set forth in the manual, was calibrated to uncover "potential" disloyalty by testing the subject's willingness to disregard parents or country, rather than simply asking whether the speaker wanted the United States to prevail in military conflict. For example, interrogators had been asking subjects who professed loyalty to the American cause whether they would agree to enlist and take up arms against Japan—and if so, whether they would be willing to kill in combat any relatives who were serving in the Japanese armed forces. Some suspects were asked whether they would assassinate Emperor Hirohito, if given the chance. The manual warned interrogators, on this point, that many who worshiped the emperor—and thereby were to be deemed faithful to the "theocratic-militaristic-totalitarian state that is Japan"—would give false replies to such questions, being "realistic enough to compromise their scruples in order to remain at liberty."¹⁵⁰ One question often put to Kibei that posed an especially serious moral dilemma for them was whether they would be willing to broadcast anti-emperor propaganda on the radio, even though it might jeopardize the safety or lives of the family members living in Japan with whom they were likely to have maintained contact.

In the end, it was virtually a "no-win" game for the persons under interrogation, because intelligence officers began to assess positive answers to these latter questions not as evidence of loyalty to America but rather as evidence of "typical" Japanese deviousness; that is, persons who actually were disloyal had simply learned to give the "right" answers and thus mask their anti-American views.

The attitude and stereotyping that had characterized the early-war security operations and were embodied in the navy manual were also often explicitly exhibited by officers at

¹⁴⁹Navy DIO Manual, August 1943, 60.

¹⁵⁰*Ibid.* 52.

the highest levels of the military hierarchy. For example, in 1942, General DeWitt—the obsessively anti-Japanese officer in charge of the Western Defense Command and the leading proponent of the internment of Nikkei on the West Coast—had argued that all Kibei were, ipso facto, loyal to Japan. DeWitt favored internment for all Kibei for the duration of the war, nullifying their U.S. citizenship, and deporting them to Japan after the war had ended.¹⁵¹ When the War Department reevaluated internment policy in 1944, Lt. General Robert C. Richardson, who had succeeded Emmons in July 1943, would advise the department that, among the 135 Kibei then interned in Hawai'i, some had admitted loyalty to Japan, but about one hundred of them

have either made statements of loyalty to the United States or have made no statements to indicate their loyalty either way, or have made evasive statements. . . . Despite the fact that so many have made statements of loyalty to the United States, it is my opinion based on findings of Hearing Boards and intelligence reports that they are dangerous to the security of the United States and that their utterances of loyalty are inconsistent with their backgrounds and training in Japan.¹⁵²

The OMG staff officers in charge of policy toward the ethnic Japanese in Hawai'i would systematically continue to cast doubt on the loyalty of the Kibei down to the last day of the war in 1945, and even beyond. The attitude of these officers was rooted, no doubt, partly in unvarnished racial prejudice. But their conviction that the Kibei constituted a uniquely dangerous potential threat to security had also been fueled by a viral spread of rumors in December 1941 and early 1942 about alleged sabotage and espionage by persons of Japanese ances-

¹⁵¹Robinson, *By Order of the President* (Cambridge, MA, 2001), 182. DeWitt was notorious for his public statement, "A Jap is a Jap," with regard to the alleged danger posed by the Nikkei on the West Coast. When the government, in 1943, first considered screening West Coast evacuees to ascertain loyalty, the project was hotly opposed by DeWitt, who told the provost marshal general, "There isn't such a thing as a loyal Japanese and it is just impossible to determine their loyalty by investigation—it just can't be done." Telephone call transcript, 14 Jan. 1943, quoted in Muller, *American Inquisition*, 33. DeWitt's role is extensively analyzed by Peter Irons in *Justice at War: The Story of the Japanese Internment* (New York, 1983).

¹⁵²Richardson to Asst. Sec. of War John McCloy, 2 Feb. 1944, in Daniels, ed., *American Concentration Camps*.

try in connection with the Pearl Harbor debacle.¹⁵³ Especially damaging in this regard was a press conference statement by Secretary of the Navy Knox on December 15: "I think the most effective 'fifth column' work of the entire war was done in Hawaii, with the possible exception of Norway."¹⁵⁴ Despite vigorous denials of such rumors by the FBI and others, they persisted both in Hawai'i and on the mainland. Such anti-Japanese sentiment was further fueled by the Roberts Commission report on the Pearl Harbor debacle, made public on January 24, 1942. Although its only reference to subversive activities was the mention of some espionage by Japanese spies in the months before the attack, including some consular agents and others "having no open relations with the Japanese foreign service," the report concluded, "[I]t is now apparent that through their intelligence service the Japanese had complete information."¹⁵⁵ The media focused on this finding as evidence that the Nikkei in America could not be trusted.

Hostile racial attitudes were given further strength, as the war went on, by the extraordinary expansion of security-sensitive military and naval installations and activities in Hawai'i, which was the base of logistic operations for the entire Pacific theater of war; by the reports of the atrocities committed by Japanese forces against Allied prisoners of war; and, perhaps above all, by the news of mounting Allied casualties filtered back to Hawai'i from the western Pacific combat areas, and the arrival of hospital ships carrying the wounded and the bodies of the fallen.

General Emmons, but even more so his successor, General Richardson, adamantly contended that the stringent control exercised by the army over civilian life through martial law—and especially the internments and other security measures target-

¹⁵³For discussion of rumors, see Allen, *Hawaii's War Years*, 47–56, and Roland Kotani, *The Japanese in Hawaii: A Century of Struggle* (Honolulu, 1985), 87–88. Rear Admiral Kimmel had written on December 12, 1941, that "[f]ifth column activities added great confusion" on December 7. Kimmel is quoted in Otto Friedrich, "A Time of Agony for Japanese Americans," *Time Magazine*, Dec. 2, 1991, <http://www.time.com/time/magazine/article/0,9171,974371,00.html>. Lind argues that these rumors were instrumental in the decision for the mass evacuation of Japanese from the West Coast of the mainland. Lind, *Hawaii's Japanese*, ch. 3.

¹⁵⁴Quoted in Kashima, *Judgment without Trial*, 75. On Secretary Knox and his campaign for evacuation and his allegations of sabotage on December 7, see also Roger Daniels, *Prisoners without Trial: Japanese Americans in World War II* (1993; New York, 2004), 37 et passim.

¹⁵⁵The report of the Roberts Commission, headed by Supreme Court Justice Owen Roberts, is available at <http://www.ibiblio.org/pha/pha/roberts/roberts.html>. For a discussion of its impact, see Robinson, *By Order of the President*, 95–97.

ed at the Nikkei community in the martial law context—were responsible for the successful maintenance of internal security. Richardson and his subordinate officers in the OMG presented Washington with all the arguments and political influence they could muster in their resistance to pressures that they relax any policies that were directed at Kibei or other groups' suspected disloyalty and possible subversion. Even as late as April 1945, when the internees from the West Coast mainland states were being released from the camps and the government was beginning to wind down security operations, Richardson's staff officers in Hawai'i were still asserting that the Nikkei population "would *unanimously* prefer Oriental control [of the Territory] and are sentimentally if not actively loyal to Japan"¹⁵⁶—this despite the fact that the Hawaiian Nisei had volunteered in great numbers for active military service and had achieved an exceptional record for valor, with Kibei serving, in particular, as translators and interpreters.¹⁵⁷

LOYALTY, RESISTANCE, AND RENUNCIATION

The matter of determining the loyalty of the Nikkei population, and especially of the Kibei, gained striking new importance in early 1943. Despite an earlier War Department study urging that "the military potential of the United States citizens of Japanese ancestry be considered as negative because of the universal distrust in which they are held,"¹⁵⁸ Assistant Secretary of War John McCloy and the administration decided in January 1943 to create an all-Nisei combat unit and to allow Nisei

¹⁵⁶Captain Stanley D. Arnold to chief, Japanese-American branch, Office of the Provost Marshal General, from "Hawaiian-Japanese," memorandum, 4 June 1945, RG 389, entry 480, box 1723, National Archives. Emphasis added.

¹⁵⁷Of the nearly 32,200 Hawaiian men inducted by the Selective Service, 49.9 percent were Nisei. When the army called for Nisei volunteers in 1943, 40 percent of Nisei men between the ages of 18 and 35 tried to register. Allen, *Hawaii's War Years*, 263–73. Of the 2,000–3,000 Nisei used in army intelligence as translators, 40 percent were Hawaiian. Hazama and Komeiji, *Okage Sama De*, 167. See also Lind, *Hawaii's Japanese*, 187–88. For further information on Hawai'i's Nisei soldiers in World War II, see, among others, University of Hawai'i, "The Hawai'i Nisei Story: Americans of Japanese Ancestry During World War II," <http://nisei.hawaii.edu/page/home>; Masayo Duus and Peter Duus, *Unlikely Liberators: The Men of the 100th and 442nd* (Honolulu, 1987) and Edwin M. Nakasone, *The Nisei Soldier: Historical Essays on World War II and the Korean War* (White Bear Lake, MN, 1999).

¹⁵⁸The report, approved Sept. 14, 1942, is quoted in CWRIC, *Personal Justice Denied*, ch. 7.

to volunteer for the military.¹⁵⁹ In order to effect this dramatic reversal of policy, the army devised a loyalty questionnaire to be completed by all Nisei applicants for military service that would reveal "tendencies of loyalty or disloyalty to the United States."¹⁶⁰ Each applicant's loyalty would then be reviewed by military intelligence and the FBI, with a joint military board making the final decision.

In February 1943, the War Relocation Authority, which had been looking for a means to give leave clearance to some of the evacuees so they could work outside the camps, seized on this procedure to determine the loyalty of all the evacuees being held in their camps, from Hawai'i and the mainland, men and women, Issei and Nisei alike, over the age of seventeen. The WRA accordingly designed a companion questionnaire, "Application for Leave Clearance," that differed only slightly from the army's.¹⁶¹

The questionnaire, forced on the residents of the camps without notice or coherent explanation, created a crisis for many of the confined Nikkei, who did not know why they were being made to answer the questionnaire or how the information would be used. Some Issei were afraid of being cast out of the camps and into hostile environments where they could not survive; some Nisei thought the questionnaire was designed to force them to volunteer to fight for the country that had stripped them of their civil liberties and imprisoned them without cause. The racially segregated all-Nisei combat unit was cited by some as further evidence of continued discrimina-

¹⁵⁹CWRIC, *Personal Justice Denied*, ch.7.

¹⁶⁰Office of Provost Marshal General, memorandum for the record, 9 Jan. 1943, quoted in CWRIC, *Personal Justice Denied*, ch. 7. The origins of the segregation policy were the subject of a memorandum to J. Edgar Hoover, FBI director, dated March 8, 1943, from Edward Ennis, head of the Justice Department's Alien Enemy Control Unit, reporting that an arrangement had been concluded with the WRA "in the interests of promoting the success of a difficult task in administering the war relocation camps involving the detention of citizens and aliens together. . . ." It was agreed "that a limited number of troublesome Japanese aliens would be taken and interned even though their conduct did not establish subversive activity under the standards heretofore applied." Quoted in Richard Drinnon, *Keeper of Concentration Camps: Dillon S. Myer and American Racism* (Berkeley, CA, 1987), 75. Drinnon, a student of the period who is highly critical of WRA Director Myer, stated that this gave "Myer's WRA an open hunting season on Issei 'troublemakers.'" Ibid.

¹⁶¹Dillon S. Myer, *Uprooted Americans*, 71-72; CWRIC, *Personal Justice Denied*, ch. 7; Robinson, *By Order of the President*, 168-69; Kashima, *Judgment without Trial*, 161. Muller, *American Inquisition*, ch. 5; Daniels, *Asian America*, 261-63.

tion. Still others feared that the questionnaire would result in their being separated from their families.¹⁶²

The questionnaires sought biographical information as well as information on such subjects as education in Japan; relatives in, and trips to, Japan; dual citizenship; and memberships in organizations. Particularly troublesome were questions 27 and 28. The first asked, "Are you willing to serve in the Armed Forces of the United States on combat duty, wherever ordered?" Question 28 was even more problematic: "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any and all attack by foreign or domestic forces, and foreswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power or organization?" The Issei were thus being asked to give up allegiance to the only country of which they could be citizens, rendering them stateless; that question was later changed for them, to ask if they would "swear to abide by the laws of the United States and to take no action which would in any way interfere with the war effort of the United States."¹⁶³

As the Commission on Wartime Relocation and Internment of Civilians was to conclude in 1982,

[T]he loyalty questionnaire demanded a personal expression of position from each evacuee. . . . Most evacuees probably had deeply ambiguous feelings about a government in whose rhetorical values of liberty and equality they wanted to believe, but who found their present treatment a painful contradiction of those values. The loyalty questionnaire left little room to express that ambiguity.¹⁶⁴

A significant number of the internees—including the Hawaiian evacuees—originally answered "no" to question 28, or refused to answer, citing the fact that they had been interned. Of a group of 138 Hawaiians who were not subsequently sent to Tule Lake for being pro-Japanese but who were still confined in mainland camps in 1945, twenty-six (nearly one-fifth)—all citizens or dual citizens—refused to answer question 28, or answered negatively because they had been interned. Others gave a qualified "yes," citing their uncertainty because of

¹⁶²For further discussion of these issues, see sources cited in previous footnote.

¹⁶³Myer, *Uprooted Americans*, 72.

¹⁶⁴CWRIC, *Personal Justice Denied*, ch. 7.

their internment.¹⁶⁵ The report on Kunitoshi Marumoto, a dual citizen, was fairly typical of the findings on internees who were not overtly pro-Japanese:

Did not answer Question 28, but appended the following statement, "Has been loyal to US and was willing to pledge allegiance to US but having been suspected and accused by the Govt. of being pro-Japanese and having been interned and retained as an internee after having stated his loyalty to the US and his willingness to defend the US, although he will abide by the laws of the US and will in no way interfere with the war effort it will be impossible to swear allegiance when the Govt. will not recognize it."¹⁶⁶

The plight of the Kibei was particularly poignant. As one mainland Kibei explained,

It was hardly a simple yes-or-no matter. We were members of the same ethnic minority as the issei. . . . Moreover, our two generations were naturally related as members of the same households, as parents and children. . . . To choose the one (pledging one's loyalty to America) meant hoping for the total destruction of the other (Japan), and here lay the cruel ramification of the issue. To pledge our loyalty to America meant collaborating in the killing and wounding of people who lived in Japan, the denial of a personal connection based on a shared culture. This denial was a source of particular anguish for Kibei like myself who were American by birth and citizenship but who had also lived and studied in Japan.¹⁶⁷

For the Kibei who were asked to volunteer for the armed services, there was the very personal dilemma:

My big concern was, what if I meet up with someone I know at the warfront? My relative, my classmate, my

¹⁶⁵War Relocation Authority, "Summaries of the Activities of Persons of Japanese Ancestry."

¹⁶⁶Ibid.

¹⁶⁷Minoru Kiyota, *Beyond Loyalty: The Story of a Kibei* (Honolulu, 1997), 97.

good friends, you know. What [sic] am I supposed to react? That was my biggest concern.¹⁶⁸

For some, renouncing the Japanese emperor, who was regarded as a deity, was especially troubling. As one investigative report on a Hawaiian Kibei stated, "His religious beliefs reveal that he believes Hirohito to be a descendant of the sun Goddess . . . and that anything he does must be right." Therefore, the report continued, in this internee's view Japan would be justified in attacking Pearl Harbor if the emperor approved, and if the emperor broadcast that he should not aid the American war effort, he would obey that order.¹⁶⁹

Some families had one relative fighting in the Japanese army and another in the U.S. Army. While some Kibei were genuinely confused as to how to answer, and others were pressured to say "no" by radical pro-Japanese elements in the camps, others may be assumed to have answered in a manner that would best promote their self-interests and gain them release from internment.¹⁷⁰

The results of the questionnaire varied from camp to camp, with the Tule Lake camp being the most extreme. Some 3,000 internees there refused to complete the questionnaire.¹⁷¹ In total, of nearly 78,000 residents of the WRA camps who were eligible to register, 87 percent responded to the loyalty question with an unqualified "yes." The remainder, including more than 20 percent of the Kibei and other Nisei men, answered "no," refused to answer, or qualified their answers.¹⁷²

¹⁶⁸Interview of Takejiro Higa, "The Hawai'i Nisei Story." Higa, it should be noted, was not interned, but the conflicted feelings he expressed likely pertained to many Kibei of draft age, however loyal. Higa had left Japan to avoid conscription into the Japanese army, but he nonetheless chose to volunteer for the U.S. Army.

¹⁶⁹War Relocation Authority, "Summaries of the Activities of Persons of Japanese Ancestry."

¹⁷⁰Most of those who answered "no" to questions 27 and 28 and were suspected by the authorities of being pro-Japanese were subsequently sent to the Tule Lake internment camp, often being separated from their families in the process.

¹⁷¹CWRIC, *Personal Justice Denied*, ch. 7; Myer, *Uprooted Americans*, 73.

¹⁷²*Ibid.* Of the total, 5,300 answered "no," and more than 4,600 refused to answer or qualified their answer. It is noteworthy that in Hawai'i, where there had not been mass evacuation, nearly 10,000 Nisei—about one-third of draft-age men—volunteered for the army. This expression of patriotism was in marked contrast to the views of the evacuated Nisei. See Jacobus tenBroek, Edward N. Barnhart, and Floyd W. Matson, *Prejudice, War, and the Constitution* (Berkeley, CA, 1954), 168 (noting that only 1,181 Nisei then in the camps, or 6 percent of those eligible in that group, volunteered; the army had hoped for 3,500).

The results of the loyalty questionnaires helped tip the balance in favor of those in the armed services, Congress, and the administration who advocated segregating the "loyal" from the "disloyal" Nikkei. In May, Secretary of War Stimson instructed Myer that the WRA should immediately "screen out from the centers and segregate in close confinement all individuals appearing to have pro-Japanese sympathies."¹⁷³ Although the WRA had earlier objected to the proposal of General DeWitt, head of the Western Defense Command, to segregate all Kibei, Myer now agreed to the new policy, and Tule Lake was selected as the segregation center. The segregants included (1) those who had applied for repatriation to Japan and had not withdrawn their applications by July 1, 1943; (2) those who had answered "no" or had refused to answer the loyalty question; (3) those who had been denied leave clearance because of adverse findings; (4) aliens from the Department of Justice camps who had been recommended for detention; and (5) family members of segregants who elected to remain with the family.¹⁷⁴

Because of the confusion over question 28, a new set of hearings was offered to those who had answered "no" or refused to answer. A number of the Hawaiian excludées changed their answers to an unqualified "yes" when given a second chance, citing, as the reasons for their original answers, confusion, frustration at having been interned, acting under pressure, or fear of being separated from their families. Most of this group were not segregated.¹⁷⁵ Many others, however, adhered to their original answers, expressed anger at the way they had been treated, and asked to be repatriated to Japan. Of the total of 1,037 Hawaiians who had been evacuated to the mainland in late 1942 and early 1943 and had been confined at Jerome, Arkansas, or Topaz, Utah, 340—approximately one-third—were transferred to the Tule Lake Segregation Center. One hundred thirty-one of this number requested repatriation or expatriation to Japan, 180 were sent because of their answers to the loyalty question, and 9 "for other reasons." The total included 165 single persons and 155 in family groups; 327 (260 males and 67 females) were U.S. citizens, presumably mainly Kibei and their

¹⁷³Quoted in Myer, *Uprooted Americans*, 75.

¹⁷⁴*Ibid.*, 76.

¹⁷⁵War Relocation Authority, "Summaries of the Activities of Persons of Japanese Ancestry."

families.¹⁷⁶ Additional transfers of Hawaiian Nikkei brought the total to 656 by July 1944.¹⁷⁷

At Tule Lake, the segregants were subjected to a situation of chaos and intimidation, both from pro-Japanese gangs composed of internees and from the officials running the camp. A large number decided in 1944 and early 1945 to renounce their American citizenship.¹⁷⁸ Hence the course of events at Tule Lake—and especially, for our purposes here, the role of Hawaiian Kibei in those events—requires brief examination and appraisal. Such an appraisal can usefully begin with the fact that by August 1945 at least fifty-five, possibly many more, of the Hawaiian internees at Tule Lake had formally renounced American citizenship.¹⁷⁹ Such renunciation was made possible by the Nationality Act of June 1944, enacted by Congress in response to wartime anti-Japanese sentiment (much of it focused specifically on events at Tule Lake itself). This legislation authorized renunciation by dual citizens who also were citizens of a country at war with the United States.¹⁸⁰

To various government leaders and intelligence officers at the time, the fact that several thousand Tule Lake internees, including these Hawaiian Kibei, had chosen to return to Japan when afforded the opportunity was evidence that these renunciants were thoroughly disloyal, and hence that they had posed a tangible

¹⁷⁶Myer to Farrington, 22 Nov. 1943, RG 210, box 280, folder 39.034 A2, National Archives.

¹⁷⁷"Segregant Population of Tule Lake as of July 1944 by Area of Pre-War (1 December 1941) Residence Compared to 1940 Census of Japanese, and by Place from Which Segregated," WDC-CAD-Research Branch, September 4, 1944, copy in JERS files, reel 170, Bancroft Library, University of California, Berkeley.

¹⁷⁸The history of the Tule Lake Center and the disturbances that occurred there is well documented, beginning with contemporary analyses undertaken by the WRA itself and by the University of California, Berkeley, group of social scientists who studied the removal and internments. A convenient recapitulation of the facts and a concise accounting of the resistance and the renunciations are provided in Donald E. Collins, *Native American Aliens: Disloyalty and the Renunciation of Citizenship by Japanese-Americans during World War II* (Westport, CT, 1985). Documents illustrating the dilemma that renunciation posed for those who were incarcerated, particularly at the Tule Lake Center, are discussed in the recent article by Gwen E. Granados, "The Federal Government and Citizenship: Archival Resources at the National Archives in Laguna Nguel," *Western Legal History* 20 (2007): 73–83.

¹⁷⁹This number may well include those who had indicated a wish to repatriate prior to their removal to the Tule Lake camp. The number of 55 represents those former Hawai'i residents listed as plaintiffs in the *Abo* case and is computed from court filings and other papers found in the Wayne Collins Papers in the Bancroft Library, UC Berkeley. There likely were more than 55 from Hawai'i, but place of residence in 1940 is not given for all plaintiffs in the listing. On the litigation, see *infra*, pp. 82 ff.

¹⁸⁰18 U.S. Code Annotated sec. 801 (1940), 58 Stat. 677 (amended 1944). See discussion in tenBroek et al., *Prejudice, War, and the Constitution*, 315–17; also Collins, *Native American Aliens*, 5–6 et passim.

potential danger to wartime security. Of course, this view was advanced to justify the entire removal and internment program.

To other contemporary observers, however, including some officials closest to the situation on the ground, the Tule Lake story was far more complex. In their view, events were driven only in part by the disloyalty and pro-Japanese sentiments truly harbored by some internees, including those organized into militant pro-Japanese gangs, but other factors were of at least equal importance. Not least of those factors were the confusion, fear, and hostility that were inspired by government actions and, more generally, the lack of respect and the harsh treatment to which the internees had been subjected.¹⁸¹ Among the important factors contributing to the disillusionment of those who said they had once been loyal—including some who had sought in vain to volunteer for combat service with the U.S. forces—were the conditions of pathological social disorder and breakdown of rules enforcement at the Tule Lake Center. In an affidavit placed on record in later legal proceedings, for example, the former assistant project director of the Tule Lake Center recalled that the internees' morale and their sense of loyalty had been eroded by "the frustration and depression" induced, as he wrote,

by living abnormal, regimented lives in an abnormal, regimented government center; the crowded, dismal barracks; the unpalatable food . . . ; lack of privacy in the community lavatories and laundry rooms; the "concentration camp" atmosphere of the daily routine; and the feeling that the "rights of man" as applied to other citizens and other aliens did not apply to them.¹⁸²

¹⁸¹One of the most damaging missteps made by the WRA director's office and camp administrators, provoking a reaction from internees that escalated into a cycle of resistance and coercion, involved giving out incorrect information as to criminal penalties that officials believed would be risked by those not filling in the questionnaires. The FBI was called in, a ranking army official had to face an angry meeting of internees, arrests were made, and amidst the growing anger and disruptions, the WRA in Washington had to inform the camp administrators that their understanding of the law had been misguided. By then, the dynamic of unrest and resistance had taken on too much momentum to stem the tide of rising resistance to all supervisory efforts. Copies of relevant administrative correspondence reflecting the confusion are in reels 170 and 171, JERS files, Bancroft Library. See especially WRA director [Myer] to H. Coverley, project director, Tule Lake Relocation Center, 26 Feb. 1943; id. to id., 27 Feb. 1946 (stating, "I am sorry we got you out on a limb regarding the arrests. . . ."); see also Myer, *Uprooted Americans*, 72–80; and, for an account critical of the administrators' actions, on the intensive cycle of tense confrontations later in 1943 that culminated in the army's declaring martial law in the center, Dorothy Swaine Thomas and Richard S. Nishimoto, *The Spoilage: Japanese-American Evacuation and Resettlement during World War II* (Los Angeles, 1969), 113–46.

¹⁸²Harry L. Black (former assistant project director, Tule Lake Center), affidavit (1946), reprinted in Collins, *Native American Aliens*, 136.

In a landmark case in which the Ninth Circuit Court of Appeals would later accept the renunciants' claims that they had given up their citizenship under duress at Tule Lake, Chief Judge William Denman stated that "the oppressive conditions prevailing there . . . were in large part caused or made possible by the action and inaction of those government officials" whom he deemed responsible for "the oppressiveness of this imprisonment."¹⁸³ Indeed, the conditions, demonstrations, and violence became so bad that martial law was imposed on Tule Lake from early November 1943 to mid-January 1944.

From the detailed archival records of the government's evaluation interviews with these renunciants, it is clear that the great majority had declared themselves loyal to the United States in earlier screenings; but their attestations of loyalty had been deemed spurious by the review boards and intelligence officers, leading not only to their internment at Tule Lake, but also to the loss of their personal loyalty. Their pleas for confrontation of the witnesses and evidence being used against them had been ignored, and they had been subjected to what they viewed as arbitrary and degrading treatment during their forcible removal to the mainland. In some of the reports, the officials explicitly stated that no tangible evidence of disloyal or dangerous activity had been found.¹⁸⁴ The hearing boards' condemnation of suspects was based heavily on the fact that these persons were Kibei; so that if interrogators or review boards were unconvinced of a suspect's sincer-

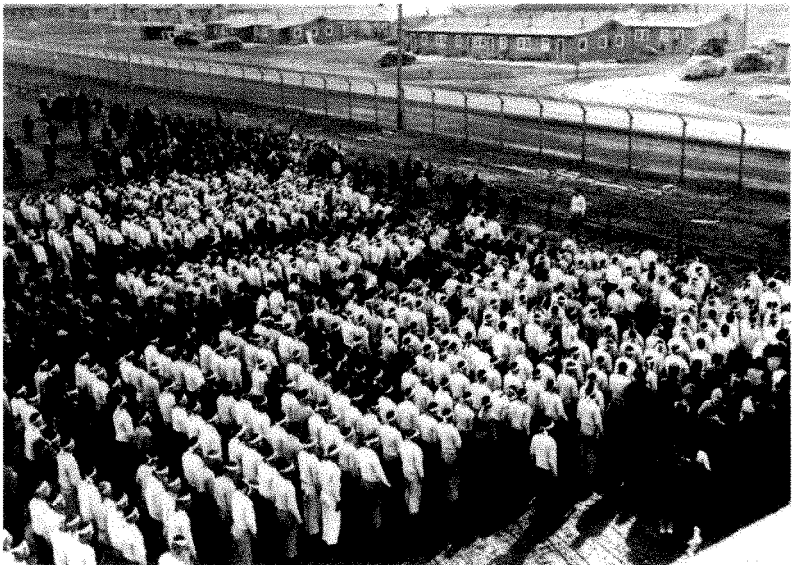
¹⁸³*McGrath v. Abo*, 186 F. 2nd 766 (1951) at 768. See also tenBroek et al., *Prejudice, War, and the Constitution*, 316–21. See *infra*, pp. 83–86, for discussion of the Ninth Circuit case. The low point for abusive administration at the Tule Lake Center came in the summer of 1944, when the authorities imprisoned rebellious and allegedly violent protestors in a stockade, a situation investigated (with little cooperation from the camp authorities) by Ernest Besig for the American Civil Liberties Union. Essentially evicted from the camp, Besig issued press releases on what he had found, charging that there had been blatant failure of due process at best, and reporting charges of extreme violence against some of the prisoners at the hands of the camp's security policy. See Drinnon, *Keeper of Concentration Camps*, 126–33. Besig also brought the situation to the attention of San Francisco attorney Wayne Collins, who would take up the leadership of a legal campaign to obtain justice for the Tule Lake prisoners who were held in the stockade there, and later for the large number who became reluctant "renunciants." *Ibid.*, 133–36. See *infra*, pp. 82–84.

¹⁸⁴War Relocation Authority, "Summaries of the Activities of Persons of Japanese Ancestry Since Arriving on the Mainland after Evacuation from Hawaii Who Are Now Residing at Tule Lake Center, Newell, California, July 2, 1945," RG 210, box 280, folder 39.034, #1, National Archives.

ity or found the individual's answers "evasive," then little or nothing more was needed to warrant internment.¹⁸⁵

The nearly 19,000 internees at Tule Lake included a significant proportion of Kibei evacuated from the West Coast states, later joined by a small cohort of Hawaiian Kibei evacuees. Together with mainland Kibei and with other Nisei internees (or "colonists," as the WRA euphemistically termed these prisoners), a number of the Hawaiian men became prominent in a determined resistance to disciplinary rule in the camp, in a movement that had begun during the 1943 registration campaign and had become progressively more

¹⁸⁵"Minutes of the Meetings of the Internee Review Board, June 1943–April 1944," RG 494, box 327, National Archives. In three of the fifteen decisions documented in these minutes, the board was willing to grant parole on the explicit condition, "if no resentment shown." (Ibid.) Reviewers cited "evasiveness" as sufficient reason for an adverse finding in many of the several score individual loyalty review files for 1943 and 1944 that the authors have examined.



At Tule Lake, members of a pro-Japanese group, Hokoku Seinen Dan, gathered opposite the administration area in preparation for a mass demonstration. (Courtesy of the National Archives)

militant.¹⁸⁶ This resistance included an organized campaign to undermine the government's loyalty reviews during the registration campaign preliminary to instituting a Selective Service draft of citizen and dual citizen internees in 1944. Their resistance also included violent action. Thus young Kibei were among the men who were disciplined—and in one instance thrown into a stockade, then shipped off to a local civilian jail—for being members of pro-Japanese gangs that had beaten fellow internees. These beatings were inflicted on supposed informers and others who cooperated with the authorities and attested to their loyalty to the United States by filling out registration forms that included the notorious questions 27 and 28.¹⁸⁷

Officials and security personnel in several of the WRA camps and centers, not only at Tule Lake, had reported from the outset of their operations that Kibei were often prominent in the ranks of "troublemakers," forming the core of support for disloyal, pro-Japanese activities (marches and demonstrations, denunciation of government rules, circulation of rumors said often to be based on propaganda broadcasts from Tokyo, strikes against job assignments and pay, and various types of spontaneous disruptions). Indeed, in his recollections of his WRA experience, former director Myer contended that the Hawai'i evacuees had proven especially rebellious. General Emmons had misled him, he complained, as to the character of the persons evacuated from Hawai'i and sent to the WRA facilities. After these evacuees had arrived at the Jerome and Topaz camps, Myer wrote, "We soon realized . . . that we had a bunch of very tough young men." Following the "segregation" interviews for assessment of loyalty conducted in 1943, "these hard-nosed toughs" were transferred to Tule Lake and became "the nucleus for the strong-armed squad that served the purposes of the group in power" (the latter consisting of earlier-interned mainland Nisei, Issei, and some Kibei) during the height of violent

¹⁸⁶A discussion of the registration campaign and the resistance to it, sparked by the resentment and confusion engendered by the notorious questionnaire with its questions 27 and 28, is provided in Muller, *American Inquisition*, 31–106. See also Gary Okihiro, "Tule Lake Under Martial Law: A Study of Japanese Resistance," *Journal of Ethnic Studies* 5 (1977): 71–85.

¹⁸⁷Thomas and Nishimoto, *The Spoilage*, ch. 6 (on martial law imposed from November 13, 1943 to January 15, 1944); tenBroek et al., *Prejudice, War and the Constitution*, 164–66; and Drinnon, *Keeper of Concentration Camps*, 117–57.



A local newspaper reported on a violent outbreak at Tule Lake. (Courtesy of the Shaw Historical Library, Oregon Institute of Technology)

outbreaks in November 1943.¹⁸⁸ On similar lines, a WRA attorney at Tule Lake reported that the younger Kibei, presumably including some of those from Hawai'i, had often done "the dirty work" of beatings and other actions aimed at intimidating other Tule Lake internees, although they did so under the control of an "insider" group of gang leaders who kept themselves under cover.¹⁸⁹ Precise numbers are impossible to come by in any attempt to assess the degree to which Hawai'i Kibei were involved as foot soldiers, let alone as "inside" leaders, of resistance and violence at Tule Lake. It should be noted, however, that Hawaiians were only

¹⁸⁸Dillon S. Myer, *Uprooted Americans*, 243–44. Myer also recounted briefly (*ibid.*, 63) an uprising at the Manzanar camp in which a Hawaiian-born World War I veteran, Harry Kurihari, took a prominent role. Kurihari, Myer wrote, "turned his back on America because he thought America had turned its back on him"—a familiar theme running through the personal histories of many internees, as reflected in their testimony in loyalty investigations and interviews.

¹⁸⁹The principal "agitators," he wrote, "rarely come out into the open themselves but used the young Kibei, with whom they were well supplied, to do the dirty work." Tony O'Brien to Glick, 17 March 1945, in JERS files, reel 170, Bancroft Library.

a small proportion—about 3.5 percent in mid-1944—of the total number of internees at Tule Lake.¹⁹⁰

For the Hawaiian Kibei and other internees who played no part in subversion or violence, becoming the hapless victims of intimidation and disorder, their incarceration at Tule Lake was a nightmare. For those in the relocation centers who reasserted their loyalty to the United States, including those who accepted conscription into the Armed Forces, it required extraordinary courage to endure.

It must be remembered that all of the incarcerated Nikkei, including those who were steadfast in declaring loyalty, had undergone the physical and psychological hardships of removal and transfer—often multiple transfers—over a period of two to four years. They had also been subjected to repeated interrogations and loyalty interviews—first, for the Hawaiian group, on initial arrest and incarceration; again when the government ordered loyalty determinations in 1943 for all persons held in the relocation centers, so as to implement the combined leave clearance/military service volunteer registration program; yet again for the “segregation” to Tule Lake of those deemed disloyal or potentially dangerous; and still again during the registration procedure for Selective Service inductions when Nisei were subject to the draft in early 1944, with answers to the infamous questionnaire as its chief focus. For anyone suspected of a role in the disruptions, there was further questioning by the camp officials, the FBI, or army officers; and for those who were the victims of disruption or violence, there was interrogation in the effort to identify those who should be apprehended. With what degree of fairness these procedures were conducted—and how frightening or confusing, or at a minimum how offensive to their sense of dignity they must have been for these people undergoing such reiterated evaluations—is an issue that must be given weight in any accounting of the government’s and the army’s record on the home front in the World War II years.

¹⁹⁰Eight men from Hawai‘i were among 67 segregants who, having declared loyalty to Japan, were therefore removed from Tule Lake to two other WRA facilities in February 1945 to await processing for repatriation to Japan. Two of the eight were identified as having participated in violent and “subversive” activities. “Appendix F: Departures for Klamath Falls,” n.d. but refers to removals in February and March 1943, copy in JERS collection, reel 170, Bancroft Library. According to the Western Defense Command, Hawaiians constituted 656 of the total of 18,599 segregants at Tule Lake as of July 1944. “Segregant Population of Tule Lake as of July 1944,” WDC-CAD-Research Branch, September 4, 1944, reel 170, copy in JERS files, Bancroft Library.

HABEAS CORPUS AND LEGAL ISSUES

The army's handling of the question of Nikkei loyalty in Hawai'i had, from the first, been based on the OMG's control of security through martial law. Of particular concern was the issue of habeas corpus, which had led the army to parole many of the Nisei and Kibei interned in Hawai'i and release them to the WRA centers. In early 1943, as the loyalty questionnaires were focusing attention on loyalty and security, the army leaders in Hawai'i were concerned that, if they lost control over the federal court's jurisdiction, the issue of habeas corpus could weaken the grip they held on life in the islands. The War Department was unwavering until near the end of 1942 in resisting pressures for any substantial transfer back to civilian government of the comprehensive controls over territorial government generally (in addition to internment power and the closing of the federal court to habeas appeals) that the army had assumed under martial law. Still, the political pressures to curtail martial law continued—from the Interior Department, the Justice Department, and Ingram Stainback, who had replaced Poindexter as governor of the Territory of Hawai'i in August 1942—much to the chagrin of the generals on the ground in Honolulu. Although not advocating that the federal court in Hawai'i be permitted to hear habeas petitions, in January 1943 Assistant Secretary of War McCloy instructed General Emmons that it was desirable to take a generous view "in the direction of returning functions to the civilian authorities"¹⁹¹—an ominous sign, from the OMG's standpoint, that it might find McCloy a weak ally if the habeas issue should become a prime target for further inroads on army rule.¹⁹²

The Supreme Court's decision to hear argument in the *Hirabayashi* case was taken by Governor Stainback (himself a former federal judge) to indicate that "any military rules that might be necessary for the protection of the Islands could be enforced in the federal court"—another ominous sign that political pressure was mounting and could involve the habeas

¹⁹¹As reported in a letter from McCloy to Fortas, 24 Jan. 1943, McCloy files, RG 107, National Archives.

¹⁹²Indeed, following negotiations among the Departments of Justice, War, and the Interior, a partial restoration of government functions to civil authorities took effect on March 10, 1943, "Restoration Day"; the civilian courts were reopened for cases not involving security; and food and price controls as well as censorship of civilian mail were turned over to civilian authorities. In other respects, however, martial law was continued, and the right to petition for a writ of habeas corpus remained suspended. Scheiber and Scheiber, "Bayonets in Paradise," 542–59.

question as well as other aspects of the jurisdiction of Judge Metzger's district court.¹⁹³

Remarkably, the right to petition for a habeas corpus hearing nonetheless remained in suspension in Hawai'i for more than two-and-a-half years after the Pearl Harbor attack. This situation was perpetuated because army orders under martial law had initially closed the federal district court for Hawai'i. Although in 1942 the OMG did permit that court to hear non-jury cases, it kept in effect a complete ban on the court's entertaining petitions for habeas corpus hearings. Judge Delbert Metzger, U.S. district court judge for the territory, complied with the army's orders closing his court immediately after the Pearl Harbor attack and consented to obey OMG orders curbing his court's jurisdiction. However, in response to a request for a writ of habeas corpus presented on behalf of a detained German-American citizen, Hans Zimmerman, Metzger declared, in a formal order in early 1942, that it was only because he was "under duress by reason of the Order and not free to carry on the function of the court in a manner in which the court conceives to be its duty" that he had accepted the army's imposition of curbs on his jurisdictional authority.¹⁹⁴ How much longer Judge Metzger, a notoriously independent-minded and feisty individual, would permit the army to impose these restrictions on his court remained an open question—a question that was of deep concern to the generals and legal staff in the OMG throughout the first eighteen months of the war.

As the OMG staff had feared, Judge Metzger did decide to open his court to a habeas petition on August 16, 1943. The case involved two German-American internees. Once Metzger opened his court's doors to the action, a scene of high drama would unfold during the resulting confrontation. The army refused to produce the prisoners, and when the court tried to have its federal marshal serve the writ on General Richardson, the marshal was roughed up by military police officers. Judge Metzger charged Richardson with contempt, levying a heavy fine. Richardson then issued General Order 31, which prohibited all pending and future habeas proceedings in Hawai'i, specifically ordered Metzger to drop proceedings in the pending cases, and threatened violators (Judge Metzger) with a military trial and the possibility of five years at hard labor for disobedience of his gen-

¹⁹³Stainback to Ickes, 9 Aug. 1943, in Hawai'i file, Ickes Papers, Library of Congress.

¹⁹⁴Quoted in Anthony, *Hawaii Under Army Rule*, 62–63. On Judge Metzger's career and character, see H. Brett Melendy, "Delbert E. Metzger, Hawai'i's Liberal Judge," *Hawai'ian Journal of History* 35 (2001): 43–63 (his wartime opinions are discussed at pp. 53–56).

eral orders. The crisis was quieted, thanks to interventions by the War Department's top civilian officials and the army's judge advocate general, who were unwilling to back Richardson's behavior in seeking to intimidate a federal judge.¹⁹⁵

The notoriety of the confrontation had a larger effect, bringing into sharp relief the conflict between martial law and civil liberties. By giving the habeas corpus issue a sharpened focus, the confrontation increased the pressures on the OMG to relax its insistence that suspension of the right of petition for habeas corpus was essential to security in Hawai'i. Of special significance was the fact that the U.S. solicitor general, Charles Fahey, weighed in during the crisis, counseling that Judge Metzger should be permitted to go forward with the hearing and the army should simply appeal to the Ninth Circuit if the district court decision was unfavorable to the OMG position and acted on the habeas petition.¹⁹⁶ In October, Fahey took a still stronger position, going directly to Assistant Secretary of War McCloy to advise that the OMG, as a matter of policy, should be prohibited from further stonewalling on the habeas policy question. Cases such as the one that had become so confrontational in Metzger's courtroom, Fahey declared, "should be permitted to take a normal course of solution by judicial processes rather than by the exercise of military power."¹⁹⁷

A letter from Secretary of the Interior Ickes (whose department in peacetime was responsible for the administration of Hawai'i) to McCloy, in the immediate wake of the Richardson-Metzger confrontation, encapsulated the view of both Ickes' own department and the Department of Justice as they sustained their campaign to curb the reach of martial law: "I would like to see the courts decide the habeas corpus issues," Ickes wrote. "If we are still an orderly and constitutional government the courts are the place to settle that issue."¹⁹⁸

Still, McCloy held firm. Although he continued to counsel the army to loosen its grip on civilian government agencies in their administrative activities, he was not yet prepared to require General Richardson to reverse the OMG's legal position with regard to habeas corpus. McCloy's intransigence on the

¹⁹⁵Scheiber and Scheiber, "Bayonets in Paradise," 571-72; and Anthony, *Hawaii Under Army Rule*, 64-77. General Richardson ultimately released the prisoners, Glockner and Seifert, in San Francisco, thus rendering the case moot.

¹⁹⁶Fahey's position was reported in the memorandum of a telephone conversation, Col. Scobey and Lt. Col. Hughes (JAGC), 25 Aug. 1943, McCloy files, RG 107, National Archives.

¹⁹⁷Fahey to McCloy, 9 Oct. 1943, McCloy files, RG 107, National Archives.

¹⁹⁸Ickes to McCloy, 20 Aug. 1943, copy in Ickes Papers, Library of Congress.

issue was probably influenced by the view of some army staff lawyers that to permit Metzger's court to hear habeas petitions without challenge "would immediately open those gates for an awful lot of bad people. There wouldn't be anything to prevent the others [in internment] from making similar application, and you have got to draw the line somewhere."¹⁹⁹ Richardson, meanwhile, worked his personal influence, declaring that his prestige as commanding general and "military governor" depended on his having the upper hand over Metzger's court. Appealing personally in a phone call to McCloy, Richardson asserted that if the army's position on habeas was undermined, the resulting court proceedings would balloon into "a litigation as to whether or not we shall have martial law in Hawaii." He regarded Metzger as oblivious to the reality of Hawai'i's position as the fulcrum of war zone operations, and predicted that "no matter what is before the court, I feel that he will order the release of [internees] pending an appeal . . . [and] every single general order that we have issued to date would simply go out of the window."²⁰⁰

Richardson's position reflected the advice being given him by his legal staff officers in the OMG. They were asserting that there was special danger in the possibility that many internees in Hawai'i who were Japanese-American citizens, including the many Kibei then interned, would exercise their rights as citizens and bring petitions for habeas hearings. It would be a disaster for military rule and imperil the safety of the islands, Richardson was told, both because it would represent a high-profile challenge to the general's authority and, more concretely, because it would risk the release of disloyal persons who could observe or sabotage military operations. Thus, in a December 1943 legal memorandum for use by Col. William Morrison (who had succeeded Green as "executive" for civilian governance and as chief legal officer in the OMG), a Judge Advocate General Corps lawyer laid out the legal situation. "It is only in the Territory of Hawaii that internment of citizens is possible," the memo advised, "and without the authority of martial law such internment would be impossible."²⁰¹ So long as martial law was in effect, the OMG thought it would be on firm legal ground in keeping U.S. citizens interned on Hawai-

¹⁹⁹Capt. Hall, in telephone transcript, 18 Aug. 1943, copy in McCloy files, RG 107, National Archives.

²⁰⁰Richardson and McCloy, memorandum of phone conversation, 3 Sept. 1943, McCloy files, RG 107, National Archives.

²⁰¹Maj. Louis F. Springer to Morrison, memorandum, "Interned American Citizens of Japanese Ancestry," 31 Dec. 1943, RG 494, box 39, National Archives.

ian soil; so long as martial law remained in effect as the army had defined it, it suspended any citizen's constitutional right to file a petition of habeas corpus that would permit a court to test the legality of the citizen's confinement if a prisoner of the army. Richardson's chief staff lawyer at the OMG predicted that if Judge Metzger had his way, "security here in Hawaii may, in the ultimate analysis, be subject to a determination in every single case of a local judge."²⁰²

Meanwhile, the army and the FBI were continuing to investigate and take into custody throughout 1943 and 1944 both Japanese aliens and Nisei, with special concern to identify disloyalty and root out the alleged danger in the Kibei element of the citizen group.²⁰³ With the closure of the Sand Island facility in early 1943, those imprisoned in Hawai'i were now placed in the internment camp near Ewa at Honouliuli, where they were incarcerated alongside a facility that held Japanese prisoners of war.²⁰⁴ Hence the army had under its legal control as internees within the territory several hundred persons—135 of them identified in OMG correspondence in early February 1944 as Kibei.²⁰⁵ The OMG insisted that these citizens must be denied their constitutional right to have a federal judge conduct a hearing on the reasons why they were taken into custody and the adequacy of the purported evidence on which the army had incarcerated them.

²⁰²[Morrison] memorandum for Gen Richardson, 20 Jan. 1944, Richardson Reading File, RG 338, National Archives.

²⁰³From January 1943 through June 1944, 670 cases of American citizens were heard, resulting in 220 individuals being interned; in the same period, 359 cases of aliens were heard, with 180 individuals being interned. It should be noted that also during this period, there was a dramatic increase in the number of releases for Nisei and Kibei, with 248 "released" in January and February for relocation in the WRA centers on the mainland. "Original Action: Releases, Internments, Paroles, Rehearings within the Hawaiian Group, Ordered by the Commanding General, Central Pacific Area, 7 December 1941–June 1944," RG 494, entry 22, box 151, National Archives.

²⁰⁴Although the Honouliuli facility, like the other camps, was surrounded by barbed wire and patrolled by armed guards, those guards were apparently less hostile than the guards on the mainland. See *supra*, p. 28, and Kashima, *Judgment Without Trial*, 85. See <http://archives.starbulletin.com/2004/06/02/news/story1.html> for the recollections of two Kibei who were detained there and reported that their treatment was not unduly harsh; one of them "took English classes, played his violin and attended Christian services on Sundays, when he prayed for the war to end." *Ibid.*

²⁰⁵One hundred of these Kibei were described by the OMG as loyal, and 35 as disloyal. Morrison to McCloy, 1 Feb. 1944, in Daniels, ed, *American Concentration Camps*. The peak population of Honouliuli was about 320. Among those interned there were Thomas Sakakihara, a former territorial representative, and Sanji Abe, a territorial senator. Japanese Cultural Center of Hawai'i, *Never Again*, 11.

Figure 1: Orders Issued, U.S. Citizens *

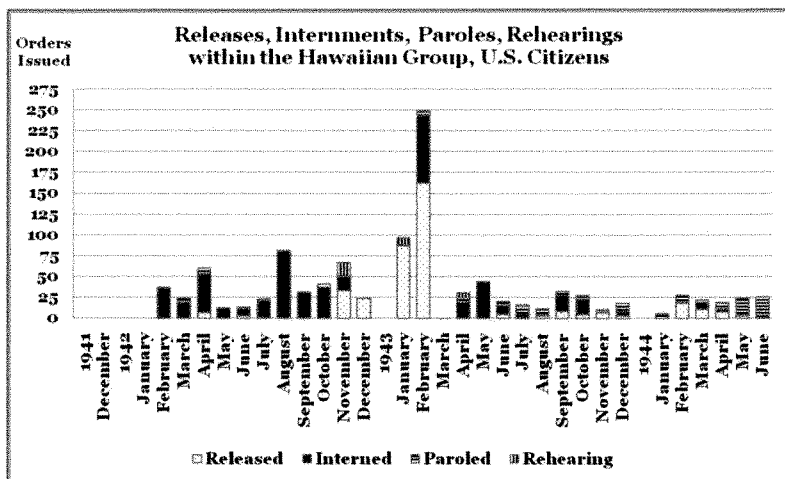
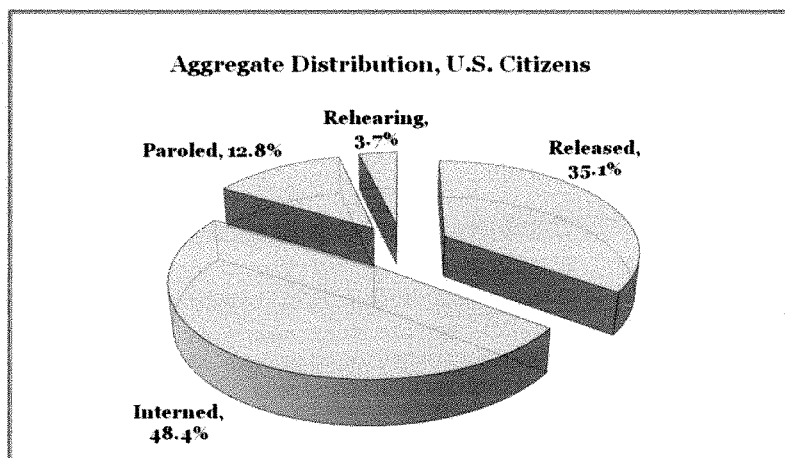


Figure 2: Aggregate Distribution, U.S. Citizens *



*From document entitled "Ordered by the commanding general, Central Pacific Area. Declassified 6 June 2008, Authority NND927556 [JG NARA]. Approved for Publication: E.P. Hardenbergh, Major T.C." Source: Office of Military Governor, USAFICPA G-4, National Archives. [Charts reconstructed from their original.] Period: 7 December 1941 to 30 June 1944.

NB: The category "releases" includes the so-called gangplank releases in January and February 1943. See text at note 125.

Figure 3: Orders Issued, Non-U.S. Citizens *

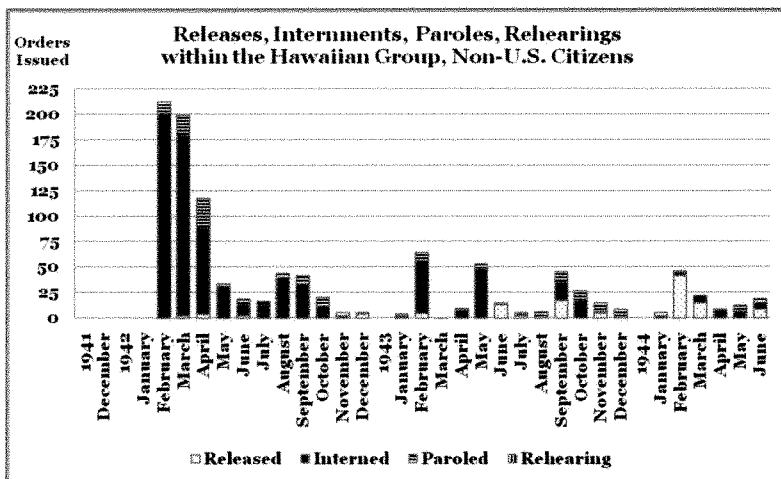
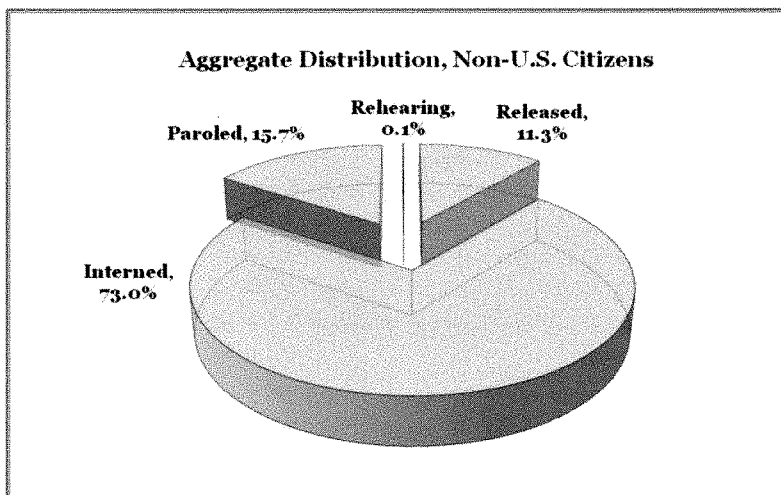


Figure 4: Aggregate Distribution, Non-U.S. Citizens *



* Source the same as for figures 1 and 2.

Apart from the criticisms levied against the OMG by the Interior Department and Department of Justice officials, there were new pressures in 1944 that threatened to make General Richardson's hard-line position almost certainly politically untenable. First, widespread publicity was given to a hearing in Congress in which the necessity for the more comprehensive suspension of civil liberties in Hawai'i was prominently questioned. Second, editorials in mainland newspapers and radio commentators had begun to criticize the army's heavy-handed methods of dealing with civil affairs in the islands—with some of the harshest criticism, ironically, coming from right-wing conservatives who portrayed the Hawai'i regime as evidence of what they had long declared were President Roosevelt's dictatorial ambitions and style. Finally, converging with these pressures from outside, in Hawai'i itself members of the bar and some local political organizations had begun to give public voice to demands for a restoration of constitutional rights.²⁰⁶

None of the criticism that was now being heard was focused on the army's treatment of Nikkei, let alone on the Kibei and their fate; instead it was concerned with the martial law regime at the more general level. Nonetheless, the emergence of the open criticism of the army's policies in Hawai'i threatened to make the impasse on the habeas issue all the more prominent—impelling Richardson and his legal staff to design new measures to foreclose the possibility of habeas petitions that they felt would, at a minimum, undermine their prestige and, in a worse case, threaten the security of the islands.

The OMG therefore intensified its efforts to win federal agency support for its suspension of habeas corpus under martial law. These efforts reached a fever pitch in 1944 with a series of conversations within the Legal Section of the OMG, led by Colonel Eugene Slattery, in search of new legal theories for continued internment of Kibei. A memo by a Judge Advocate General lawyer, Archibald King, who was privy to these communications, notes that "it was stated [by Slattery and other OMG staff] that, as martial law is likely soon to be abolished in Hawaii, it is desired to find some legal theory upon which [Kibei] internment may be continued after its abolition."²⁰⁷ Slattery proposed, as one possibility, new federal legislation that would divest Kibei of their American nationality by consequence of years spent in Japan either receiving education or performing military ser-

²⁰⁶Anthony, *Hawaii Under Army Rule*, 105–18; Scheiber and Scheiber, "Bayonets in Paradise," 611–13.

²⁰⁷Col. Archibald King, memorandum for the files, "Japanese Internees in Hawaii," 8 Sept. 1944, RG 494, entry 22, box 148, National Archives.

vice.²⁰⁸ The OMG staff was aware that members of Congress were discussing proposals for establishment of a hearings board that could strip citizens of their American nationality based on the content of their written statements, such as negative answers to loyalty questions. The OMG staff discussion did not win support in Washington, but it reflected an environment of great anxiety within the Legal Section of the OMG concerning the likely overturn of its internment decisions in any habeas challenge.²⁰⁹

For Richardson, the habeas issue, the necessity for martial law, and the Kibei issue were elaborately intertwined. Basing his opinion on the findings of the hearing boards and intelligence reports, Richardson wrote to McCloy about the Kibei in February 1944:

I now propose to evacuate from Hawaii for resettlement in war relocation centers on the mainland of the United States those [interned] Kibeis who have professed loyalty to the United States for the reason that if any one of them should institute habeas corpus proceedings in the local United States District Court, we might not be able to present a strong case against them.²¹⁰

The Kibei thus transferred—along with their families—would be formally released from internment and placed in custody of the War Relocation Authority. On the other hand, Richardson continued, the Kibei who stated before the hearing board that they were loyal to Japan would continue to be interned in Hawai'i. "Should any of them petition for a writ of habeas corpus it is believed that our case against them is so sufficient that a court would not order their release from internment."²¹¹

Despite the virtual moratorium placed upon Hawaiian evacuation in March 1943, Colonel Morrison proposed to the War Department that the OMG be permitted to transfer approximately 135 Kibei and their families to the mainland, claiming

²⁰⁸R.W. Flournoy to Hackworth, "Disloyal Japanese Americans: Proposed Measures for Their Expatriation and Deportation, Conference with Colonel King and Colonel Slattery," 6 Sept. 1944, *ibid.*

²⁰⁹For the concrete proposals as presented twice in this period, see Congressional Record, February 23 and June 23, 1944, in Daniels, ed., *American Concentration Camps*.

²¹⁰Richardson to J.J. McCloy, letter, 1 Feb. 1944, RG 494, entry 11, box 39, National Archives.

²¹¹*Ibid.*

that the Honouliuli internment camp was overcrowded.²¹² McCloy swiftly rejected the proposal on learning that these evacuees would be sent to the Tule Lake segregation camp, which was already congested and volatile at that time. McCloy proposed instead that the OMG resolve its internee overcapacity problem by paroling the least dangerous of the Kibei.²¹³

Morrison responded, in turn, that McCloy's proposal was impractical. Security requirements made it imperative, he wrote, that the OMG continue its policy of interning American citizens and Kibei in the territory. He added that assurances of War Department support were needed in the event that new habeas corpus litigation should arise and threaten the release of internees being held in the islands.²¹⁴

As Washington leaned towards the abolition of martial law in Hawai'i and the release of the Kibei who were interned there, the OMG remained recalcitrant, insisting on the necessity of its security policy as long as the war was still raging in the Pacific. Prohibited from continuing to evacuate Kibei to the mainland and seared by growing pressure from Washington to terminate martial law, the OMG developed a last-ditch legal alternative to evacuation—exclusion.

THE EXCLUSION PROGRAM

Exclusion, at its core, was little more than the forced evacuation of Nisei citizens, including Kibei, to the mainland, but with one fundamental legal difference from internment. Since mainland authorities lacked the legal power to intern Hawai'i Kibei or to enforce their parole, the OMG was unable to evacuate Kibei without facing severe criticism for sending a purportedly dangerous population group to roam freely on the mainland. Consequently, the OMG developed a new strategy to remove Kibei from the territory. At the OMG's request, the president issued Executive Order 9489, signed on October 18, 1944, which authorized Richardson to designate the Territory of Hawai'i or any part thereof a military area, over which he would possess authority as the military commander. This au-

²¹²Ibid.

²¹³Secretary of War McCloy to Brigadier General William R.C. Morrison, memorandum, 5 Feb. 1944, RG 494, entry 11, box 39, National Archives.

²¹⁴Brigadier General William R.C. Morrison to Secretary of War McCloy, memorandum, 10 Feb. 1944, RG 494, entry 11, box 39, National Archives.

thority included the power to order the exclusion of individuals from the designated military area.²¹⁵

In essence, Executive Order 9489 thus gave to the Hawaii Command the same authority that Executive Order 9066 had given to the Western Defense Command, which had resulted in the mass removals of the ethnic Japanese population from the West Coast; its result, however, was far less disastrous for Hawai'i's Nikkei population generally than Executive Order 9066 had been for the mainland Nikkei.

On October 24, 1944—the very day that martial law in Hawai'i was formally terminated—General Richardson issued Public Proclamation No. 1 of the military commander of the Territory of Hawaii Military Area, designating the entire Territory of Hawai'i a military area.²¹⁶ He declared that “any or all such persons will be ordered excluded or evacuated from the Territory of Hawaii Military Area or from any part thereof by the Military Commander whenever such exclusion is necessary to prevent espionage or sabotage.”²¹⁷

In the months preceding this proclamation, officials in the Legal Section of the OMG had compiled lists of Kibei and other dual citizens to be excluded from the territory, and the first 70 Kibei selected for exclusion were already identified the day before Richardson's proclamation.²¹⁸ Following a hearing for the suspects, the results of which were a foregone conclusion, the Hawaii Command shipped the first group of excludées from the port of Honolulu on November 8, 1944, just two weeks after the proclamation went into effect.²¹⁹ By war's end, a total of 73

²¹⁵For background, see Scheiber and Scheiber, “Bayonets in Paradise,” 594–95, 607–11.

²¹⁶Major Robert B. Griffith to Brigadier General William R.C. Morrison, memorandum, “Exclusion Procedure in the Territory of Hawaii Military Area,” 13 Nov. 1945, RG 494, entry 22, box 148, National Archives. N.B. With the termination of martial law, the Office of the Military Governor became the Hawaii Command.

²¹⁷*Ibid.* Richardson's proclamation was modeled closely on documents solicited from the Western Defense Command and Eastern Defense Command that were used in the mass removal of the ethnic Japanese from the West Coast and selected areas in the eastern United States. Major Chas. A. Middleton to Col. William R.C. Morrison, memorandum, “Individual Exclusion Order Procedure,” 11 Sept. 1944 [forwarding two copies of Individual Exclusion Order Procedure, Headquarters Western Defense Command and Fourth Army, as of September 1, 1942], RG 494, entry 22, box 148, National Archives.

²¹⁸“Dual Citizens Selected for Exclusion from Territory of Hawaii Military Area,” Oct. 23, 1944, RG 494, entry 22, box 148, National Archives.

²¹⁹“Sailing List of Seventy-One Hawaiian Excludées,” Nov. 8, 1944, RG 494, entry 22, box 148, National Archives.

exclusees had been sent to Tule Lake, 67 in the first group and an additional 6 in July 1945.²²⁰

RETURNEE ISSUES

However, in late 1944 and early 1945, even as the Hawaii Command was sending exclusees to Tule Lake, consensus had formed in Washington against the continued internment and exclusion of the Nikkei. Indeed, in January 1945, the Western Defense Command rescinded its mass exclusion orders against West Coast Nikkei from the mainland.

In Hawai'i, too, discussion began in earnest by early 1945, as the war entered its final phase, as to the return of the Hawaiian Nikkei evacuees and internees to the Territory of Hawai'i. On December 18, 1944, the U.S. Supreme Court had ruled, in the *Endo* case, that it was unconstitutional to continue to detain a citizen who had been certified as loyal by the internment authorities. This ruling was in the background as the military considered the issue of the release and return of Hawaiian Nisei and Kibei who were still in custody.²²¹ As early as January 1945, William Morrison, who had been promoted to brigadier general and whose office was now called the Office of Internal Security (OIS) in Hawai'i,²²² stated that he found it proper to permit Japanese civilian internees currently on parole on the mainland, and who had children in the armed forces of the United States, to return to Hawai'i.²²³ The initial policy shift toward the return of the Hawaiian Nikkei thus was inspired in

²²⁰Dillon S. Myer, director, War Relocation Authority, to Assistant Secretary of War Davidson Sommers, memorandum, 3 Aug. 1945, RG 494, entry 11, box 32, National Archives.

²²¹*Ex parte Endo*, 323 U.S. 283 (1944).

²²²The OIS was successor to the office of the "executive" (the office originally held by Col. Green) under the old OMG organization, and was the office administering civil government affairs and implementation of security policies.

²²³Brigadier General Morrison, OIS, to Office of the Provost Marshal General, memorandum, "Japanese Civilian Internees from the Territory of Hawaii with Sons in the Armed Forces of the United States," 16 January 1945, RG 494, entry 11, box 32, National Archives. With no precedent in the return of Japanese evacuees to Hawai'i, the Hawaii Command requested that the provost marshal general's office make the arrangements to transport these individuals back to the territory.

part by recognition of the contributions being made by some evacuees and their families toward the war effort.²²⁴

This sentiment was echoed in Washington and among the Hawaiian Nikkei evacuee population itself. In February 1945, Secretary of the Interior Harold Ickes wrote to Secretary of War Henry L. Stimson, contrasting the relaxation of restrictions on mainland Nikkei with the evacuation and exclusionary orders that were still in place against the Hawaiian Nikkei. Ickes was particularly concerned that "many of the Hawaiians who were voluntarily evacuated in 1943 agreed to being evacuated to the United States, in part at least, as a matter of patriotic cooperation with the authorities," while others, who had declined to evacuate the Territory of Hawai'i, had subsequently been released from the Honouliuli internment camp and returned to their homes in Hawai'i. A sense of injustice was rising among the voluntary evacuee population, who "feel that their cooperation with the Army authorities has resulted in a worse situation for themselves than for those who elected not to cooperate."²²⁵

General Richardson was asked to comment on Secretary Ickes' proposal to initiate a return procedure for the Hawaiian Nikkei in March 1945, when, it must be noted, the Pacific theater was still the scene of intense combat. Richardson proposed that, taking into consideration the current military situation and the developments in mainland policy toward Nikkei, a return of the Hawaiian evacuees could be started so long as the "proper precautions" were taken to ensure that disloyal persons were not returned to the territory.²²⁶ He subsequently proposed that a board of officers review the case of each

²²⁴Memorandum to Brigadier General William R.C. Morrison, "Japanese Civilian Internees from the Territory of Hawaii with Sons and Daughters in the Armed Forces of the United States," 12 Jan. 1945, RG 389, entry 480, box 1723, National Archives [describing a point system for determining priority return status for evacuees, which favored elderly individuals, persons who were evacuated before January 1, 1943, and persons with sons or daughters in the U.S. armed forces].

²²⁵Secretary of the Interior Harold L. Ickes to Secretary of War Henry L. Stimson, memorandum, 14 February 1945, RG 494, entry 11, box 32, National Archives. Ickes also noted that the OMG had initially led the federal authorities to believe that the Hawaiian-Japanese evacuees did not pose a security risk to the mainland, but that in practice many received exclusionary orders from Western Defense Command, and some (such as the former war workers whom the OMG demanded be kept separate from other Japanese seeking repatriation) were designated for segregation.

²²⁶General Richardson to commander-in-chief, Pacific Ocean Areas, memorandum, "Return of Hawaiian Evacuees to Homeland," 23 March 1945, RG 494, entry 11, box 32, National Archives.

evacuee and assign priority status for return.²²⁷ The priority group system would give preference to individuals with sons or daughters in the armed forces of the United States, the aged, the infirm, and to "persons deserving of such consideration because of unusual circumstances."²²⁸

Richardson recognized, however, that the army's ability to bring all of the evacuees home by the end of 1945—nine months off—was contingent on available transport.²²⁹ He also expressed the caveat that "there may be some individuals among these evacuees whose return . . . will not be recommended for security reasons," specifically including the 67 Hawaiian Nikkei who were excluded in 1944; continued retention on the mainland, he insisted, was necessary for these security risks.²³⁰ Richardson's memorandum indicates that his headquarters was continuing to plan for the exclusion of some Hawaiian Nikkei late into the war, and indeed a small group of Hawaiian excludées were sent to Tule Lake as late as July 1945.²³¹

The shortage of transport, however, was not the only obstacle to the return of the Hawaiian internees and evacuees. Because the Hawaiian Nikkei who had been transferred to the mainland had landed on the West Coast en route to relocation camps, the Western Defense Command had issued several hundred individual exclusion orders against Hawaiian evacuees and excludées. These orders were based on the OMG's earlier summary findings, as the Western Defense Command did not have access to the files or materials by which the OMG had

²²⁷General Richardson to the adjutant general, War Department, memorandum, "Return of Hawaiian Evacuees to Homeland," 17 April 1945, RG 494, entry 11, box 32, National Archives.

²²⁸*Ibid.*

²²⁹The challenge of finding space for returnee Nikkei on ships going from the mainland to Hawai'i was difficult for at least two reasons: First, the flow of troops and supplies out to the combat zones, with Hawai'i as the mid-Pacific staging area, of course had priority on transport; and, second, Secretary Ickes, Governor Stainback, and other elective officials pressed the army to use what space did become available to expedite the return of haole (Caucasian) and other civilians who (fearful of a Japanese invasion) had heeded army warnings after the Pearl Harbor raid and voluntarily left Hawai'i for the mainland. The number of these "strandees" in March 1944 was said to be 5,000. John Frank to Abe Fortas, memorandum, 31 March 1944, Fortas files, RG 48, Department of the Interior Records, National Archives.

²³⁰General Richardson to the adjutant general, War Department, memorandum, "Return of Hawaiian Evacuees to Homeland," 17 April 1945, RG 494, entry 11, box 32, National Archives.

²³¹Dillon S. Myer, War Relocation Authority, to Major Davidson Sommers, Office of the Assistant Secretary of War, memorandum, 3 Aug. 1945, RG 494, entry 11, box 32, National Archives. See *supra*, p. 73 at note 220.

made its decisions.²³² Accordingly, when the Western Defense Command allowed the mainland Nikkei to return to the West Coast, it left in place some 491 individual exclusion orders against Hawaiian Nikkei evacuees and excludées. The Hawaiian Kibei and the other individuals in this contingent thus found themselves in legal limbo.²³³

By spring 1945, it had become imperative that these individual exclusion orders be lifted; otherwise the Hawaiians could not return through West Coast ports.²³⁴ Captain Stanley D. Arnold of the Japanese American Branch was assigned by the Western Defense Command to travel to Honolulu, review the files, and summarize the relevant information.²³⁵ In addition to gathering information from the review board documents, Arnold was tasked with gathering information on the OMG's security program.²³⁶

On his month-long mission, Arnold collected and examined copies of hundreds of records, and he personally interviewed numerous army staff officials regarding their assessments of the Hawaiian Nikkei, generating a rich documentary record of the Hawaiian military government in the war's final months. In his candid report to the Western Defense Command, Arnold declared that the ostensible success of the Hawaiian security program owed less to the OMG's administrative talents than to the flexibility and privilege afforded it by the duration and

²³²Draft memorandum, "Hawaiian Excludées and Personnel Security Program," spring 1945, RG 389, entry 480, box 1723, National Archives.

²³³In addition to the 491 still excluded, Arnold found that 657 Hawaiian evacuees on the mainland were not excluded from the West Coast. (These statistics are from Captain Arnold's report, in RG 389, entry 480, box 1723, National Archives.) The group that remained excluded by WDC were primarily male and between twenty and forty years of age, the prime demographics for Kibei evacuees and excludées. In contrast, of the 657 Hawaiian evacuees not excluded by WDC, 68 percent were female and 62 percent were below the age of twenty—indicating that they were almost certainly mainly the voluntary evacuees who had followed their family members to the mainland.

²³⁴Major Clarence R. Harbert to Colonel Alton C. Miller, memorandum, "Return of Japanese to Hawaii," 17 Jan. 1945, RG 389, entry 480, box 1723, National Archives.

²³⁵Col. A.B. Johnson, assistant to the provost marshal general, to the adjutant general, memorandum, "Temporary Duty Orders outside Continental Boundaries," 6 April 1945, RG 389, entry 480, box 1723, National Archives. On the organization and functions of the Japanese American Branch and the Japanese American Joint Board, each of which played an important role in loyalty determination processes, see Muller, *American Inquisition*, 39–65.

²³⁶Draft memorandum, "Hawaiian Excludées and Personnel Security Program," spring 1945, RG 389, entry 480, box 1723, National Archives.

scope of martial law in the territory.²³⁷ At the same time, Arnold asserted that

the Hawaiian Department made no mistake in ridding themselves of [the evacuees and internees], and that security agencies in continental United States were exercising sound discretion when as a matter of policy they regarded every Hawaiian Japanese evacuee or internee with considerable doubt as to his loyalty.²³⁸

Arnold was struck in particular by the insularity of the Kibei population, noting that "many Kibei have been back to Hawaii as long as ten years without learning even one word of the English language, as it is not necessary for them to associate or transact business with Caucasians in view of the heavy Japanese population."²³⁹ Arnold summarized the Kibei in the following way: "Their conception of government is the Japanese Consul, their spiritual guide, the Buddhist Church and the Shinto Shrine, their economic source, the pineapple planter or the fishing boat operator."²⁴⁰

Meanwhile, Richardson's staff proceeded to implement a policy aimed at granting return to the large majority of voluntary evacuees and their families. The review procedure that they developed, however, was slow, individualized, and discretionary. Hence, it resulted in considerable delay, even as the Department of the Interior was eager to complete the process before the relocation camps were shuttered by the end of 1945.²⁴¹ By late May, the commanding general's review board had approved the return of 393 Hawaiian Nikkei formerly interned on the mainland or placed in mainland relocation centers. These individuals were divided into six priority groups. Groups I, II, and III were composed of individuals and their dependents who had sons or daughters in the U.S. armed forces. Groups IV, V, and VI contained citizens and aliens considered by the board in the normal course of review. But the task was far from complete: as one security officer noted, a total of 705 aliens had been evacuated to the mainland for internment and

²³⁷Captain Stanley J. Arnold to chief, Japanese-American Branch, Office of the Provost Marshal General, memorandum, "Hawaiian Japanese," 4 June 1945, RG 389, entry 480, box 1723, National Archives.

²³⁸*Ibid.*

²³⁹*Ibid.*

²⁴⁰*Ibid.*

²⁴¹In fact, the last persons did not leave the Tule Lake center until March 1946.

1,040 citizens and aliens had been evacuated to relocation centers, for a total of 1,745 individuals.²⁴²

Dillon S. Myer, the director of the WRA, warned that unless the return procedure could be expedited substantially, many evacuees would be required to relocate temporarily on the mainland once the relocation camps closed. Moreover, Myer cautioned, the WRA would soon be unable to cover the costs of ocean transportation, requiring a greater financial contribution from the army.²⁴³ Thus, by August 1945, the mainland authorities were in agreement that the return of the evacuees to the territory was necessary and that the Hawaii Command needed to expedite the process before the mainland WRA bureaucracy was shut down altogether. Richardson's headquarters, in contrast, was pursuing a more cautious approach, slowly processing individual return applications and leaving the matter of ocean transportation to the mainland authorities to resolve.

THE END OF THE WAR

This seeming impasse between the Hawaii Command and the mainland authorities was broken only by the sudden

²⁴²Colonel Louis F. Springer to Brigadier General William R.C. Morrison, memorandum, "Evacuees of Japanese Ancestry Approved for Return to Territory of Hawaii," 25 May 1945, RG 494, entry 11, box 32, National Archives. As with previous sets of figures, however, these numbers were contested in documents prepared by the mainland authorities. An August 10, 1945, memorandum from the WRA's Dillon Myer to Major Davidson Sommers stated that the WRA originally received 1,136 Hawaiian-Japanese evacuees, in addition to the 73 excludées sent to Tule Lake between 1944 and July 1945. As of August 10, Myer reported that only four of the 1,136 evacuees had returned to Hawai'i, with 65 others designated for inclusion in an early movement. Six hundred twenty-eight individuals were located in Tule Lake, while 319 evacuees were located in other camps. Additionally, Myer noted that 65 individuals had relocated permanently to the mainland, and 55 individuals had died, been interned, or repatriated to Japan. Dillon S. Myer to Major Davidson Sommers, memorandum, 10 August 1945, RG 494, entry 11, box 32, National Archives. These figures from Myer's memorandum differ from the official WRA report, *The Evacuated People*, which states that 1,037 evacuees were received at the WRA camps between November 1942 and March 1943, with another eight voluntary evacuees arriving in 1943-44. A total of 73 excludées from Hawai'i arrived between November 1944 and July 1945, with 99 Hawaiians paroled or released from DOJ internment camps entering the WRA centers from 1942 to 1944. WRA, *The Evacuated People*, 191.

²⁴³The WRA notified the OMG of this financial problem in an August 13 memorandum exhorting General Richardson to expedite action for return of the evacuee population before WRA funding dried up. Harrison A. Gerhardt, executive to assistant secretary of war, to General Richardson, memorandum, 13 Aug. 1945, RG 494, entry 11, box 32, National Archives.

conclusion of hostilities between the United States and Japan in late August 1945. On August 27, 1945, General Richardson notified the War Department that he had rescinded all orders that had been issued by the OMG or the Hawaii Command under Presidential Proclamation No. 2525 (invoking the Enemy Aliens Act) and Presidential Executive Order No. 9489 (designating a military commander for the territory of Hawai'i and authorizing him to prescribe the territory as a military area), there being no further military necessity for them. With the approval of the War Department, Richardson also released immediately after V-J Day all alien enemies in internment in Hawai'i and on parole from internment.²⁴⁴ As of August 29, there were 18 aliens and 4 Kibei interned in the Honouliuli internment camp.²⁴⁵ In addition, 47 individuals in the territory of Hawai'i had been paroled for one year or more, while 62 others had been on parole for less than one year as of that date.²⁴⁶

On the issue of the return of evacuees on the mainland, the termination of martial law in Hawai'i in October 1944 and the surrender agreement between the United States and Japan on September 2, 1945, emboldened the mainland authorities to push for greatly accelerated procedures. On September 11, the Provost Marshal General's Office (PMGO), unwilling to continue processing individual exclusion orders, proposed that Richardson should issue a blanket order rescinding exclusion orders.²⁴⁷ On the same day, the PMGO requested from the Immigration and Naturalization Service in the Department of Justice a list of the Hawaiian evacuees and internees scheduled for return, organized by priority of shipment.²⁴⁸ Also in September, the Hawaii Command and the Provost Marshal General's Office gathered information on those Kibei

²⁴⁴OMG to Secretary of War McCloy, radiogram, 27 Aug. 1945, RG 494, entry 11, box 32, National Archives; Secretary of War McCloy to General Richardson, memorandum, 8 Sept. 1945, RG 494, entry 11, box 32, National Archives.

²⁴⁵Internees list, Aug. 29, 1945, RG 494, entry 11, box 32, National Archives.

²⁴⁶Parolees list, Aug. 31, 1945, RG 494, entry 11, box 32, National Archives.

²⁴⁷A.W. Tollefson, Provost Marshal General's Office, to General Richardson, memorandum, "Return to Hawaii of the Remaining Japanese on the Mainland Who Were Originally Evacuated from Hawaii," 11 Sept. 1945, RG 494, entry 11, box 32, National Archives.

²⁴⁸A.W. Tollefson, Provost Marshal General's Office, to United States Department of Justice Immigration and Naturalization Service, memorandum, 11 Sept. 1945, RG 494, entry 11, box 32, National Archives.

excluees who had renounced their U.S. citizenship and were seeking repatriation.²⁴⁹

As the drive to return the Hawaiian Nikkei to their homes in the territory accelerated on the mainland, the availability of transport emerged as the single most crucial issue. By October, the Hawaii Command and the Provost Marshal General's Office had divided the evacuees and excluees eligible for return into four groups: Group 1 consisted of the 10 evacuees who had returned to the territory in July 1945; group 2 consisted of 106 internees and evacuees, while groups 3 and 3A jointly consisted of 387 internees and evacuees; finally, group 4 consisted of approximately 1,100 internees and evacuees.²⁵⁰ As returnees were moved to the West Coast to wait for available transportation, there was more bureaucratic jousting, this time on finances: Richardson insisted that the Army Port and Service Command must assume responsibility for the housing, messing, and transportation of the former internees and evacuees. The closing of the WRA relocation camps further complicated the logistics of caring for the returnees awaiting transport to the territory.²⁵¹ At the same time, the demands for space on available transport of the mainly haole (Caucasian) "strandeers" who had left Hawai'i individually in early 1942 had further stalled the implementation of plans for the return of the Nikkei.²⁵²

Finally, on November 5, departure orders were issued for return groups 2, 3, and 3A on the U.S. Army transport *Yarmouth*, which left Seattle on November 7.²⁵³ Group 4 was scheduled to ship from the Port of Los Angeles aboard

²⁴⁹General Richardson to Provost Marshal General's Office, radiogram, 14 Sept. 1945, RG 494, entry 11, box 32, National Archives. A total of 248 individuals from Hawai'i asked for repatriation. Allen, *Hawaii's War Years*, 141. A separate storm was brewing throughout the course of September 1945 over the continued internment in Honouliuli, Hawai'i, of three Kibei seeking to renounce their U.S. citizenship and repatriate to Japan. The legal authority for their continued detention after the termination of martial law was doubtful. The matter was resolved when the attorney general allowed them to renounce their American citizenship, and the three were eventually transferred to Tule Lake. Extensive correspondence on this episode is archived in RG 494, entry 11, box 32, National Archives.

²⁵⁰Message from Provost Marshal General's Office to General Richardson, 27 Oct. 1945, RG 494, entry 11, box 32, National Archives.

²⁵¹Message from General Richardson to commanding general, Army Port and Service Command, 22 Oct. 1945, RG 494, entry 11, box 32, National Archives.

²⁵²See note 229, *supra*.

²⁵³Clearance order from Seattle POE to Fort Shafter, Nov. 5, 1945, RG 494, entry 11, box 32, National Archives. Soga, *Life Behind Barbed Wire*, 219.

the SS *Aconagua* on November 25.²⁵⁴ A final issue arose in the request from the army's Hawaii Command at Fort Shafter that the mainland authorities consult with all non-residents intending to return to Hawai'i to ensure that all had located a "definite place to live" on return, since there was an acute shortage of housing and building materials in the territory.²⁵⁵ The WRA confirmed that it had made such consultations on December 5, 1945.²⁵⁶ However, it was not until mid-April 1946 that the last of the internees and evacuees left for home.²⁵⁷

WAR'S AFTERMATH: THE RENUNCIANTS AND THE COURTS

For some of the renunciants held at Tule Lake, however, the end of the war did not mean an end to their ordeal of incarceration. With Japan's surrender, the WRA was preparing to close the camp early in 1946. This plan was well known to the prisoners, and rumors circulated that families would be broken up with forced relocation in North America or deportation to Japan. Compounding the plight of many renunciants was the WRA's intransigent refusal in early 1945 to permit any further non-internee transfers to the Tule Lake facility,

²⁵⁴Clearance order from Los Angeles POE to Fort Shafter, Nov. 14, 1945, RG 494, entry 11, box 32, National Archives.

²⁵⁵Commanding general Middle Pacific to commanding general Los Angeles port of embarkation, memorandum, 28 Nov. 1945, RG 494, entry 11, box 32, National Archives.

²⁵⁶War Relocation Authority to Fort Shafter, memorandum, 5 Dec. 1945, RG 494, entry 11, box 32.

²⁵⁷WRA, *The Evacuated People*, 55. Close to 1,500 of the nearly 2,000 who were sent to internment camps or relocation centers returned to Hawai'i, bringing with them almost 100 new children and family members. Eighteen persons died, and 241 chose to remain on the mainland. Two hundred forty-eight Hawaiians chose repatriation to Japan. Allen, *Hawaii's War Years*, 141; WRA, *The Evacuated People*, 55.

even to enable families to reunite there despite the uncertainties of pending decisions about an internee's fate.²⁵⁸

When the war ended, several hundred of the 5,000 renunciants, citing duress, coercion, and confusion at the time they formally renounced, were already in the process of petitioning the government for permission to revoke their renunciations. The Department of Justice (DOJ) flatly rejected their appeals, asserting that once a renunciation was filed, no reversal was possible; it was even contended that once having renounced, being no longer a dual citizen, a renunciant was a citizen only of Japan, hence an enemy alien (a bizarre legal stance that the DOJ adopted on grounds the surrender itself did not mark an official end to the war).²⁵⁹

As events proved, the DOJ would adhere to its hard-line stand on the irrevocability of renunciations throughout a long, complex period of litigation over the status of the Tule Lake prisoners.²⁶⁰ The opening shot of the litigation was sounded in federal district court in San Francisco in November 1945, in a plea for an injunction filed exactly two days before the ships carrying hundreds of renunciants were scheduled to leave for Japan. Civil liberties attorney Wayne Collins represented 987

²⁵⁸D.S. Myer (director, WRA) to Ray West (project director, Tule Lake Center), 22 March 1945, and copies enclosed with it of letters from Myer directly to Tule Lake prisoners informing them their wives could not be given permission to join them as "it is contrary to the policy of the WRA to admit persons to the Tule Lake Center who are not already in centers. Hence your request must be denied at this time," RG 210, box 280, National Archives. The authors of this article have seen in government and personal papers, as well as in the Hawaii Command/OMG records, scores of poignant letters from spouses and other family members separated in this way, and in several cases letters from sons who were serving in combat with the 442nd or with the army in the Pacific theater, pleading that their parents be reunited when the father was incarcerated and the mother was left behind in Hawai'i.

²⁵⁹The following account of the renunciants' status and the litigation that followed is based on analysis provided by Collins, *Native American Aliens*, passim, and John Christgau, "Collins versus the World: The Fight to Restore Citizenship to Japanese American Renunciants of World War II," *Pacific Historical Review* 54 (1985): 1–31. A perceptive contemporary analysis (published in 1954, when the last stage of the litigation was still in progress), still very useful, is in tenBroek et al., *Prejudice, War, and the Constitution*, 175–84. See also Patrick O. Gudridge, "The Constitution Glimpsed from Tule Lake," *Law and Contemporary Problems* 68 (2005): 81–118, a study that also gives attention to the UC Berkeley project (the JERS) and its critics.

²⁶⁰The government was unyieldingly determined, it became clear, to deport all the internees and other prisoners they could, to stay a step ahead of legal proceedings that would impede the program, and to accomplish deportations speedily. The posture taken by the Department of Justice, in defending against renunciants' legal claims as they did, over so long a time, provoked charges from some defenders of the Nikkei and from civil liberties groups that it amounted to a campaign to get rid of Japanese residents in the largest numbers possible.

citizen or dual-citizen plaintiffs in this suit, but he also filed a petition for habeas corpus on behalf of another group being held at Tule Lake pending their deportation as well.

Accepting jurisdiction, District Court Judge Louis Goodman ordered the deportations stopped, and he called on the government to submit evidence pertaining to individual plaintiffs' loyalty or disloyalty. The DOJ responded by announcing that it would hold a "mitigation hearing" for each individual internee, to review its decision that American citizenship should not be restored. Even at this late stage in their ordeal of removal and imprisonment, the Kibei found themselves uniquely at risk, for in the mitigation hearings, the government examiners apparently treated the mere fact that a renunciant was a Kibei as sufficient evidence of disloyalty, and thus sufficient reason to deny the petition for restoration of citizenship.²⁶¹ Judge Goodman rejected this contention and other evidence that the government lawyers presented to deny the great majority of the litigants their claims; and he ordered that citizenship should be restored. There was no constitutional authority, he wrote, "to detain and imprison American Nisei citizens . . . when they were not charged with criminality." Also found in his final order in April 1949—three-and-a-half years after the end of World War II—was that the state of mind of prisoners at the time they renounced was necessarily affected, as he wrote, by the "fear, anxiety, resentment, uncertainty," and sense of "hopelessness" to which they had been reduced by oppressive physical conditions, pervasive violence, and the government's confusing administrative policies at Tule Lake.²⁶²

The government immediately filed an appeal in the Ninth Circuit for reversal of the order. So once again the status of the renunciants' citizenship was in question, deportation was still

²⁶¹The other reasons that would warrant denial of petition were that the person had chosen to enter the Tule Lake Center voluntarily in order to reunite with family there; or that the person had been assigned to the center as a prisoner "because of a negative answer to question 28, or because of a denial by the WRA of leave clearance." See tenBroek et al., *Prejudice, War, and the Constitution*, 182. In their petitions to the federal courts for redress, the renunciants presented affidavits asserting that they had been given no time to prepare for the interviews, were afforded no opportunity to summon witnesses or obtain depositions in their favor, were denied the right to engage legal counsel of their choice or to see the secret dossiers on them held by their interrogators, and, withal, had been subjected to a procedure "neither full, complete nor adequate and . . . neither fair nor impartial" (quoted from template prepared by attorney Collins and incorporated in petitions to U.S. Attorney General Thomas Clark, dated Tule Lake, February 1946, in the Wayne Collins Papers, Bancroft Library, University of California, Berkeley).

²⁶²Final order, Judgment and Decree, April 12, 1949, quoted in Christgau, "Collins versus the World," 27.

threatened, and their lives were cast in a fog of uncertainty. The proceedings in the appeal were joined by other prisoners, almost all from Tule Lake, whose names had been added to the suit since the first filing in district court; now 4,315 renunciants were parties to the suit. Not until January 17, 1951, did the decision come down.²⁶³ Judge Denman wrote the opinion, accepting the factual conclusions of the district court that the voluntariness of individual renunciations was questionable in light of conditions at Tule Lake. Rather than restore citizenship outright, however, the court held only that there was a "rebuttable presumption" that individual renunciants had been coerced or otherwise had involuntarily renounced. The door to resuming a free life in their homeland was thus opened for the renunciants. It was a victory, but a qualified one—for now thousands of individual affidavits would need to be filed in the district court by individual renunciants, with the government given the opportunity to review and offer its own judgment on each case for the court's consideration. If approval followed with an individual submission, citizenship would be restored in that case.²⁶⁴

It was a great disappointment to the renunicants that the Ninth Circuit had not swept the slate clean and restored their citizenship outright, as Judge Goodman had said was their constitutional right. The disappointment was especially keen since Judge Denman, in a case decided in 1949, *Acheson v. Murakami*, had written for the Ninth Circuit court in a decision upholding judgment in favor of three citizens (wives of Issei) who had renounced at Tule Lake. In that case, the court had restored their citizenship forthwith. Moreover, in his opinion in *Murakami*, Denman expressed, in harsh denunciatory language, a detailed and clearly outraged judgment on every aspect of the government's policies for relocation and internment. He deplored "General DeWitt's doctrine of enemy racism" and his record of "inflam[ing] the existing anti-Japanese sentiment," and, more outrageous still, DeWitt's expression of certainty "that a race of such enemy blood strain must commit sabotage." The same mentality was responsible for the officialdom's crediting of rumors about sabotage by Nikkei in Hawai'i in connection with the Pearl Harbor raid: "The Army

²⁶³*McGrath v. Abo et al.*, *McGrath v. Furuya et al.*, 186 F.2d 766, 773.

²⁶⁴The decision did grant immediate and full relief, with restoration of citizenship, to 899 Nisei who had been under the age of 21 when they had renounced, for 8 persons declared mentally incompetent, and for 58 renunciants whose appeals for restoration had been denied by the DOJ solely on grounds that "they went to Tule Lake to be with family members." See Collins, *Native American Aliens*, 137–38.



In his opinion in *Murakami*, Chief Judge William Denman presented a detailed, outraged judgment regarding the government's policies for relocation and internment, directly referring to racism and the practice of inflaming anti-Japanese sentiment. (Courtesy of Ninth Judicial Circuit Historical Society Archives)

high command knew all these stories were false." Quoting from seventeen interviews of Tule Lake prisoners published in *The Spoilage*,²⁶⁵ Denman postulated that a setting and a regime that would not have been tolerated in a federal penitentiary, together with knowledge of rampant anti-Japanese racism in the country, necessarily affected "the minds of our fellow citizens as to the value of their citizenship." Denman's opinion also referred in detail to the armed turrets on corners of the stockade, the cramped dormitory-style quarters that packed multiple families into crowded spaces with no hope of privacy, the lack of protection against dust storms and winter cold, and the terrifying effects of violence by the pro-Japanese groups and the gangs, all affecting prisoners' state of mind. Comparisons with the Nazi regime and race hatred were also interspersed in the opinion. In sum, the court in *Murakami* was unremitting in criticism of the army and the WRA and broadly sympathetic to the plight of the renunciants.

But that was in 1949. The evidence that Judge Denman and his court found sufficient then to restore citizenship to the three women was found insufficient to warrant immediate relief for the more than 4,000 litigants in the 1951 *Abo* appeal. In such a large group, the court decided, given the district court record, it was logical to expect that there were in fact some disloyal persons who should not be allowed to regain citizenship, for the "state of mind" rationale would not apply to them. (The court expressed similar skepticism as to the subgroup who renounced only after the bombings of Hiroshima and Nagasaki had made it evident that Japan would lose the war.) The Cold War's effect on the judicial mind in the Ninth Circuit was now at work as well. Thus Denman wrote that against the Cold War background, "with the hot war in Korea, the federal courts should be more vigilant than ever [about disloyalty]. . .," making it important to identify "enemy minded renunciants." Of particular interest to our present concerns, however, is that he went on to focus on the loyalty of the Kibei. His opinion cited the fact that more than half the native-born citizens at Tule Lake were Kibei, and that the record in district court in *Murakami* had established that at least some Kibei were "permanently pro Japanese." These "enemy minded" people had to be identified and denied their goal of regaining citizenship. And this is what the court decided, in its posture of "judicial vigilance," necessitated the

²⁶⁵*The Spoilage* and *The Salvage* were companion volumes, both the products of the UC Berkeley JERS project.

submission of the several thousand affidavits and the subsequent individual determinations.²⁶⁶

With reference to the fate of the Kibei from Hawai'i held in Tule Lake at the war's end, our computation, from data in Wayne Collins' records, indicates that a minimum of 55 renunciants from Hawai'i submitted affidavits to the district court after the 1951 Ninth Circuit decision in *Abo*. What the total number of plaintiff renunciants from Hawai'i may have been, what proportion of the 55 we have identified were Kibei, and other interesting questions about the Hawai'i prisoners remain unresolved. What is certain is that these 55 identified plaintiffs constituted, at minimum, one in eleven of all the Hawai'i prisoners held at Tule Lake; it is uncertain whether a much larger proportion had chosen repatriation and so were not involved in the *Abo* litigation.²⁶⁷

After further negotiations between Collins and DOJ officers, including Assistant Attorney General Warren E. Burger, arrangements were agreed upon for expediting the process for review of affidavits by the government. Collins worked with a majority of the named plaintiffs to frame their statements and oversee processing. Of the 5,589 applications from renunciants, citizenship was restored to 4,978 (including 1,327 of the Nikkei who had already been sent back to Japan in 1945 and 1946, some 347 of the latter group having been denied restoration of their citizenship). The *Abo* case went on for fully twenty-three years (Collins "battled eight different attorneys general" over that time, as one scholar observes); the final district court action, a "Withdrawal and Dismissal," in the one remaining renunciant's case did not occur until November 13, 1968.²⁶⁸

One can easily imagine the joy of the family when a Hawai'i renunciant won restoration, before or after returning home to the islands; the numbers of such returnees, however, are unknown. There had been emotional public ceremonies and reunions of loved ones in Honolulu in 1945, when the *Yarmouth* had brought into port the mass return of hundreds of Hawai'i's imprisoned Nikkei. The renunciants who came back from Tule Lake were the last remnant of that coerced exodus.

²⁶⁶186 F.2d 766, 772.

²⁶⁷Wayne Collins Papers, Bancroft Library, University of California, Berkeley, contains the full records of Collins' filings and pleadings, his correspondence with the litigants and the organization that was formed to support their efforts, and billing records.

²⁶⁸Christgau, "Collins versus the World," 30-31. An especially ironic aspect of this final day in court was that the named government defendant was Attorney General Ramsey Clark, whose father, Thomas Clark, was the named defendant in the initial filing of the suit in the U.S. district court in 1946. *Ibid.*, 31.

STATISTICAL SUMMARY
(All figures refer to Hawai'i population)

Population of Hawai'i, 1940	423,330
Nikkei population of Hawai'i, 1940	157,905
Aliens (Issei)	37,353
U.S. citizens of Japanese ancestry (Nisei & Sansei)	120,552
Kibei (est.)	5,000 ^a
Nisei over age 16 (est.)	70,550 ^b
Nisei & Sansei under 16 (est.)	50,000 ^b
Nikkei population investigated by FBI or milit. intel. (est.)	10,000 ^c
Nikkei pop. arrested & interned, December 7-9, 1941	367 ^d
Issei	345
Nisei	22
Nikkei pop. sent to mainland intern. & WRA camps, 1941-45	1,874 ^e
Issei (est.)	712
Nisei (including Kibei) (est.)	1,162
Kibei (est.)	324 ^f
Nikkei population at Tule Lake	628 ^g
Nikkei population expatriated to Japan	248 ^h

^aSee note 28.

^bSee note 6.

^cSee note 5.

^dSee note 57. In addition to the Nikkei, 74 German nationals and 19 citizens of German ancestry, and 11 Italian nationals and 2 citizens of Italian ancestry were arrested.

^eSee notes 242 and 275. Includes 306 U.S. citizens who were paroled from internment in Hawai'i and assigned to relocation centers on the mainland; 783 alien and citizen "voluntary evacuees"; and 73 U.S. citizen excludées. Statistics from military and other government sources are not consistent.

^fSee note 124.

^gSee note 242.

^hSee note 285.

Their return was a series of individual events—important to their families, to be sure, but largely private. The music of the celebrations had faded; the history of the evacuations, exclusions, and internments came to a poignantly quiet ending; and for these families, too, the war was ended at last.

SUMMARY AND CONCLUSION

Both the mass imprisonment of the Nikkei population on the mainland and the selective imprisonment of individual Hawaiian Nikkei—including the Kibei, most of whom held dual citizenship—evoke the basic challenge of our constitutional law, as recently expressed by retired Supreme Court Justice Souter, that

the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one. The court has to decide which of our approved desires has the better claim, right here, right now. . . .²⁶⁹

With regard to the mass evacuation from the West Coast states, in an infamous moment for the rule of law in America, the Supreme Court of the United States decided that Japanese-American citizens' claims of liberty and the application of traditional constitutional guarantees must be rejected. The crisis situation of a war suddenly thrust on the nation, and the convictions held by the military—and the president—as to the dangers of possible espionage and sabotage allegedly posed by the Nikkei presence in the western mainland states persuaded the Court to uphold the emergency measures as being within the terms of the Constitution.²⁷⁰

²⁶⁹Hon. David H. Souter, Harvard Commencement Address, in *Harvard Gazette*, May 27, 2010, <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

²⁷⁰For an insightful discussion of these oft-analyzed decisions, see Joel Grossman, "The Japanese-American Cases and the Vagaries of Constitutional Adjudication in Wartime," *University of Hawai'i Law Review* 67 (1997). Wiecek, *Birth of the Modern Constitution*, places the history of these cases in a richly textured contextual analysis of the wartime stresses on constitutional norms and executive decision making.

Hawai'i's residents of Japanese descent were spared what President Roosevelt and the chiefs of staff initially wanted to impose on them—the same fate of mass removal and incarceration as their mainland counterparts suffered. Instead, as we have seen, some 10,000 of them were investigated, hundreds were interrogated, and, of the latter, approximately 2,000 were taken into custody for internment, evacuation, or exclusion.²⁷¹ To be sure, the remainder of Hawai'i's Nikkei, including the 37,000 born in Japan and so legally categorized as "enemy aliens," were permitted to continue with their lives in the islands. But they did so under a wide range of specially targeted prohibitions and restrictions under martial law.

The fate of the Kibei, however, was especially cruel. Viewed from the outset of the war with deep suspicion as to their loyalty and reliability, they were subject to special scrutiny and exceptional treatment at virtually every step of the investigatory, assessment, and imprisonment processes.²⁷² The majority of the several hundred Hawaiian Kibei who were incarcerated at either the mainland WRA facilities or the Honouliuli camp were confined until war's end, and in some cases for months afterward. In addition, family members often chose to join those confined on the mainland and thus shared their fate.²⁷³ More than 600 Hawaiian Nisei and Kibei ended up in the notorious center at Tule Lake, where internees deemed disloyal and those who requested repatriation had been concentrated.²⁷⁴

One thing seems certain: the Kibei were disproportionately represented among the Hawaiians who were evacuated or excluded. According to an October 1945 memorandum prepared

²⁷¹The subgroup termed *evacuees* included, as we have noted, a few hundred so-called voluntary evacuees; but two features of their treatment justify using the term *taken into custody*. First, many internees' family members who were transferred from their residences to the mainland in the "volunteer evacuee" category were actually given no choice. There is specific evidence, for example, of a group of internees' wives on Maui who were summarily ordered by the army, on a few days' notice, to report to an evacuation center and then were transferred to the mainland—selected because they were on the welfare rolls and, as such, were a burden to the OMG budget. (Rev. Yamada, "Struggling Within a Struggle," 31–32.) Second, even those who did actually volunteer because they were seeking to join the heads of their families then in mainland internment were transferred to a relocation center or internment camp; although they did not always link successfully with their kin, in any event they also clearly were "in custody."

²⁷²See text and notes, pp. 45 ff.

²⁷³See pp. 33–35, re women and children who were evacuated.

²⁷⁴"Segregant Population of Tule Lake as of July 1944," WDC-CAD-Research Branch, September 4, 1944, reel 170, copy in JERS files, Bancroft Library, UC Berkeley.

by the Provost Marshal General's Office, a total 1,874 persons had been evacuated from Hawai'i to the mainland during the war. Of this total,

- 712 aliens (plus a few Kibei who wanted to renounce U.S. citizenship) were sent to internment camps on the mainland under the terms of the Enemy Aliens Act;
- 306 formerly interned or detained U.S. citizens—presumably mainly Kibei—were paroled from internment in Hawaii and assigned to relocation centers on the mainland between November 1942 and March 1943;
- 783 civilians, both citizens and aliens, including men, women, and children who presumably were family members of internees or former internees and were designated "voluntary evacuees," were evacuated, most of them with the previous group; and
- 73 U.S. citizens, again presumably mainly Kibei, were excluded from the Territory of Hawaii Military Area after martial law ended in 1944.²⁷⁵

General Richardson attested that the persons who had been selected for evacuation (other than the women and children) were, "for the most part dual citizens who were considered at that time to be potentially dangerous to the military security of the Territory of Hawaii, but not to the United States as a whole."²⁷⁶ Although we cannot say with certainty how many of the 306 former internees and 73 excludées were Kibei, according to our analysis of the WRA records, there were 324 Kibei in the relocation centers. Allowing for the fact that a few female Kibei accompanied their husbands, we can conclude that the vast majority—perhaps as many as 80 percent—of those 379 American and dual citizens whom Richardson deemed potentially dangerous to the security of the islands were Kibei.²⁷⁷ And yet, the Kibei comprised, by even the highest estimates, somewhat less than 5 percent of the adult Nisei citizen population in Hawai'i.²⁷⁸

Undoubtedly some of the Kibei who were deprived of their liberty were either in favor of a Japanese victory or were neu-

²⁷⁵A.M. Tollefson, Provost Marshal General's Office, "Persons Evacuated from the Territory of Hawaii Military Area Presently Residing on the Mainland," Oct. 9, 1945. See note 242, *supra*, re discrepancy of statistics.

²⁷⁶See Richardson to CIC, Pacific Oceans Area, memorandum, 23 March 1945, RG 210, entry 17, box 3, National Archives.

²⁷⁷In addition, we know there were three Kibei still being held in Honouliuli toward the end of the war.

²⁷⁸See *supra*, note 27.

tral or ambivalent about who won the war. Certainly a significant number of them asked for repatriation to Japan—at least after they had been subjected to incarceration in the internment camps and/or relocation centers. That does not necessarily mean, however, that they were a threat to security or would engage in espionage or sabotage. But for the pro-Japanese Kibei and Nisei as well as for those who were staunchly loyal to the United States, the processes by which these people were taken from their homes and incarcerated, with many families given no way to reunite, were strikingly deficient as measured by the established norms and imperatives of constitutional due process.

*"Processing," Not Due Process:
The Dynamic of Nontransparent Procedure*

It was often said in professional intelligence circles that determining the "loyalty" of a suspect was the most important thing to be achieved in an investigation or interview, but it was also the most difficult thing to accomplish with accuracy. That is why the FBI as well as the army and navy intelligence officers adopted the categories *potentially disloyal*, to justify some of the internments, and *passive loyalty* as a category that would bring a person under the shadow of suspicion and even warrant taking the suspect into custody for internment or removal, absent behavior termed *active loyalty*. That these categories were elastic, subjective, and could be convoluted and perverse in their application to individual cases surely was inevitable. According to an attorney for the WRA who was present at the loyalty interviews at Tule Lake in March 1943,

I heard every kind of approach and noted wide variations in the treatment by different interviewers of the same conduct and the same responses by different kibei. For instance, when Kibei A would say "I am confused. I do not know whether to register or not,"—interviewer X would reply "All right. You go back home and think it over. Come back tomorrow morning and see me." At another table Kibei B would say substantially the same thing as Kibei A had said, and interviewer Y would answer . . . "Get on the truck. . . . You can get 20 years for what you're doing."²⁷⁹

²⁷⁹Edgar Bernhard, principal attorney, to Philip M. Glick, War Relocation Authority, 13 April 1943. JERS Collection, reel 170, Bancroft Library, University of California, Berkeley.

The underlying premise of the entire intelligence operation that led to the loss of liberty for the nearly 2,000 Nikkei in Hawai'i (as it did for all the mainland Nikkei internees) was that to be of Japanese descent was to be suspect. This was profiling in raw and unvarnished form. In the case of Hawai'i, that premise was vastly less devastating in its effects than it was as applied by the army on the mainland, for in Hawai'i it was the basis for "selective" investigation rather than mass removal or internment. The military intelligence and FBI operations in the islands were geared to the investigation of individual suspects' personal behaviors (presumed to reveal cultural proclivities and hence primary loyalties) in light of educational background, religious beliefs and practices, business or organizational associations, and other factors regarded as relevant to assessing loyalty. To that degree, the determination of loyalty rested at least superficially on an evaluation of a range of relevant facts and factors, rather than beginning and ending with the single criterion of race.²⁸⁰

Many particulars of the substantive criteria that were formulated to separate the "loyal" from the "disloyal" appear in retrospect, however, to have been insupportable. For example, questions were posed to suspects for which almost any answer would be evidence of disloyalty or "potential disloyalty." Assumptions that anyone of Japanese descent would be ready to lie, would be at best evasive, was untrustworthy, and the like, clearly prejudiced the decisions that led to many incarcerations. Worst of all, with regard to the general investigative and decision-making procedures, decisions often turned on evidence of questionable relevance to whether a suspect was actually a security risk, such as membership in specified organizations, cultural lifestyle, religious affiliation, style of dress, possession of religious materials, use of the English language, relatives living in Japan, contributions to suspect organizations (the contributions in some cases literally less than a dollar), and the like. Yet it was on the basis of facts such as these that persons were taken away from their families and their homes, faced, as many of them understandably believed, with the possibility of never seeing loved ones again.

²⁸⁰See, e.g., text *supra*, pp. 41–46. Eric Muller provides an informative discussion of the theoretical and practical perplexities associated with loyalty assessment. Minimal fairness, he states, requires "a welter of information about an individual's past conduct, environment, and psychology. Hinging a prediction of a person's future risk of dangerous or illegal behavior on one or two rudimentary facts about him is unthinkable. And when those facts are a person's ancestry and cultural practices and ties, the prediction is uniquely dangerous. . . . Focus on a person's ancestry and cultural practices is far more likely to corrupt an inquiry into his loyalty and dangerousness than to enhance it. . . ." Muller, *American Inquisition*, pp. 143–44.

General Emmons admitted as much when being deposed under oath for a postwar civil liability trial: "In Hawaii, we were taking no chances," he said, "and we used the expression 'potentially dangerous' in a very liberal way, . . . a very broad way. . . . In the case of any doubt of any kind, we had the man interned. . . ." ²⁸¹ For many who were interned, Emmons readily conceded, there was no evidence that the person interned would likely do any harm. In making his decisions, Emmons admitted, it did not matter whether the person in question was an American citizen or not, and he did not hesitate to approve arrest, internment, or evacuation of individuals even in the absence of any "real evidence that they were dangerous." He stated further, "We had information in the form of gossip, hearsay and conclusions, and so on, that I would distinguish from evidence. What I mean is that had we presented in court what we had, and what the FBI had, on these people, the court would not [have] accepted it. . . . At least, I never saw any [such tangible evidence]. . . . Had we had such evidence, we would have tried them before a military commission." ²⁸²

The adjudication procedure thus was explicitly based on crediting even undocumented gossip or suspicion. The process of loyalty determination was nontransparent; it gave unlimited discretion to the military commander, who was free to accept or reject the decisions of formal review boards (and he regularly accepted the advice of intelligence officers when they recommended that he override review boards' findings that a particular individual was loyal and should be released.) ²⁸³ If specific documentation of behavior allegedly warranting internment was available to the army, it was not revealed to the person under investigation or interrogation, and permission was never granted to confront accusers. The case files for those sentenced to internment or removal typically would be closed with the

²⁸¹Deposition of Gen. Delos Emmons, taken at San Francisco, May 18, 1949, in *Zimmerman v. Poindexter et al.*, box 157, Case Files for the U.S. District Court for the District and Territory of Hawaii, National Archives (Pacific Region), San Bruno, California.

²⁸²*Ibid.*

²⁸³In the 1943–44 board review of earlier decisions on individual internees, we have found in our examination of summaries of action as well as of individual files that about one-fourth, at least, of the favorable initial recommendations had been overridden by the military and intelligence officers who made final recommendations to the commanding general to continue incarceration. Emmons deposition in *Zimmerman v. Poindexter et al.*, cited in n. 281, *supra*.

prescribed stock phrase "dangerous or potentially dangerous to the security of the United States."²⁸⁴

By this process were hundreds of U.S. citizens deemed "disloyal" or "potentially disloyal," and therefore subjected to incarceration; for some, including hundreds of the interned Kibei from Hawai'i, the final result was exposure to the terrifying chaos and coercion that prevailed at the Tule Lake camp. Entrapment in the processes of investigation, interrogation, transfer, and incarceration was compounded at Tule Lake by confusion, duress, and violence—with the result that several thousand internees and their kin from the mainland, plus a reported 136 from Hawai'i, signed papers renouncing their U.S. citizenship and asking for return to Japan.²⁸⁵ Even with regard to the foregoing opaque and nonaccountable procedures that the internees and other evacuees endured, the Kibei were once again placed in an especially disadvantaged position at every step in the process, victimized by the crudest variant of racial profiling. When a Kibei was interrogated, the chances of being found disloyal, or at least of being found "potentially dangerous" or worse, were far greater than for other Nisei or indeed (at least after the initial roundup in December 1942) than even for alien enemies who were taken into custody and interned.²⁸⁶ To be a Kibei was to be subject to a very strong (and explicit) presumption of some degree of disloyalty and/or unreliability.

This presumption of Kibei disloyalty had been expressed since 1940 or earlier in the key policy documents on which the intelligence services relied heavily for guidance: the Ringle Report and the Munson Report, both of which contended that the Kibei were primarily loyal to Japan—and the "most dan-

²⁸⁴These factual statements and others that we have given with regard to the procedures and decisions on loyalty are based, unless otherwise specifically noted, on our examination of scores of individual files in the intelligence and army records held in the National Archives and the Bancroft Library, UC Berkeley, and material in the Japanese Cultural Center of Hawai'i collections. Full analysis of these cases will be included in a book, tentatively titled "Bayonets in Paradise," which is currently in process of research and writing by Harry and Jane Scheiber.

²⁸⁵War Relocation Authority, *The Evacuated People*, 192. Of the 136 requesting transfer to Japan who were in the WRA camps, 125 were evacuees, 10 were excludées, and 1 had been released and was on parole. Allen gives the total number of those from Hawai'i who requested repatriation to Japan as 248. Allen, *Hawaii's War Years*, 141. Presumably, this larger number includes those who were in Department of Justice camps as well as others who were never in custody, including family members of those who elected to return to Japan.

²⁸⁶Nearly 50 percent of Hawai'i citizens who had hearings were interned, compared to 7 percent of aliens. Exhibit 10, *Zimmerman v. Poindexter et al.*, box 155, case files, civil case 730, for the U.S. District Court for the District and Territory of Hawaii, National Archives (Pacific Region), San Bruno, California.

gerous element" of the Nikkei—and recommended that their internment be given high priority in any security program; it was also expressed in the two naval intelligence manuals issued in Hawai'i in 1943, discussed above, and in briefings given to investigators.²⁸⁷ Indeed, that presumption was embellished in several key documents (widely circulated in the intelligence bureaucracy) expressing the view that the Japanese government had purposefully sent many Kibei back to Hawai'i or the mainland to engage in espionage or sabotage, or with some other unspecified but sinister "mission" on behalf of the Japanese military. Ringle's assessment, it will be recalled, specifically proposed that many Kibei "*may have been deliberately sent back to the United States by the Japanese government to act as agents.*"²⁸⁸

This perdurable presumption of Kibei disloyalty lay behind the army's decision, in a mode of almost panicked urgency, to move the Kibei internees out of Hawai'i when Judge Metzger opened his court for a habeas hearing in 1943, and thus led General Richardson to fear that his entire regime of martial law would be jeopardized. This same presumption persisted at all stages of "processing" of the Hawai'i Kibei as they were moved to the mainland camps and subjected to the series of investigatory interviews conducted there during 1943 and 1944. Those deemed disloyal, or who refused to answer the loyalty questionnaires, were segregated with the mainland Nikkei at the Tule Lake Center. Various intelligence guidelines for hearing officers' determination of loyalty stated that "bitterness" or "lack of remorse" (like "evasiveness") might be considered sufficient reason to deny the suspect person parole or release, or to send the prisoner into internment at Tule Lake.²⁸⁹

"In Case of Invasion": The Perpetual Emergency

It remains to ponder why the army, with the full support of the Roosevelt administration, held so rigidly to the theory that internment or removal of so many Kibei and other Nikkei was essential to the security of the islands and the protection of the war effort in the Pacific—despite the absence of sabotage or espionage. The answer lies mainly, we submit, in

²⁸⁷The Ringle Report is quoted in the text, *supra*, at note 59; the Munson Report is discussed in text and quoted at note 42; the 1943 memoranda by naval intelligence in Hawai'i are discussed on pp. 41 ff.

²⁸⁸See text at note 59. Emphasis added.

²⁸⁹See also note 181. See Donald E. Collins, *Native American Aliens*, 102.

the way in which the intelligence services and the military leadership framed the criteria for incarceration and evacuation of the "dangerous" and the "potentially dangerous" persons who were taken into custody.²⁹⁰ Building on the premise, discussed above, that Japanese ancestry (let alone status as a Kibei) was sufficient to warrant suspicion of disloyalty, the interrogators, FBI investigators, review boards, and military brass made operational in a specific way General Emmons' maxim that "doubt of any kind" could not be accepted. No chances could be taken. But chances taken in what sense? Here the relevant criterion was explicit, appearing repeatedly in the internal correspondence now available in the archival records, as it also appeared formally in the intelligence manuals and guidelines for interrogators and review boards. This criterion was, in effect, the likelihood that a given suspect would lend active assistance to Japanese combat forces in the worst-case scenario—in which the Japanese would launch an invasion of Hawai'i, landing on the beaches of the islands while a renewed air attack would be directed at military and naval installations.

Thus, in a basic sense, the fairness of the criterion being applied to an individual depended on the plausibility of the worst-case scenario. When a federal commission held secret hearings in Hawai'i under the chairmanship of Justice Roberts four weeks after the Pearl Harbor attack, this question arose in interrogating witnesses. Especially revealing was the testimony of Robert Shivers, the FBI agent in charge of Hawai'i, who told the commission that there had been absolutely no sabotage reported during the air raid. But when he was asked if he was confident that no acts of sabotage would be committed in the event of another raid, he replied, "Absolutely not." He regarded it as a distinct possibility. In light of his widely circulated public statements refuting rumors of Nikkei involvement in sabotage either on December 7 or after, this exchange and what followed in Shivers' testimony offers an important insight into the mentality and the particular concerns of responsible security officials at this critical juncture. Commissioner William Standley, a navy fleet admiral, asked, "Does that [the lack of sabotage after December 7] convey to you the possibility that that was deliberate so as not to alarm the people about sabotage so that when the real test comes that sabotage would be effective?" Shivers responded that undoubtedly there were some in Hawai'i "who would be lulled or want to be lulled into

²⁹⁰This is not to underestimate the importance of personalities. General Emmons' resistance to the pressures for mass evacuation have been noted.

that train of thought and who would probably try to lull other people into that train of thought."²⁹¹ Asked more specifically to predict how the Nisei and Issei population of the islands would act if an invasion should occur, Shivers predicted that in the event of any "temporary decisive victory" by Japan in the war, let alone if the islands were attacked again, "the old spirit will begin to bubble forth" so that the "subservience" evident in the Nikkei community would disappear. He concluded that "some of them will probably do anything they can," if in a position to assist an invasion force.²⁹²

A more forceful view of potential treachery was offered to the commission in the testimony of Angus Taylor, the U.S. attorney for the district of Hawai'i. Seasoning his presentation with some scornful remarks about Shivers' naïveté in publicly attesting to Japanese-American loyalty, Taylor declared, "On my information, I think that if there were an invasion or something of that sort they would go over to the other side."²⁹³

There is no doubt that General Emmons was concerned about such a possibility. Indeed he referred to it explicitly in an unexpected context, viz., to reinforce his argument that a mass evacuation, as desired by the president, the navy, and others in 1942, was unnecessary. Emmons stated in this connection that if he were given the level of troop reinforcements he was requesting, he was confident his command could suppress any uprising or sabotage that might occur during a further attack.²⁹⁴

After the damage inflicted on the Japanese fleet in the Battle of Midway in June 1942, the burden of expert opinion was that Hawai'i was no longer in danger of invasion. Even a year later, however, General Emmons and OMG lawyers were contend-

²⁹¹Shivers testimony, January 6, 1942, in *Pearl Harbor: Commission to Investigate the Japanese Attack of December 7, 1941, on Hawaii* (offprint copy in Bancroft Library, UC Berkeley), 668.

²⁹²*Ibid.*

²⁹³Taylor testimony, *ibid.* 677. Other federal commissions have visited Hawai'i and seen "only the beauty," Taylor went on, embellishing his point with some rambling and almost incoherent ruminations. These commissions "make an investigation, and they are wined and dined and they see some hula-hula girls, and they go out and they see the Japanese children saluting our flag one time and do not see them thumbing it the next." (*Ibid.*) The top officers in the Department of Justice and many OMG officers, including Emmons, regarded Taylor as overly emotional on the question of Japanese American disloyalty, and his allegations of evidence to prove immediate danger were discounted when evaluated in Washington. See Scheiber and Scheiber, "Bayonets in Paradise," 493, 493n.

²⁹⁴Emmons to adjutant general, 10 Feb. 1942, in Daniels, ed., *American Concentration Camps*.

ing against any reduction in their authority in the martial law regime on grounds that Hawai'i remained susceptible to attack by Japanese forces, by air raids at a minimum. In sworn testimony in the *Duncan* case hearing in Judge Metzger's court in April 1944—at a time when the level of combat was being intensified in the western and southern Pacific (presumably rendering Japanese naval and air forces even less capable of launching a cross-Pacific attack on Hawai'i)—General Richardson actually declared under oath that Hawai'i was in imminent danger of attack.²⁹⁵ (This was at a time when the War Department was preparing to downgrade the Hawaiian Islands to a "communications zone.")²⁹⁶

For the army command, the implication of these repeated warnings of danger from the Hawaiian Nikkei population in case of an invasion was clear: not only were internments necessary, but also martial law must be preserved to its fullest extent. Resisting every effort to return key elements of governance to the civilian officers and courts, Richardson made clear to the War Department the connection he wanted recognized between the ethnic Japanese "threat" and the need for martial law. "It must be remembered," he insisted in a June 1944 message to McCloy, that "apprehension, detention, hearing and internment continue even now," with 43 persons of Japanese ancestry (the majority Kibei) having been interned in the first five months of the year. Some of the U.S. citizens among the new internees "are considered far more potentially dangerous," he claimed, "than some aliens." Martial law was thus twinned with internment; together they had, "without doubt, exerted a continuing pressure upon the Japanese community and acted as a deterrent on the Japanese community."²⁹⁷ Thus, even while admitting that they did not have solid enough evidence on their internees to withstand judicial scrutiny if there were a habeas corpus proceeding, the generals continued to hammer away at the idea that residents of Japanese extraction represented a serious threat to security, along with the idea that an invasion might occur that would unleash disloyal Japanese subversives or saboteurs. And they continued to link the scope and sustained force of martial law

²⁹⁵Not only Richardson but also Admiral Chester Nimitz testified in the *Duncan* case hearing that "invasion," though possibly in the form of commando raids or air attacks, was still an imminent danger. Discussed in Justice Black's majority opinion in *Duncan v. Kahanamoku*, 327 U.S. 304, 329 (1946).

²⁹⁶Lt. Col. Harrison to Capt. Colclough, memorandum, 6 June 1944, McCloy Files, RG107, National Archives.

²⁹⁷Richardson to McCloy, 9 Aug. 1944, Asst. Sec. of War Files, RG 107, National Archives.

with internments or removal of Nikkei as the complementary tools that they needed to maintain adequate security in anticipation of such a worst-case scenario.

The Absence of Legal Challenge

None of the Kibei, nor indeed any of Hawai'i's Nikkei citizens who were incarcerated or evacuated, ever had their day in court during the war years. Neither the Supreme Court justices who had heard the three Japanese American cases from the mainland nor even a federal judge in the district court in Hawai'i ever ruled on whether the army had violated the constitutional rights of these citizens by internment, evacuation, or exclusion. This absence of any judicial action was attributable partly to the army's series of stratagems which, as we have seen, moved the prisoners first to the mainland, then back to Hawai'i, then to the mainland again—precisely in order to make it difficult for them to get a habeas corpus proceeding before a federal court.

This very ironic failure of Hawaiian Kibei or other Nikkei to present a habeas petition during the war can be attributed, it seems fairly certain, to fear on the part of the prisoners themselves and their families that by challenging the military authorities, they would provoke the military to initiate in the islands some variant of the mass expulsion and internments that had occurred on the mainland.²⁹⁸ A further possible explanation, suggested in an interview given to us by the late Senator Hiram Fong (who had been a young politician and lawyer in Hawai'i when the war broke out and martial law was first imposed), was that there was a Japanese cultural disposition not to challenge the government because of the risk of the shame that would attend an unsuccessful appeal to law. Whatever the reasons, the fact remains that no habeas challenge was raised by the Hawaiian Nikkei population from December 7, 1941, to the end of the war.

Yet one vital fact remains indisputable: There was never an iota of evidence to prove a single act of espionage, let alone sabotage, committed—either before or after Pearl Harbor—by

²⁹⁸This is a theme that runs through the confidential detailed Morale Section reports of 1942, filed with the OMG, copies in the Hawaii War Records collection, University of Hawai'i Library; and also in the Japanese American Evacuation Files, Bancroft Library.

Kibei or any other Nisei or Japanese alien in Hawai'i.²⁹⁹ This fact was attested to repeatedly, both in internal agency documents and in public, by both military and civilian intelligence officers, and by the FBI. The army and the intelligence chiefs in Hawai'i contended throughout the war that the absence of such acts was attributable to the measures taken, in the larger martial law context, against the Nikkei community and targeted in a unique way against the Kibei. Was this the full explanation? Or was it instead an inversion of logic, denying the possibility that the Kibei and other Nikkei in fact posed little or no real danger of subversion, let alone espionage or sabotage? The Hawaii Command's intransigence and attachment to the proposition that martial law must be perpetuated in its fullest scope—even down to the last months of 1944—bore all the hallmarks of a military bureaucracy that had invested itself in a program of total control. In their unwillingness to part with any element of that program, the military in Hawai'i exhibited little concern with constitutional liberties and insisted that their own determination of what measures "military necessity" required must be the sole prerogative of commanders on the ground.

In sum, the military's unyielding resistance to any curbing of martial law powers became a dominating imperative of its policy in the last two years of the war; and the army's preoccupation with interning, evacuating, and "excluding" Nikkei served to buttress and advance the army's arguments for the larger objective of preserving martial law in their proclaimed "fortress" in the Pacific. In that sense, the record of their treatment of the Kibei of Hawai'i must be understood in the context of interrelated policies and actions impelled and advanced by racial stereotyping and discrimination, by resistance to the acknowledged constitutional procedures that were designed to protect citizens' rights even in wartime, by disregard and

²⁹⁹See note 52 regarding the activities of the Japanese consulate re "espionage." There was also the case of a downed Japanese pilot being helped by a single Nisei on the isolated island of Ni'ihau, but it is likely that such assistance was driven by ignorance and fear more than by loyalty to Japan. At the time the pilot crashed, the residents of Ni'ihau were unaware that the United States and Japan were at war. The pilot was killed by the islanders, and the Nisei killed himself. The Nisei's wife, suspected of being a Japanese spy, was held in a military prison on Oahu until late 1944. A January 1942 navy report cited the incident as indicative of the "likelihood that Japanese residents previously believed loyal to the United States may aid Japan" and probably influenced the administration's thinking on the need for internment of the Nikkei. William Hallstead, "The Ni'ihau Incident," *World War II* (November 2000), available at <http://www.historynet.com/the-niihau-incident-htm/2>. See also Allen, *Hawaii's War Years*, 44–46; Haama and Komeiji, *Okage Sama De*, 131–32; and the official U.S. Navy website, http://www.navy.mil/search/display.asp?story_id=30209.

literally contempt for federal judicial authority in the islands, and, not least, by a military bureaucracy's ardent defense of the position of power it had established in the first intensive hours of the emergency that engulfed Hawai'i when Japanese planes attacked the U.S. fleet and airfields on the fateful morning of December 7.

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ACKNOWLEDGMENTS

The authors are indebted to the librarians and archivists in the U.S. National Archives, the Hawai'i and Pacific Room of the University of Hawai'i at Manoa Library, the Hawai'i State Archives, the Bancroft Library of UC Berkeley, and the Japanese Cultural Center of Hawai'i, in Honolulu. Funding for the research was partially supported by the Office of Dean Christopher Edley, Jr., and by the Sho Sato Program of UC Berkeley Law. Thanks are owed also to James Phillips, a doctoral student in the Jurisprudence and Social Policy Program at UC Berkeley Law, for assistance in research, and to Helton deCarvalho and Toni Mendicino of the law school's faculty support unit staff for assistance in preparation of the manuscript and illustrations for publication. Professor Emeritus Roger Daniels, University of Cincinnati, provided many valuable suggestions, but the authors are of course solely responsible for all matters of facts and interpretation.

UNITED STATES LAW IN THE PACIFIC ISLANDS

HON. ALFRED T. GOODWIN

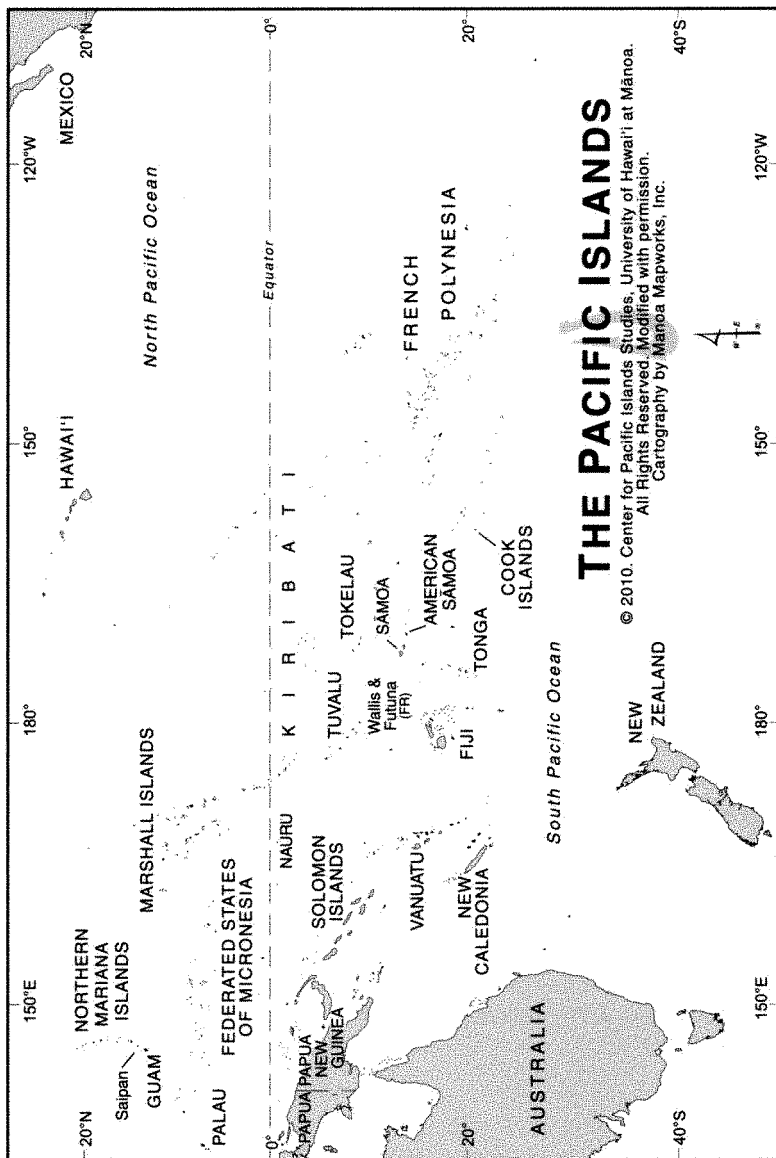
INTRODUCTION

Legal researchers, political science students, and travelers reading local newspapers from time to time encounter references to American courts applying American law in distant ports and islands of the western Pacific and wonder, How did they get there? Who is in charge? Why are lawyers and judges trained in the United States enforcing local, international, and U.S. law thousands of miles away from their home states?

As the nineteenth century was ending, the war with Spain brought Guam and the Philippines (plus Puerto Rico), with their unique political questions, under the control of the United States. Theretofore, American presence in the western Pacific had been largely a matter of acquiring coaling stations for the U.S. Navy, in competition with the emerging industrial and maritime powers of Europe. In addition to the Spanish colonies acquired off shore, the United States also brought Polynesian Eastern Samoa and the Hawaiian archipelago under its sovereignty at the turn of the century.

In the years between the great wars of the first half of the twentieth century, Japan emerged as an industrial and maritime power. The League of Nations had "mandated" Germany's colonial sites in the Pacific Islands to Japan after the First World War. Rival American and British hegemony continued between the wars over the islands previously under those flags,

Alfred T. Goodwin is a senior circuit judge, U.S. Court of Appeals for the Ninth Circuit. The opinions expressed here are solely those of the author and do not necessarily reflect the views of any other member of the court.



THE PACIFIC ISLANDS

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with surveillance of Japanese activity subdued by economic conditions and concern focused on the resurgence of Germany in Europe.

Between World Wars I and II, the United States maintained naval, and later air, bases on Oahu, Wake, and Midway Islands, on Luzon in the Philippines, and on Guam. At the same time, Japan used its League of Nations mandate covertly to construct naval and air facilities on Saipan, a short flight north of Guam, together with major naval bases in the Truk Lagoon (now called Chuuk), smaller facilities in other Caroline Islands, and a major colonial headquarters in the archipelago of Palau, a relatively short flight east of Mindanao in the Philippines.

The relationship between American Samoa and the United States had been, for its first thirty years, essentially a "gentlemen's agreement" between Samoan *matais* (traditional chiefs) and officers of the U.S. Navy. Congress finally formalized the acquisition of Tutuila and two related smaller islands of Eastern Samoa by statute in 1929.¹ Of course the major United States presence in the Pacific was pre-statehood Hawai'i.²

For nearly four centuries (from 1521 to 1898), Spain had effectively claimed and colonized the Philippines, the Caroline Islands (named for King Charles of Spain), and the Mariana Islands (named for his queen), of which Guam was the largest and most populous. Despite a century of American influence, interrupted from 1942 to 1945 by Japanese occupation, Guam still reflects the cultural and religious heritage of Spanish rule.³ The Chamorro language is rooted in sixteenth-century Spanish, supplemented with linguistic input from Filipino and other island and Asian cultures.⁴ Guam's Organic Act designates the island as an unincorporated territory of the United States, meaning that it is not destined for statehood in the foreseeable future. The island has strategic importance because of its highly developed air and naval bases, and it has a central com-

¹See 48 U.S.C. §1661.

²For general background on how the sovereign kingdom of Hawai'i became a noncontiguous American territory and, later, a state, and how its judiciary system developed, see Samuel P. King, "Federal Courts and the Annexation of Hawaii," *Western Legal History* 2:1 (Winter/Spring 1989). Chief Judge Emeritus King writes from personal knowledge and his own careful research. Additional information tracing the evolution of common law courts in the kingdom of Hawai'i to the present may be found in "The Judicial System of Hawaii," by Chief Justice William S. Richardson, 1 *Hawaii Digest* (1968), xvii.

³Religious holidays, street names, the Chamorro language, and land registration still reflect Spanish rule and Philippine influence.

⁴Ethnicity: Chamorro 37.1 percent, Filipino 26.3 percent, other Pacific Islanders 11.3 percent, Caucasian 6.9 percent, other 11.1 percent. *Pacific Magazine* (January/February 2006).

mercial position as a crossroads for the emerging small nations of Micronesia to interact with the larger nations of the Pacific Rim.

Before the outbreak of World War II, the United States government was content to control the territory of Hawai'i, the Philippines, and Guam, with additional naval stations on Midway and Wake Islands. These assets gave the United States secure shipping lanes westward to Asia. American commercial air service, by the Pan American flying boat, began—via Hawai'i and Guam—just as Japanese military planners were quietly developing their own bases throughout their mandated trusteeship islands. Air commerce, however, which now ties the economy of Micronesia to Japan and to both sides of the Pacific, had to await both the end of World War II and the new technology of long-range jet aircraft. Before the jet age, time and distance effectively held change to a slow pace throughout Micronesia.

During the half-century following the end of World War II in the Pacific, the population of the 2,140 islands and atolls of Micronesia doubled to 107,000, with commensurate economic, cultural, and legal tension creating demand for courts of law.⁵ Because the United States had a major role in the replacement of Japanese governance with that of the Trust Territory of the Pacific Islands (TTPI)⁶ under the mandate of the United Nations, law courts modeled on those of the United States (as were operating in American Samoa) were created to deal with the growing number of criminal and civil cases that followed the changes from occupied to liberated to self-governing island societies. American lawyers and judges, but not necessarily U.S. law, followed the United States flag into the TTPI.⁷

The United Nations Security Council appointed the United States trustee to administer the island political subdivisions in Micronesia that had been "mandated" to Japan during the two decades following World War I.⁸ The United States trusteeship

⁵2000 Census, National Statistics Office, Department of Economic Affairs, Federated States of Micronesia.

⁶The TTPI was an area of more than three million square miles and consisted of six districts: the Northern Mariana Islands, Palau, Yap, Truk (now Chuuk), Ponape (included Kosrae) and the Marshall Islands.

⁷The trust territory had its own flag. *United States v. Covington*, 783 F.2d 1052, 1055 (9th Cir. 1985).

⁸See "Trusteeship Agreement for the League of Nations Japanese Mandated Islands," July 18, 1947, *United States Statutes at Large* 61:3301.

was designated a "strategic" trust.⁹ It included the populated Mariana Islands of Saipan, Tinian, and Rota, together with eleven smaller, unpopulated islands, all called the Northern Mariana Islands.¹⁰ Also under U.S. trusteeship were the Caroline Islands of Yap, Kosrae, Pohnpei, and Chuuk,¹¹ with their associated smaller islands and atolls; the island group in the far western Caroline Islands now known as the Republic of Palau; and the Republic of the Marshall Islands (RMI), made up of twenty-nine coral atolls and some 1,196 smaller islands spread over an area of roughly one thousand miles from east to west and from north to south. The RMI lies about halfway on an imaginary line between Australia and Hawai'i. The RMI population of approximately 60,000 lives on a total land mass about the size of Washington, D.C. The best-known atolls are Majuro, the capital of the RMI, Kwajalein, Bikini,¹² Rongelap, Mili, Jaluit, and Eniwetak.

The United States undertook the administration of the newly designated TTPI well aware that the local economies of many of its districts had been damaged by military occupation and liberation. As of 1946, with the exception of Palau, virtually none of the islands that had been fortified by Japan as bases for its operations in the Pacific could feed their own populations. Traditional local economies were not prepared for the task of rebuilding shattered infrastructure. Most of the island communities in Micronesia had little or no prewar experience with either monetary economies or international affairs. Their populations, languages, and cultures had been influenced in various ways, however, by several centuries of contact with European traders and missionaries and, earlier, with Asian and

⁹Of the eleven trusts created by the United Nations after World War II, only the Trust Territory of the Pacific Islands was a "strategic" trust. As a strategic trust, the Trust Territory of the Pacific Islands was overseen by the Security Council, whereas the other ten trusts were overseen by the Trusteeship Council. See the U.N. Charter, chapter XII, articles 7577 and 8283.

¹⁰They were so named because they lay north of the Mariana Island of Guam, which had been an unincorporated United States territory from 1898 until it was occupied by Japan from 1942 until 1944, when it regained territorial status.

¹¹Formerly called Ponape and Truk, prewar names changed upon the independence of the Federated States of Micronesia.

¹²The Bikini atoll was the site of a series of U.S. nuclear weapons tests, called Operation Crossroads, in the summer of 1946. See Jonathan M. Weisgall, *Operation Crossroads: The Atomic Tests at Bikini Atoll* (Annapolis, MD, 1994). Nuclear testing in the Marshall Islands is further discussed infra, p. 12.

Austral-Oceanic navigators who had left no written records of discovery and colonization.¹³

In the aftermath of two wars, civilian populations were eager to become self-sufficient and to join the community of nations as self-governing, independent countries. It was clear to all that they would need help, which the United States offered, but with conditions. Negotiations about these conditions occupied many of the next forty years, during which the rule of law and progress toward self-government advanced gradually under the trusteeship and, at last in 1994, to political, if not financial, independence.

Because the Security Council had designated the former Japanese-mandated islands as a strategic trust, the first administrative officers were civil affairs officers assigned by the U.S. Navy. After 1951, military administration gradually gave way to civilian administration under the Department of the Interior. Two exceptions were Saipan, which was jointly administered by military and civilian officers for several years,¹⁴ and the Marshall Islands, some atolls of which remain of strategic military interest today and are subject to rigorous security restrictions.¹⁵

Lasting relationships that were formed with the U.S. judiciary continue in varying degrees in most of the courts of the independent nations in free association¹⁶ with the United States. Indirect but friendly relations also continue between former TTPI judges and those of now-independent island governments that were closely related to the judiciaries of Australia and New Zealand through U.N. trusteeship under those nations, such as, inter alia, Fiji, Vanuatu, Kiribati, Tuvalu, and Samoa.

Beginning in the early 1970s, then-Chief Judge Richard Chambers of the Ninth Circuit convened a Ninth Circuit Pacific Island Committee. Under his leadership, that committee promoted informal conferences with judges in Australia, New Zealand, the Samoas, Fiji, and French Oceania, as well as those of Guam, Saipan, and the U.S. Trust Territory. These relationships led to the formation of judicial conferences held

¹³See, e.g., J. Koji Lum et al., "Mitochondrial Nuclear Genetic Relationships among Pacific Island and Asian Populations," *American Journal of Human Genetics* 63:2 (1998): 613–24.

¹⁴*United States v. Guerrero*, 4 F.3d 749 (9th Cir. 1993).

¹⁵See *Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs*, 133 F.3d 717, 720 (9th Cir. 1998). For example, Kwajalein has been taken over by the U.S. Navy and allows no passengers to deplane from commercial airlines without military security clearance.

¹⁶New sovereign nations associated with the United States for military purposes "shall consult in the conduct of their foreign affairs, with the Government of the United States." Covenant of Free Association, §23(a) 48 U.S.C. (notes).

in odd-numbered years and hosted by the various nations of the Pacific Islands on both sides of the equator.¹⁷

Before he ascended to the U.S. Supreme Court, Judge Anthony M. Kennedy had succeeded Judge Chambers as the chair of the Ninth Circuit's Pacific Island Committee, which dealt with administrative matters relating to the federal courts in Guam and Saipan, and with the TTPI courts that worked in association with federal courts in educational assignments. After Judge Kennedy left the circuit, his Pacific Island Committee duties were assigned to the author, who continued to chair the committee until Chief Judge J. Clifford Wallace completed his term as chief judge of the circuit and then became the committee chair in 1996.

THE POLYNESIAN MODEL—AMERICAN SAMOA

Before we discuss the administration of justice under the TTPI and after independence under Compacts of Free Association with the United States, it is helpful to examine the century-long administration of American justice on the Polynesian island of Tutuila and its related smaller islets, called American Samoa. That United States territory, population about 68,000 in 2005, is a close neighbor to the larger sovereign state of Samoa, population about 185,000. Related culturally and by blood and marriage, the populations of the two Samoas largely ignore the political boundaries between them, and they have English language court systems founded on their respective common law legal cultures. Both systems meet in the South Pacific Judicial Conferences started by Judge Chambers, and the High Court of American Samoa has close relations with the courts of Hawai'i and the Ninth Circuit, even though there is no actual jurisdictional link between the two systems.

American Samoa was never formally colonized or occupied by a European power. The "handshake" relationship formed between these small islands and the United States lasted for about three decades before Congress enacted a territorial statute. At the turn of the nineteenth century, the United States agreed to protect the customary land tenure and culture ("Fa-a-Samoa") in return for the use by the U.S. Navy of the harbor at Pago Pago (pronounced *Pango Pango*). American Samoa became and, for more than a century through two world wars, has re-

¹⁷See Jon M. Van Dyke, "The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific," *Western Legal History*, this issue.



In American Samoa, the business district and the courthouse (above), as well as the governor's office and the bicameral legislature, are all located in the harbor area, within walking distance of one another. (Photograph by Nathan Mease, used with permission)

maintained a territory of the United States. Its sons and daughters serve in the armed forces of the United States and are found in substantial numbers on U.S. college campuses and on mainland athletic teams. Having the status of U.S. nationals, at any given time about twice as many American Samoans reside in California and other states as remain on their home islands, where opportunities for young Samoans to find gainful employment are limited.

With a total land area of less than two hundred square kilometers, American Samoa has a growing population and increasing legal problems. In the harbor area, the business district and the courthouse, as well as the governor's office and the bicameral legislature (the Fono), are all located within easy walking distance of one another. The economy is enhanced by two tuna packing companies and by payments from the United States, mostly in the form of Social Security, Medicare, federal military pensions, general government operating costs, and grants-in-aid for capital improvements, construction projects, airport, public safety, education, and public health appropriations.

The justices of the High Court of American Samoa are appointed by the secretary of the interior. When the number of

appeals from the high court's trial division reaches a volume sufficient to justify an oral argument calendar, the chief justice of the high court asks the secretary of the interior to appoint one or more law-trained judges as "acting associate justices" of the high court to sit for a particular calendar, with travel and per diem paid by the Department of the Interior. For many years these appointments commonly were assigned to lawyers and active or retired judges known to the secretary of the interior or to that department's middle management, and these visitors would travel to Pago Pago to hear cases.

With a growing volume of litigation, appeals ready for argument accumulate at a rate that requires the convening of an appellate panel about every two years. The high court for the last two decades has been served by Michael Kruse, a New Zealand law-trained Samoan chief justice, and by Lyle Richmond, a long-time resident "stateside" law-trained associate justice, plus five or more matais appointed by the governor, who serve as lay judges and assist with both the trial of cases and the consideration of appeals. The high court employs U.S. law school graduates as law clerks for one- or two-year terms. The high court also has ready access to the library and other resources of the Ninth Circuit and, with e-mail, enjoys prompt communication.

The law-trained judges of the high court, after consultations with the governor of American Samoa and the Department of the Interior, have established an informal practice of inviting as visiting appellate judges for the high court some district and circuit judges of the Ninth Circuit who have had substantial experience in island courts elsewhere in the Pacific and who are known to produce timely written opinions. Since the 1980s, this practice has commended itself to the government of American Samoa and to its judiciary. However, the High Court of American Samoa is the only offshore U.S. territorial court that does not have a jurisdictional relationship with a federal court. Its decisions, as a practical matter, are final. Territorial law requires the governor to review death penalty judgments, with final review by the secretary of the interior. (In modern history, none has been recorded.) Aggrieved litigants in both civil and criminal matters have also indirectly appealed final high court decisions by first seeking administrative relief from the secretary of the interior and then by instituting separate judicial action against the secretary in the U.S. District Court for the District of Columbia.

The half-century of experience that the High Court of American Samoa had accumulated by 1947 became an appropriate model for new courts as they were established for the TTPI, as the rule of law, American-style, expanded into Micronesia.

TRUST ADMINISTRATION

The United Nations' establishment of the "Trust Territory of the Pacific Islands" handed the United States indefinite responsibility for military security and, for forty years, the political governance of a vast area of ocean, islands, reefs, atolls, and lagoons stretching from the state of Hawai'i to Palau. The stated goals of the U.N. trusteeship were to assure peace and to provide for the temporary administration of the island groups recently occupied by Japan and for their early transition into self-government.¹⁸

The future political entities of the TTPI, except for military bases, remained under the jurisdiction of the secretary of the interior. Civil servants and Peace Corps workers, who often—but not always—pursued a common agenda, provided assistance in health, education, welfare, municipal government, and the establishment of small businesses. Law courts were created where needed, and law-trained judges were appointed by the secretary of the interior to preside until local judges could be trained and appointed or elected. Peace Corps volunteers were joined by a handful of lawyers from the United States in assisting local populations with legal problems.

By 1986, when President Reagan formally terminated the trustee status of the new Commonwealth of the Northern Mariana Islands, all the former districts of the Trust Territory of the Pacific Islands enjoyed civil government under indigenous leadership. Executive and legislative bodies were in place, and local judicial systems were hearing cases. In Palau and the Marshall Islands, law-trained judges were appointed from among visiting American lawyers who applied for positions left vacant by retiring trust-territory trust judges, who formerly had been selected and paid by the United States. The trust districts that were combined into the Federated States of Micronesia (FSM) continued to be served temporarily by trust-territory judges who wished to remain as appointees of the new country. As those former trust-territory judges gradually vacated their positions to return to their homes, the FSM government elected not to recruit law-trained replacements and appointed lay judges from traditional leadership sources. These indigenous judges then employed, as needed, staff attorneys from among visiting American lawyers willing to work indefinitely as legal advisors to the lay judges, who made final decisions after trying or disposing of the cases.

¹⁸See "Trusteeship Agreement," *supra*, note 8.

The relatively few appeals produced by the local courts during the trustee period were decided by the High Court of the TTPI from 1958 until 1988. With a declining caseload, the high court formally closed its books when Palau became independent in 1994. During its most active period, the high court had as many as four full-time justices and four part-time justices. As is currently the practice in American Samoa, the justices of the High Court of the TTPI tried cases, and when a judgment was appealed, the court would form a three-judge panel to hear the appeals, with the trial judge excused from the appellate panel. Occasionally these panels would include a visiting judge from the Ninth Circuit. Any appeal from a High Court Appellate Division could be taken by a petition for certiorari to the secretary of the interior, but no record has been found of any appeal being accepted by the secretary.

Palau's trust relationship remained in effect until October 1, 1994, when Palau became the Republic of Palau, in free association with the United States.¹⁹ Both English and Palauan languages are "official" in the courts and government agencies of Palau.²⁰

As the only United Nations trusteeship to have a direct relationship with the American judiciary, the TTPI ceased to function in 1994. However, informal relations between the now independent courts of Micronesia and the judiciary of the Ninth Circuit continue today. During the trusteeship, no appeals from the courts of the TTPI were taken to the Ninth Circuit, but administrative services were furnished by the Pacific Islands Committee of the Ninth Circuit, which reported to the United States Judicial Conference.²¹

Today, the decisions of the highest courts of the politically independent nations associated with the United States are final. The new courts have retained the American-style procedures that were adopted during the trust period, but they choose their own sources of law for substantive rules. "Free association" as a practical matter means that these former trust territory districts are politically, if not economically, independent. They are associated with the United States for military purposes and certain foreign affairs. In most cases, the English

¹⁹The delay in ending the trusteeship over Palau was caused, in part, by negotiations about the entry into Palauan waters of U.S. Navy vessels armed with nuclear weapons.

²⁰Some English translations refer to the country as Belau, a pronunciation favored by some speakers of the local language.

²¹A document on file in the office of the Ninth Circuit Executive, San Francisco, contains a detailed description of the history and activities of this committee from its formation by Judge Richard Chambers in 1976 until the present.

language is the official court language, and the American dollar is the currency of choice.²²

Each country has treaty ties with the United States that include military security and coastline protection by the United States, and favorable trade, travel, and immigration rights. For example, because the western Pacific is subject to severe tropical cyclones (typhoons), the U.S. Coast Guard provides weather monitoring service during critical periods. In exchange for treaty rights and financial and other assistance from the United States, these countries allow the United States to use designated island areas for military bases. These countries and the United States exchange ambassadors, and diplomatic relations exist with other nations. All have seats in the United Nations. From time to time, interesting diplomatic and public relations events flare up when a small, new republic like the RMI tries to decide which China to recognize for diplomatic purposes.

The free association nations (Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands) continue to rely on U.S. judicial resources in varying degrees for training their judges. At the urging of former Chief Judge Wallace of the Ninth Circuit, Congress appropriated funds for judicial education in all of the free association states. Although the execution of the educational plan for each state is directed by that state's judiciary, it is assisted by the judicial conference and education unit of the Office of the Circuit Executive of the Ninth Circuit.

Federal financial assistance is necessary for inter-island judicial travel and to bring professional assistance from the mainland and from Hawai'i, Guam, and the Commonwealth of the Northern Marianas. Federal judges, at the invitation of the chief justices of the free association states, frequently sit as visiting acting justices of the supreme courts of these countries, affording them the services of appellate courts without the expense of maintaining year-round local appellate courts with light caseloads. All of the chief judges of the Ninth Circuit who followed Chief Judge Chambers have cooperated with the free association states in furnishing judges as visitors to assist with appeals. These judges receive no payment for their service, but the host country reimburses travel expenses.

Chief Judge Mary M. Schroeder of the Ninth Circuit presided in Saipan over a ceremony in 2004 marking the termination of the jurisdiction of the Ninth Circuit to hear appeals from the judgments of the Supreme Court of the Commonwealth of the Northern Mariana Islands, which, by an act of Congress,

²²The Japanese yen is readily accepted and exchanged in many of these states.

became appealable thereafter only by certiorari to the U.S. Supreme Court. Chief Judge Schroeder also took an active role in assisting the Supreme Court of Guam in handling its first appeals from the local superior court, which had been heard by an appellate division of the Guam District Court until the effective date of congressional legislation that enabled Guam to have its own supreme court.

With this background, we turn to individual former trust territory districts and their current status.

THE REPUBLIC OF THE MARSHALL ISLANDS

Lying 3,674 kilometers southwest of Honolulu, the Marshall Islands were relieved of Japanese occupation by land, sea, and air battles that resulted in heavy loss of life and destruction of property. The prewar economy of these coral atolls was virtually eliminated, and the islanders were no longer self-supporting in food or trade. Under trusteeship, the United States obtained the consent of the traditional leaders to use Bikini, Enewetok, and other atolls for nuclear weapons testing. After convincing the native leaders that the testing would "ensure world peace for all men for all times," the U.S. Navy moved the affected populations to other atolls thought to be safer. Some sixty-seven separate explosions were staged before testing ended in 1958.²³

Since independence, in compensation for the destruction of all or parts of the four test atolls and lagoons, the Republic of the Marshall Islands (RMI) has been receiving substantial transfer payments from the United States, which, together with the sale of fishing permits in its surrounding waters, make up a large part of the RMI public and private income.

The RMI's first chief justice of the high court was Harold Burnett, who had been chief justice of the High Court of the Trust Territory of the Pacific Islands from 1970 to 1982. Justice Burnett would visit Majuro, the capital of the republic, as needed to try cases. When it became necessary to convene an appellate division to hear appeals from the high court, visiting judges would be invited to hear them. The RMI later created a supreme court and employed a contract chief justice, who resigned in 1986 when his independence was challenged by the

²³See Weisgall, *Operation Crossroads*, *supra*, note 12. See also Philip A. Okney, "Legacies and Perils from the Perspective of the Republic of the Marshall Islands Nuclear Claims Tribunal," in *Oceans in the Nuclear Age: Legacies and Risks*, ed. David D. Caron and Harry N. Scheiber (Leiden and Boston, 2009).

RMI's president, a major property owner on one of the atolls who was displeased with a judgment of the court.

Although it is too early in the history of the RMI to speculate about the survivability of judicial independence, the most recent election produced a president and a cabinet who have publicly pledged their support of an independent judiciary. The RMI resident judiciary includes Carl Ingram, chief justice of the trial court (high court), who is a graduate of Stanford Law School and a member of the California bar, and Associate Justice James H. Plasman, a University of Minnesota J.D. who also served on the Nuclear Claims Tribunal. The chief justice of the RMI Supreme Court for several years was a retired superior court judge from California who visited, as needed, and sat with two visiting judges to form a three-judge court. In 2003, Daniel Cadra, a member of the bar of Alaska with several years of judicial experience in Palau as well as in the RMI, became chief justice. As did his predecessors, he commutes from his home state as judicial calendars require. The supreme court's visiting judges are nominated by the chief justice and appointed as acting justices by the president of the republic, with the concurrence of the Nitijela (their senate). Visiting judges may come from other islands in Micronesia or from the United States. Federal judges invited from the United States must have the consent of the chief judge of their respective circuits.²⁴ Their only compensation is the reimbursement of travel expenses by the RMI.

The High Court of the RMI schedules regular calendars on Majuro and Kwajalein, with occasional visits to other atolls. The supreme court hears appeals only on Majuro, the site of an international airport. American lawyers practice in Majuro, and visiting lawyers from other island nations or from the United States can be admitted *pro hac vice* upon motion. The RMI has an organized bar, for which admission requires the passing of an American-style bar examination. English is the official language of the courts, and filing fees are collected in U.S. dollars. Civil litigation proceeds in a manner similar to that of courts in the United States.²⁵

THE FEDERATED STATES OF MICRONESIA

The western Caroline Island state of Yap, with the eastern Caroline Island states of Chuuk, Pohnpei, and Kosrae, together

²⁴See 28 U.S.C. §297[a].

²⁵See *Republic of the Marshall Islands v. American Tobacco Company et al.*, no. 2001-005, RMI Reports 2002.

with the many smaller islands and atolls of each named state, make up the Federated States of Micronesia (FSM). The World War II anchorage in the lagoon of Ulithi is now part of Yap, about 3,000 kilometers west of Kosrae.

Moer is now the headquarters of the state of Chuuk, which includes the world's largest coral-rimmed lagoon. The Japanese Combined Fleet that was anchored there was effectively destroyed on February 16 and 17, 1944, by the American military action called Operation Hailstone.²⁶ The principal atoll and related smaller atolls and islands emerged from the war with severe loss of life and damage to infrastructure and resources.

While the other states of the FSM were only moderately damaged by the war, all suffered substantial economic loss. The populations of Kosrae, Pohnpei, and Yap are still struggling to improve their economies and the management of their fisheries. Their prewar self-sufficiency in food production has been substantially restored but may not be keeping pace with population growth. Imported food and beverages, not all bringing positive health benefits, abound in the local markets. Even with help from the United States, the economies of the FSM remain fragile. Populations are growing faster than their resources and investments can supply. The limited resources of these widely dispersed states are making it difficult to keep pace with worldwide price inflation and the Western-influenced consumer expectations of their populations. (In response to the increasing cost of petroleum-based motor fuel, however, motorists in Chuuk have discovered that coconut oil is a good substitute for diesel oil in diesel engines.)

Each of the Federated States has a two-level court system. The superior court is presided over by a lay judge drawn from traditional leadership and locally trained in court procedure. The judges at the trial level may or may not have some law training. The supreme court of each state and the Supreme Court of the Federated States are now staffed by traditional lay judges, assisted by law-trained law clerks and staff attorneys. During the trusteeship, Edward King, a law-trained American judge, was appointed chief justice of the FSM in 1981; he continued to serve in that capacity through independence in 1986 and the transition to the Compact of Free Association with the United States until he resigned in 1992. Chief Justice King was replaced by Chief Justice Andon Amaraich, one of the authors of the FSM constitution, who served until his death in January 2010. Judge Martin Yinung, from Yap, is

²⁶William H. Stewart, *Ghost Fleet of the Truk Lagoon, Japanese Mandated Islands: An Account of "Operation Hailstone," February 1944* (Missoula, MT, 1985).

currently acting chief judge.²⁷ Justice Richard Benson, also an American lawyer, began service on the FSM Supreme Court during trusteeship and continues to sit by assignment in the several states of the FSM.

By 2000, most of the American law-trained judges in the FSM had been replaced by lay judges from the traditional leadership of the federated states. The FSM government has, from time to time, invited law-trained judges from other jurisdictions to sit as acting justices. In such cases, the foreign visitors may be invited to sit for a recused local judge or to help with a special calendar. In recent years, the FSM judges have participated actively in judicial education programs, with intermittent financial support from the United States. Judges from the Ninth Circuit, acting as members of the Pacific Islands Committee,²⁸ continue to act as advisors and, from time to time, are invited to sit as visiting judges. These U.S. judges also assist with judicial education at the invitation of local judiciaries.

THE REPUBLIC OF PALAU

Palau was the first of the TTPI districts to achieve practical independence and to set up its own government, but the last to complete its entry into free association with the United States. Palau is the furthest west in the Caroline chain and the most remote from the United States. Its many small islands are divided among sixteen states in a federal system of government, with Koror as its principal city and state. Palau had a turbulent passage from Japanese occupation, liberation, and trustee administration to self-government. The transition period was marked by political unrest and the assassination of Palau's first president. The local language differs from the many languages spoken in much of the rest of Micronesia, but most of the traditional leaders are bilingual in English and Palauan, and older Palauans converse easily in Japanese. Chamorro, the primary local language of both Saipan and Guam, is also spoken widely. Despite the distance between Palau and Saipan, cordial and profitable commercial and familial relationships exist between the peoples of the two areas.

²⁷Clerk of court in Truk to Judge Goodwin, April 2010.

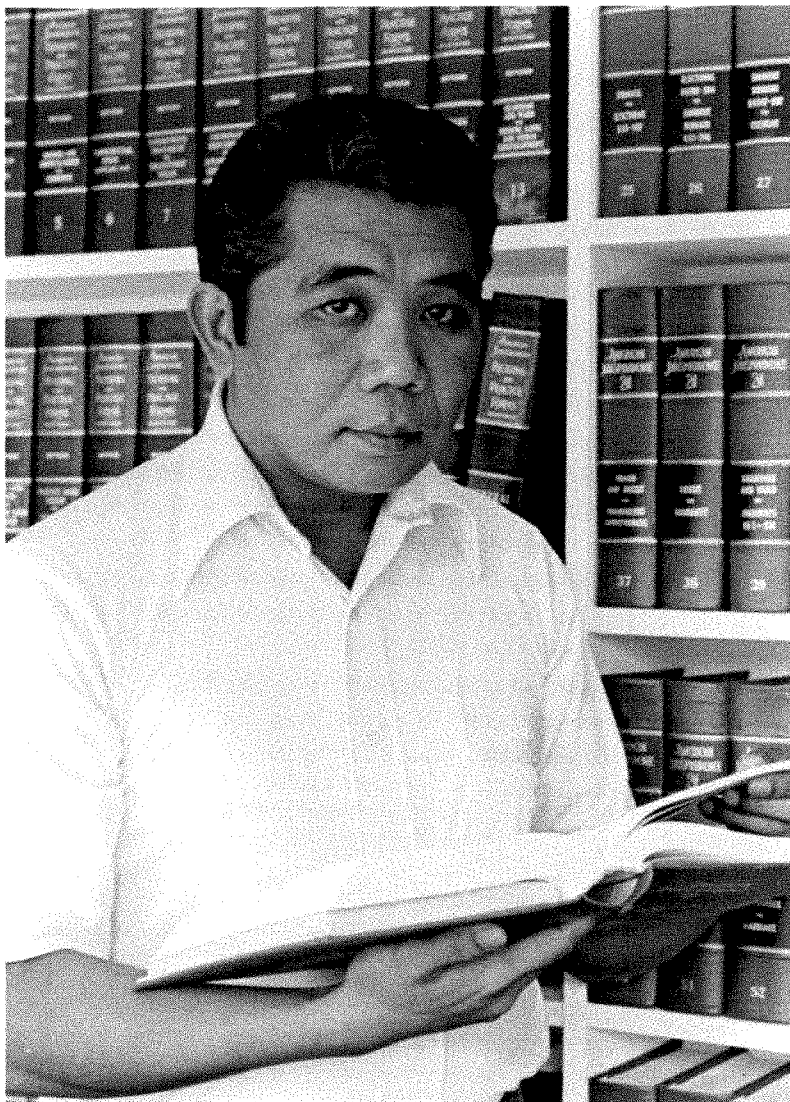
²⁸See note 24, *supra*. The United States Judicial Conference Committee on Federal-State Jurisdiction currently receives the reports of the Ninth Circuit's Pacific Islands Committee.

The population of Palau is well educated, fiercely independent, and endowed with a healthy work ethic, which is evidenced by the numerous Palauans employed in trade and industry throughout Micronesia. During the trustee period, Palau, while geographically remote from the center of Micronesia, was a major site of trust territory administration as well as of the High Court of the TTPI.²⁹ Between the two world wars, Palau had been the site of the headquarters for the Japanese mandate administration. The Japanese colonial government sent many young Palauans to Japan for education and training as civil servants, and their descendants are active in government and commerce today.

Palau's principal economic resource is the marine life that surrounds the eight major islands and the 252 smaller islands making up the republic. Internationally, the best-known island is Peleliu, the scene of a famous three-month battle between Japanese and U.S. forces in 1944 that took twelve thousand lives. Palau also achieved publicity from the filming of the TV reality show *Survivor* in 2005 and, more recently, from its agreement to accept some of the prisoners being held by the United States in Guantanamo. Tourism from East Asia adds to the economy, but the distance and inconvenient air schedules between Palau and the United States militate against rapid expansion of American tourism.

Full independence for Palau, as noted, was delayed by negotiations over U.S. nuclear naval vessels, but this delay did not affect the development of the court system and the rule of law. Palau was the first free-association nation to have American-style law courts presided over by law-trained judges. In 1979, long before the termination of trust administration, this developing republic formed a supreme court with trial and appellate divisions. The first chief justice, Mamoru Nakamura, was a graduate of the Willamette University School of Law in Salem, Oregon. He was born on Peleliu, lived as a child in Japan, returned to Palau, and went to the United States to complete his education. He served as a justice of the High Court of the TTPI from 1977 to 1988 and established the Palau court system on the U.S. model. The Palau Supreme Court is politically independent and highly respected. Justices are appointed for life, and the commitment to judicial independence seems secure, subject to the economic constraints common in newly formed island republics. The current chief justice, Arthur Ngiraklsong,

²⁹The TTPI's first (1947) headquarters were in Honolulu; they moved to Guam in 1953, and to Saipan in 1962. The High Court of the TTPI was headquartered in Truk from 1947 to 1952, and in Saipan from 1952 until 1994.



Mamoru Nakamura, a native of Peleliu who was educated in an American law school, served as the first chief justice of the High Court of the TTPI from 1977 to 1988 and established the Palau court system on the U.S. model. (Courtesy of Trust Territory Photo Archives, Pacific Collection, University of Hawai'i-Manoa Library)

is a Rutgers University Law School graduate and a leader in judicial education and independence throughout Micronesia.

During the trustee period, U.S. judges staffed the High Court of the TTPI and traveled to Koror for cases arising in Palau. Since the establishment of the Palau Supreme Court, both of its chief justices have been native Palauans holding American law degrees. Palau's associate justices are Palauan and U.S. law school graduates and stateside lawyers. Law clerks, top graduates of U.S. law schools, serve one-year appointments in the manner of the law clerks in the U.S. federal courts. The Land Court and the Court of Common Pleas in Palau are served by experienced traditional judges who are not necessarily law graduates but who are well grounded in traditional law and customs applicable in land disputes and small civil claims.

GUAM, THE OTHER U.S. TERRITORY

The island of Guam, located on the western side of the international dateline directly south of Japan and 13 degrees north of the equator, became a U.S. territory by purchase following military conquest during the war with Spain at about the same time Samoan leaders entered into their relationship with the United States. A two-level court system evolved through various acts of Congress during the century following annexation, by the United States, of the Philippines and Guam from Spain. At present, local civil and criminal cases are tried in the Superior Court of Guam, with appeals being taken to the Supreme Court of Guam. Further appeals can be sought, by certiorari, to the U.S. Supreme Court.³⁰ As is the case with the Commonwealth of the Northern Mariana Islands (CNMI), all the judges in Guam are law trained. The Organic Act of Guam provides also for a U.S. district court, under Article I of the constitution, to try all federal matters and "diversity" civil cases. The district judge, appointed by the president and confirmed by the Senate, has all authority of an Article III judge, save tenure.³¹

Between 1951 and 1996, appeals from the Superior Court of Guam were heard by the appellate division of the Guam District Court, which convened ad hoc three-judge panels for each calendar. Having only one judge, the Guam District Court borrowed judges from other federal courts. After 1978, when

³⁰See 48 U.S.C. §1424.

³¹*Ibid.*

the U.S. District Court for the Commonwealth of the Northern Mariana Islands was organized, its judge, Alfred Laureta, frequently took the half-hour flight to Guam from Saipan, and a second visiting federal judge from Hawai'i or the mainland would complete the panel. In 1988, Alex Munson of California was appointed to the District Court of the CNMI and became the usual second judge of the appellate division of the Guam District Court.

From 1996 until 2005, appeals from the Superior Court of Guam could proceed to the Supreme Court of Guam and then to the Ninth Circuit. After it had completed action on the pending appeals that had been filed before the creation of the Guam Supreme Court, the District Court of Guam discontinued hearing appeals. Because petitions for writs of certiorari to the Guam Supreme Court now may be filed in the U.S. Supreme Court, they are no longer filed in the Ninth Circuit.³² Appeals from the Guam District Court that were federal cases when filed, however, continue to be heard by the Ninth Circuit Court of Appeals. Oral arguments are heard two or three times a year in Honolulu, or, if delay would cause undue hardship, argument can be calendared in San Francisco, where appeals are heard every month.

THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Seven years before Guam activated its supreme court, the Commonwealth of the Northern Mariana Islands,³³ under the terms of the Covenant to Establish a Commonwealth,³⁴ created its own supreme court, all appeals from which, for fifteen years, were taken to the Ninth Circuit. Appeals were limited by 42 U.S.C §1824(a) to federal questions.³⁵ Ninth Circuit review ended in 2004, and U.S. Supreme Court review may now be sought by petition for certiorari. As with cases from Guam, appeals from the district court on Saipan, which are federal cases when filed, continue to be heard by the Ninth Circuit,

³²*Santos v. Guam*, 437 F.3d 1151 (9th Cir. 2000).

³³A United States territory is a temporary political relationship, whereas the Commonwealth of the Northern Mariana Islands is in a permanent political relationship with the United States.

³⁴*The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America Act of March 24, 1976*, Public Law 94-241, *U.S. Statutes at Large* 90 (1976): 263–79.

³⁵*Oden v. Northern Marianas College*, 440 F.3d 1085 (9th Cir. 2006).

pursuant to statute. Unless time pressure requires earlier calendaring, the commonwealth appeals are usually heard when a Ninth Circuit panel is sitting in Honolulu.

The economic and political differences between a commonwealth and an unincorporated territory are complex and require close reading of the relevant Organic Act and the Commonwealth Covenant.³⁶ Saipan is perhaps unique among areas under the flag of the United States of America in that approximately 80 percent of Saipan's nongovernmental work force in the 1990s consisted of foreign workers. Only 6,000 native Mariana Islanders were employed in the local economy while approximately 28,000 temporary foreign workers were employed as of 1995.³⁷ In recent years, a combination of factors, including competition in the U.S. market from Chinese manufacturers of apparel, a mandated increase in the minimum wage, and an impending mandated cap on the number of foreign workers, have converged to create a crisis in the CNMI economy.³⁸

For judicial purposes, the political and structural differences between a territory and a commonwealth will have significance on a case-by-case basis, depending on the type of legal question presented. Federal cases involving most criminal and commercial transactions are treated in virtually the same way in both systems. Cases involving taxes, immigration, and local government in its relations with the United States or with other countries will require careful attention to the relevant statutes. The Ninth Circuit is frequently required to deal with questions of first impression arising from the unique provisions of the Commonwealth Covenant, which in many respects creates legal rights and limitations that are incompatible with federal constitutional concepts. For example, under the covenant, persons not of CNMI ancestry may not purchase real property in the islands

³⁶See, e.g., *Sagana v. Tonorio*, 384 F.3d 731 (9th Cir. 2002) (involving the plight of foreign workers in the commonwealth).

³⁷Greg Holloway, "Comment: The Effort to Stop Abuse of Foreign Workers in the U.S. CNMI," *Pacific Rim Law and Policy Journal* 6:2 (March 1997): 391-98.

³⁸For example, between 2004 and 2007, employment dropped from 40,420 to 26,010, and per capita income declined by 28 percent. Malcolm D. McPhee & Associates and Dick Conway, "Economic Impact of Federal Laws on the Commonwealth of the Northern Mariana Islands," CNMI, Office of the Governor, October 2008. The CNMI came under federal minimum wage regulations in 2007 and immigration law in 2008. The goal of the new federalization policy is to reduce "the foreign worker population in the CNMI not holding a U.S. visa to zero by 2014." CNMI Department of Labor, Annual Report, 2009, p. 3. This policy will undoubtedly result in the deportation of most foreign workers in the CNMI. The documents cited are available at <http://marianaslabor.net/news.asp>.

that make up the commonwealth, nor is there a right to trial by jury for persons charged with crimes punishable by less than five years in custody. The covenant with the United States reserved the right to own land to the inhabitants of the islands and their descendants as a condition of the association.³⁹

CURRENT STATUS

With the former TTPI districts now independent nations, Guam, American Samoa, and the CNMI have the only island courts west of Hawai'i within the jurisdiction of the U.S. judicial system. Guam and the CNMI have an Article I district court and a full complement of local courts. Commonwealth courts (CNMI) and territorial courts (Guam) have jurisdiction over local criminal and civil cases that do not present federal questions. In summary, there are two federal trial courts in the western Pacific—in Guam and in the Commonwealth of the Northern Mariana Islands—that are part of the federal judiciary. Appeals from these two courts are heard by the Ninth Circuit. American Samoa, as noted, retains its high court and its relationship with the Department of the Interior, but it has no federal court. Avuncular relations continue among U.S. judges and judges of the former trust communities. Australian judges visit as temporary judges in Samoa; New Zealand judges visit as temporary judges in the Cook Islands; French judges are assigned to courts in Tahiti, French Oceania, and New Caledonia; and U.S. judges, when invited and appointed by local governments, sit as visiting judges in American Samoa and in the former TTPI districts.

The political goals of self-government for the trust territory have been generally attained. The courts are open and effective. The relations between the free association courts of the former trust territory and the courts of the "mainland," as the United States is sometimes called, are friendly but not jurisdictional. United States judges, when invited, make themselves available to assist with judicial education and with court calendars. Professional exchanges made possible through meetings and conferences are encouraged and receive some financial assistance from the United States.

In recent years, former Chief Judge J. Clifford Wallace of the Ninth Circuit has been a leader in judicial education throughout Micronesia and other island nations participating in the South Pacific Judicial Conference. The charge of the Pacific

³⁹*Wabot v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990).

Islands Committee of the Ninth Judicial Circuit is to act as a resource to the United States territories and former Trust Territory of the Pacific Islands in their endeavor to make their judicial systems more effective and advance the rule of law. In consultation with the various law libraries in the Pacific, the Pacific Islands Committee made an analysis of each library and recommended a set of volumes; each library indicated its status and the assistance it needed. Based on this survey, the Pacific Islands Committee, working through the library of the Ninth Circuit and its satellite library in Hawai'i, found books and has shipped many crates of legal volumes from U.S. libraries.⁴⁰ (Much of this good work has been superseded in part by the recent adoption by most of the local island courts of law-trained clerks who are skilled in the internet and such aids to legal research as Westlaw and Lexis.)

The Ninth Circuit Pacific Islands Committee has also developed, in collaboration with the National Judicial College, an educational needs assessment for the courts of the territories and former trust territories. The committee was successful in securing funding for the judiciaries of the former TTPI jurisdictions, American Samoa, CNMI, and Guam, which is earmarked for judicial education. In cooperation with the National Judicial College in Reno, two institutes for lay judges were organized, and numerous other educational programs for judges and court staff were initiated by the island jurisdictions themselves. The Pacific Islands Committee also continues to provide judges upon request to sit in island courts and to provide consultation for judicial improvement.

To increase communication and cross-fertilization of ideas among these island jurisdictions and other jurisdictions of the Pacific, the Pacific Islands Committee (and its predecessor, the Judicial Conference of the United States Trust Territory Committee) has been instrumental in fostering the South Pacific Judicial Conference. This conference, held biannually, is made up of the chief justices of the various island jurisdictions in the Pacific.⁴¹

CONCLUSION

This paper does not attempt to explore any of the interesting and unanswered constitutional questions lurking in the

⁴⁰The law library enhancement project was most active during the 1990s.

⁴¹A more detailed description of the history and activities of the Pacific Islands Committee may be obtained by contacting the Office of the Circuit Executive, P.O. Box 193939, San Francisco, CA 94119-3939.

labor, immigration, and land alienation laws of the CNMI, or of American Samoa. Neither does it deal with tension between federal equal rights laws and the residual rights, if any remain, of the indigenous Polynesians of Samoa under territorial status, and of Hawai'i, now that it has become a state.⁴² Nor does it deal with the neglect of the Appointments Clause in Guam's Organic Act and its numerous amendments creating a form of executive, judicial, and legislative government for Guam.

Apart from these unanswered questions—all of them important—there is reason for optimism about the judicial systems of these emerging independent nations. In company with neighboring U.S. territories, these nations are continuing to develop independent courts in which the rule of law can provide dispute resolution to lubricate global commerce and secure the rights of contract and property in the thousands of small islands touched by rapidly changing conditions over which they have minimal control. Whether all of these islands will become self-sufficient in food, health, education, and human rights for their rapidly expanding populations remains to be seen.

⁴²See *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006).

THE PACIFIC JUDICIAL CONFERENCE: STRENGTHENING THE INDEPENDENT JUDICIARY AND THE RULE OF LAW IN THE PACIFIC

JON M. VAN DYKE¹

INTRODUCTION

The dynamics of the Pacific have changed dramatically during the past fifty years, as island communities emerged from the “orgy of national enslavement” that occurred in the nineteenth century² into a new era of independence and regional

¹This paper was written with the assistance of Gary Nelson, class of 2011, William S. Richardson School of Law, University of Hawai‘i at Manoa; Jacquelyn Tryon Esser and Terrence Thornburgh, class of 2009, William S. Richardson School of Law, University of Hawai‘i at Manoa; Joshua Walsh, class of 2008, William S. Richardson School of Law, University of Hawai‘i at Manoa; Brice Dumas, LLM recipient, 2008, William S. Richardson School of Law, University of Hawai‘i at Manoa; Sherry P. Broder, attorney, Honolulu; Gerald W. Berkely-Coats, class of 1991, William S. Richardson School of Law, University of Hawai‘i at Manoa, and now assistant director for international support services at Virginia Tech; and Melinda A. Berkley-Coats, formerly a journalist on Guam. Particular thanks go to Jerry and Melinda Berkley-Coats, who organized and summarized the materials from these conferences in a manner that has allowed this narrative to be presented. Thanks also go to Judges Clifford Wallace and Richard Clifton for their encouragement regarding this project, as well as to all the chief justices and attendees who have participated in the Pacific Judicial Conferences.

²Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai‘i* (Kihei, Hawai‘i, 1998), 63; see Jon M. Van Dyke, *Who Owns the Crown Lands of Hawai‘i?* (Honolulu, 2008), 2–3.

Jon M. Van Dyke is a professor of law and the Carlsmith Ball Faculty Scholar at the William S. Richardson School of Law, University of Hawai‘i at Manoa. In the spring semester of 2011, he will be a visiting professor at the School of Law of the University of California, Berkeley.

integration.³ Samoa (formerly Western Samoa) became independent in 1962, Nauru in 1968, Fiji and Tonga in 1970, Papua New Guinea in 1975, the Solomon Islands and Tuvalu in 1978, Kiribati in 1979, and Vanuatu in 1980.⁴ The Republic of the Marshall Islands and the Federated States of Micronesia became independent as freely associated states (with the United States) in 1986, with Palau achieving this same status in 1994. The Cook Islands and Niue are freely associated states connected with New Zealand, and Tokelau is a territory of New Zealand. Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI) remain under the sovereignty of the United States.⁵ French Polynesia is an overseas territory (*territoire d'outre-mer*) of France, Wallis and Futuna is an overseas collectivity (*collectivité d'outre-mer*) of France, and New Caledonia is in the process of becoming more autonomous, but is still under French sovereignty.⁶

³See generally Jon Van Dyke, "The South Pacific: Lessons Learned," in *Maritime Regime Building: Lessons Learned and Their Relevance for Northeast Asia*, ed. Mark J. Valencia (The Hague, 2001), 93; Van Dyke, "Regionalism, Fisheries, and Environmental Challenges in the Pacific," *San Diego International Law Journal* 6 (2004): 143–78.

⁴Chief Justice Vincent Lunabek of Vanuatu explained to the Fifteenth Pacific Judicial Conference in Madang, Papua New Guinea, that judicial decisions during the colonial period contributed to the drive for independence in Vanuatu:

Although the Joint Court [established during the colonial period] had jurisdiction over all Condominium matters, its main *raison d'être* was to minimize conflict among the European settlers over the grab for land.

This had the effect of legalizing fraudulent land dealings by some unscrupulous Europeans, and mistaken land dealings in which indigenous 'vendors' were unaware of the nature of the transaction and unable to understand the written contracts.

Not surprisingly land grabs, fraud and speculation during the colonial period were the main causes of unrest and the stimuli of nationalist political movements leading to independence in 1980.

Vincent Lunabek, "Developing Culturally-Appropriate Dispute Resolution Procedures: The Vanuatu Experience" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

⁵See generally Jon Van Dyke, "The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands," *University of Hawai'i Law Review* 14 (1992): 445–517; Ediberto Roman, *The Other American Colonies* (Durham, NC, 2006); Stanley K. Laughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* (North Baldwin, NY, 1995); Arnold H. Leibowitz, *Defining Status* (Dordrecht, Netherlands, 1989).

⁶See generally Ron Crocombe, *The South Pacific*, 7th ed. (Suva, Fiji Islands, 2008); W. von Busch, et al., eds., *New Politics in the South Pacific* (Suva, Fiji Islands, 1994); Peter Hampenstall and Noel Rutherford, *Protest and Dissent in the Colonial Pacific* (Suva, Fiji Islands, 1984); Yash H. Ghai, ed., *Law, Politics and Government in the Pacific Island States* (Suva, Fiji Islands, 1988).

The evolution in governance that occurred during this decolonialization process required that changes also be made in the judiciaries of these island communities, but it has been challenging to establish appropriate judiciaries in these small islands with their close-knit populations and traditions of consensus decision-making. Many have observed that the widely separated islanders have a shared system of values governing the settlement of disputes, but the vast distances separating the Pacific islands have made it extremely hard for island judges to communicate and learn from one another. The limited telephone communication, the slow postal service, and the awkward (or nonexistent) air links connecting them in the 1970s meant that the judges in these small islands operated in isolation, and almost every question they dealt with was a case of first impression, or so it seemed. Air routes did not connect the islands in the North Pacific with those below the equator. Those islands linked to the United States drew on a different legal heritage from those linked with Britain, and those linked with France were separated from the others by language as well as by legal tradition.

Bringing together judges from throughout the Pacific for periodic meetings has been a daunting challenge because of the geography involved, but the importance of doing so cannot be overestimated. The Pacific Judicial Conferences described in this article have strengthened the judiciaries throughout the region by bringing judges together to share their experiences and provide support to one another when needed. Determining the appropriate role for the judiciary in a small community where clan ties and customary linkages are frequently of overriding importance has been difficult, but most Pacific island communities now have judiciaries that operate independently, and the conferences have played a useful role in this development.

The first South Pacific Judicial Conference took place in Samoa in 1972, as a result of the ingenuity and perseverance of Donald C. Crothers (chief justice of the High Court of American Samoa from 1968 to 1972), Barrie C. Spring (chief justice of the Supreme Court of Western Samoa from 1966 to 1972), and Richard H. Chambers (judge of the U.S. Court of Appeals for the Ninth Circuit from 1959 to 1994). Since then, the chief justices of the Pacific island communities have met about every two years, and these meetings have played an important role in reinforcing the commitment to independent judiciaries and constitutional governments in the diverse (and mostly small) islands of the Pacific. These meetings—which began to be called the “Pacific” Judicial Conference instead of “South Pacific” at the Fifteenth Conference in Papua New Guinea in 2003, to reflect the active participation of judges from north of

the equator—are a biennial “ad hoc collegiate forum of chief justices and their delegates from the Pacific Region,” which assembles to discuss matters of mutual interest.⁷ Anthony M. Kennedy, when he was still a judge in the U.S. Court of Appeals for the Ninth Circuit, told the Sixth South Pacific Judicial Conference in Saipan in 1984,

The spirit of judicial and constitutional evolution here is more dynamic, more questing in the Pacific areas represented here than in any region of the world. This spirit is the catalyst for new political and judicial institutions and structures. Your conference, with its exchange of ideas and perspectives, can become an integral part of that evolution.⁸

This narrative is designed to describe the issues addressed by, and the accomplishments of, these Pacific Judicial Conferences, and to examine the issues that continue to need attention.

THE FIRST SOUTH PACIFIC JUDICIAL CONFERENCE

The idea of the South Pacific Judicial Conference was formulated in September 1970 by American Samoa Chief Justice Donald Crothers, who proposed to Western Samoa Chief Justice Barrie Spring that, instead of holding a judicial conference between the two Samoas as Spring had suggested, an enlarged gathering of chief justices from around the Pacific be held.⁹ Chief Justice Spring supported the idea, and thus the concept of a South Pacific Judicial Conference was given life.

For the next year, Crothers dedicated much of his time to the organization of this conference. Determined to bring a dream into reality, the chief justice explained later in a letter to Ninth Circuit Chief Judge Chambers that for the following year, he did “virtually nothing else but devote much of my time . . . trying to get this South Pacific Judicial Conference off the ground,” and he appreciated the “encouragement, assistance, and advice” he received from Chambers.¹⁰

⁷“Introductory Note” (Seventeenth Pacific Judicial Conference, Nuku’alofa, Tonga, Nov. 5–9, 2007), www.paclii.org/PJDP/resources/PJC/Introductory_Note.pdf.

⁸Anthony M. Kennedy, “Address to the South Pacific Judicial Conference” (Sixth South Pacific Judicial Conference, Aug. 27–29, 1984, Saipan, CNMI).

⁹Correspondence in the files of the U.S. Court of Appeals for the Ninth Circuit.

¹⁰*Ibid.*

PACIFIC JUDICIAL CONFERENCES

<u>Conference</u>	<u>Dates</u>	<u>Location</u>
First South Pacific Judicial Conference	Jan. 10–13, 1972	Samoa (Apia & Pago Pago)
Second South Pacific Judicial Conference	July 16–19, 1975	Honolulu, Hawai'i, USA
Third South Pacific Judicial Conference	April 19–23, 1977	Port Moresby, Papua New Guinea
Fourth South Pacific Judicial Conference	May 15–19, 1979	Rarotonga, Cook Islands
Fifth South Pacific Judicial Conference	May 24–26, 1982	Canberra, Australia
Sixth South Pacific Judicial Conference	Aug. 27–29, 1984	Saipan, Commonwealth of the Northern Mariana Islands
Seventh South Pacific Judicial Conference	March 3–5, 1987	Auckland, New Zealand
Eighth South Pacific Judicial Conference	May 1–3, 1989	Poipu Beach, Kaua'i, Hawai'i, USA
Ninth South Pacific Judicial Conference	May 21–24, 1991	Papeete, Tahiti, French Polynesia
Tenth South Pacific Judicial Conference	May 23–28, 1993	Yanuca Island, Viti Levu, Fiji
Eleventh South Pacific Judicial Conference	Feb. 5–10, 1995	Tumon, Guam, USA
Twelfth South Pacific Judicial Conference	April 13–18, 1997	Sydney, Australia
Thirteenth South Pacific Judicial Conference	June 28–July 2, '99	Apia, Western Samoa
Fourteenth South Pacific Judicial Conference	Sept. 24–28, 2001	Noumea, New Caledonia
Fifteenth Pacific Judicial Conference	June 23–27, 2003	Madang, Papua New Guinea
Sixteenth Pacific Judicial Conference	July 25–29, 2005	Port Vila, Vanuatu
Seventeenth Pacific Judicial Conference	Nov. 5–9, 2007	Nuku'alofa, Tonga
Eighteenth Pacific Judicial Conference	June 15–18, 2009	Punaauia, Tahiti, French Polynesia
Nineteenth Pacific Judicial Conference	Scheduled for Nov. 2010	Guam, USA
Twentieth Pacific Judicial Conference	Scheduled for 2012	Solomon Islands

After a year of planning, the First South Pacific Judicial Conference was opened on January 10, 1972, in Apia, Samoa. This meeting was the first time that judicial representatives assembled from the three cultural regions of the Pacific—Polynesia, Melanesia, and Micronesia. The meeting also included the president of the court of appeal in French Polynesia (Yves Pegourier) and the chief justice of the Hawai'i Supreme Court (William S. Richardson), as well as judges from the Trust Territory of the Pacific and U.S. federal courts. On the second day, the conference moved to Pago Pago, American Samoa, where it closed on January 13, 1972.

This meeting provided the first opportunity for the judges of the Pacific, both local and expatriate, to share experiences and knowledge and to discuss different adaptations to the constitutional and political changes they were experiencing. Chief Justice Spring was elected chair by the delegates in attendance, and he opened the conference by explaining the judicial system of Western Samoa, including its relationship to the executive branch. Justice C.C. Marsack of Suva, Fiji, addressed the group next on cultural and ethnic disparities and their effect on the judicial process in Fiji. At this meeting, as at many that followed, a central focus was on customary legal traditions and how to incorporate them into Western law under the new constitutions that governed the independent countries. The participants in the First Conference agreed that preservation of the cultural heritage of the peoples of the Pacific was vital to successful establishment of the rule of law. Other subjects discussed at this First Conference included a proposal for a South Pacific Regional Court of Appeal, immigration and extradition, the narcotics problem in the South Pacific, and a comparison of court systems.

THE STRUGGLE TO KEEP THE CONFERENCE ALIVE

This First South Pacific Judicial Conference was a success, but problems arose regarding when and where a Second Pacific Judicial Conference might be held and who would be responsible for organizing it. Crothers, who was scheduled to return to the United States in the following month, suggested that Spring be appointed as "sort of a guardian to get the thing together again." But five months later, in June 1972, Spring also returned home, to Auckland, New Zealand, and "tossed the ball" to John Minogue, chief justice of the Supreme Court of Papua New Guinea. This handoff proved problematic because Australia was in the process of disengaging itself from its

United Nations trusteeship over Papua New Guinea, creating considerable uncertainty in the judiciary. As the Papua New Guinea Supreme Court tried to transition from the Australian judicial world to the newly independent Papua New Guinean judiciary, Minogue announced in March 1974 his intention to resign. He suffered a heart attack that same month and formally retired in May 1974.¹¹ The task of organizing the Second South Pacific Judicial Conference then fell to the new chief justice of Papua New Guinea, Sydney Frost.

At this point, Ninth Circuit Chief Judge Chambers, building on his longstanding interest in the Pacific, stepped back into the picture. Several years earlier, in 1968, he had visited various Pacific islands and was "shocked by the state of the judiciary" in the islands he visited, especially by the lack of basic judicial resources. Chambers then began a "hands across the sea" project to encourage courts in the Ninth Circuit to send copies of basic legal publications, such as the *American Law Reports*, to the courts in the Pacific.

In September 1974, Chambers wrote to Sir Garfield Barwick, chief justice of the High Court of Australia, explaining that

Justice Minogue is shopping for a successor and as soon as he gets one, we hope to prevail on him to call the Second Pacific Judicial Conference to be held in Honolulu either just before or just after our [Ninth Circuit] conference and also, we would hope to have some joint sessions. Justice Minogue has indicated he thinks our plan is a good one.¹²

As a result of Chambers' suggestion, and with the assistance of both William S. Richardson, chief justice of the Hawai'i Supreme Court, and Samuel P. King, chief judge of the U.S. District Court for the District of Hawai'i, the Second South Pacific Judicial Conference was convened in Honolulu on July 16, 1975. This meeting, unlike the First Conference, was not limited solely to judicial officers but also included others involved in the administration of justice. In attendance were representatives from Papua New Guinea, French Polynesia, American Samoa, the Trust Territory of the Pacific Islands (TTPI), Western Samoa, Australia, and the United States. Richardson set the tone at the beginning of the conference by observing,

¹¹Sir John Minogue participated again in the Fifth South Pacific Judicial Conference in 1982, which was held in Canberra, as part of the Australian delegation and was listed as "former Chief Justice, Papua New Guinea."

¹²Correspondence in the files of the U.S. Court of Appeals for the Ninth Circuit.

We are a family of nations, a gigantic circle of humanity, a living ring of intense activity. . . . In the ancient past, our ancestors had frequent contact with each other, but these relations have almost disappeared, and we have become isolated by war and nationalism. Today, we've chosen to end this isolation, at least in the judicial field, knowing that the peoples of the world could attain peace and harmony by meeting and exchanging ideas regarding our legal systems. . . ."¹³

Although occasionally three years have passed between meetings, the conference has generally been convened every two years. The location shifts each time, and many of the island communities have played host, with two of the first nineteen conferences having been held in Australia, French Polynesia, Guam, Hawai'i, Papua New Guinea, and Samoa. The number of participants has varied from a low of seventeen at the Third Conference in Papua New Guinea in 1977, to a high of eighty-nine at the Fifteenth Conference, also in Papua New Guinea, in 2003. At the Tenth Conference in Fiji in 1993, Gordon Ward, then chief justice of Tonga, urged the conference not to grow too large, because its value has always been to allow for intimate conversations among participants.¹⁴ The number of observers has always been kept small, and the media are usually authorized to report only on the opening speeches and social events.¹⁵

The organizers have always focused on ensuring representation from all the diverse regions and cultures of the Pacific. Judges from French Polynesia have played an active role and have been at all the conferences except the fourth (Cook Islands, 1979), the thirteenth (Western Samoa, 1999), and the fourteenth (New Caledonia, 2001); and judges from New Caledonia have attended all the conferences since the Seventh South Pacific Judicial Conference in Auckland. Some of the conferences, including the fourth in the Cook Islands in 1979 and the eighteenth in Tahiti in 2009, have offered simultaneous translation so that participants can listen in either English

¹³*Ibid.*

¹⁴Tenth South Pacific Judicial Conference, May 23–28, 1993, Yanuca Island, Viti Levu, Fiji.

¹⁵Social events and networking have also always been an important part of these conferences. After the Eighth South Pacific Conference in Poipu Beach, Kaua'i, Hawai'i, in 1989, Anne King, wife of U.S. District Judge Samuel P. King, assembled recipes from the other wives of the judges and circulated them to all the conference participants. *Recipes from the South Pacific Judicial Conference* (Poipu, Hawai'i, 1989).

or French. At least one judge (and frequently two or more) from the U.S. Court of Appeals for the Ninth Circuit has participated in every conference except the fifth in Canberra in 1982 and the thirteenth in Apia, Samoa, in 1999. Judges from the Hawai'i Supreme Court were regular participants in the early conferences but did not attend the 1993 conference in Fiji and have not sent any participants since the 1995 conference in Guam. A judge from Canada came to the Ninth Conference in Tahiti in 1991, and judges from Taiwan and the Philippines came to the Eleventh Conference in Guam in 1995.¹⁶ The dynamics of the conferences have always involved some underlying tension between the South Pacific judges, who are mostly linked to the British legal tradition, and those from the North Pacific, who are mostly linked with the United States and its legal tradition.

The tradition of the conferences has been to refrain from adopting any formal resolutions. At the Eighth Conference in 1989, a motion in favor of judicial independence was proposed by Judge Robert Hefner of Palau and seconded by Judge Alex Munson of the U.S. District Court for the Northern Marianas, but it was later withdrawn, not because of any disagreement about its substance, but because the participants felt that if the group passed resolutions for external consumption, the nature and value of the meetings would change. Some participants at the Ninth Conference in 1991 suggested passing a resolution to support judicial independence in the Marshall Islands, but Judge Samuel P. King noted that it would be difficult for the conference to determine whether only chief justices should vote, or how such a vote would be conducted, and he thought it would be better for individual justices to express their concerns. Similarly, at the Seventeenth Conference in Tonga in 2007, many judges wanted to voice support for the judges in Fiji who were attempting to act impartially in a difficult situation. Because of the tradition against passing resolutions, the group decided instead to encourage the chair of the conference, Chief Justice Anthony Ford of Tonga, to issue a statement reflecting the concerns voiced during the conference discussions, that

¹⁶The 1987 conference was originally scheduled to be in Fiji, but Fiji withdrew as host because of cyclones Eric and Nigel and "other difficulties," and this meeting was moved to Auckland, New Zealand. The 1989 conference was also originally scheduled to be held in Fiji, but Fiji again withdrew as host, because a military coup had made it impossible for the Fijian judiciary to operate independently (discussed in more detail below). That conference, the eighth, was moved to Kaua'i in Hawai'i, and Fiji later hosted the Tenth Conference in 1993.

a judge should be able to make a decision on the merits of the case without any sort of direct or indirect pressure from government or anyone else. The judiciary was under pressure from the Fiji government, which goes against the idea of the independence of the judiciary [and the] principle . . . that a judge should be able to make a decision on the merits of the case without any sort of direct or indirect pressure from government or anyone else.¹⁷

Again after the Eighteenth Conference in Tahiti in 2009, President (Chief Justice) Olivier Aimot, the chair of this meeting, issued a statement summarizing views expressed at the meeting:

In keeping with the 1995 Beijing Statement of Principles of the Independence of the Judiciary, which affirms that no community can live in peace, freedom and prosperity unless governed by the rule of law, members reiterated the importance of maintaining the rule of law through an independent judiciary, assisted by an independent legal profession.

Members viewed with concern reports on recent events in Fiji and the serious threats these events represent to the independence of the judiciary and the legal profession and thus to the maintenance of the rule of law in that country.

They urge Fiji's resumption of its world status as an exemplar of the rule of law. And they look forward to the judges of Fiji resuming their rightful place among their number.¹⁸

The only votes that have ever been taken at a conference have been to determine where the next meeting should be held.

Among the judges who have been particularly active at these conferences are

- Olivier Aimot (has attended six conferences, three from New Caledonia and three from French Polynesia)
- Arnold K. Amet (six conferences, from Papua New Guinea)
- Andon Amaraich (seven conferences, from the Federated States of Micronesia)

¹⁷"Pacific Judges Call for Probe of Fiji Judiciary," *Fijilive.com*, Nov. 14, 2007. This statement by Chief Justice Ford led to a call for the United Nations Special Rapporteur on the Independence of Judges and Lawyers to be allowed into Fiji to conduct an investigation of the judiciary. Pacific Islands Report, "Pacific Judges Call for Probe of Fiji Judiciary," <<http://archives.pireport.org/archive/2007/november/11-5-05.htm>>. See *infra* text at note 80.

¹⁸Statement of President Olivier Aimot, chair of the Eighteenth Pacific Judicial Conference, Tahiti, June 18, 2009 (delivered at the end of the conference).

- Michael E.J. Black (eight conferences, from the Federal Court of Australia)
- William C. Canby (four conferences, from the U.S. Ninth Circuit)
- Richard Chambers (the first four conferences, from the U.S. Ninth Circuit)
- Jose S. Dela Cruz (four conferences, from the Commonwealth of the Northern Mariana Islands)
- James Douglas Dillon (six conferences, from the Cook Islands, Fiji, Nauru, and Niue)
- Gavin Donne (four conferences, from the Cook Islands, Nauru, Niue, and Tuvalu)
- Gerard Fey (four conferences, from New Caledonia)
- Soukichi Fritz (four conferences, from Chuuk)
- Harry Gibbs (five conferences, three from Australia and two from Kiribati)
- Alfred T. Goodwin (four conferences, from the U.S. Ninth Circuit)
- Robert A. Hefner (four conferences, from the Trust Territory of the Pacific and later the Commonwealth of the Northern Mariana Islands)
- Judah Johnny (four conferences, from Pohnpei)
- Mari Kapi (seven conferences, from Papua New Guinea and, in 1993, from Fiji)
- Anthony M. Kennedy (five conferences, three when he was a judge on the U.S. Ninth Circuit and two when he was an associate justice on the U.S. Supreme Court)
- Edward C. King (seven conferences, from the Federated States of Micronesia)
- Michael Kruse (five conferences, from American Samoa)
- M. Vincent Lunabeck (four conferences, from Vanuatu)
- John Mansfield (five conferences, from the Federal Court of Australia)
- Robin Millhouse (four conferences, from Kiribati)
- Alex Munson (nine conferences, from the Trust Territory of the Pacific and later the Commonwealth of the Northern Mariana Islands)
- Arthur Ngiraklsong (six conferences, from Palau)
- William S. Richardson (the first four conferences, from the Hawai'i Supreme Court)
- Lyle Richmond (five conferences, from American Samoa)
- Bruce Robertson (seven conferences, from New Zealand and Vanuatu)
- Edwel H. Santos (four conferences, from Pohnpei)
- Tiavaasu'e Falefatu M. Sapolu (eight conferences, from Samoa)
- Timici Tuivaga (eight conferences, from Fiji)

- John von Doussa (five conferences, from Australia, Vanuatu, and Fiji)
- J. Clifford Wallace (ten conferences, from the U.S. Ninth Circuit)
- Frederick Gordon Ward (five conferences, three from the Solomon Islands and two from Tonga)

Bryan Beaumont and Ian Sheppard from Australia and John Muria from the Solomon Islands have also been active participants in the conferences.

THE NINTH CIRCUIT'S PACIFIC ISLANDS COMMITTEE¹⁹

Shortly after the Second South Pacific Judicial Conference, Chief Judge Chambers recommended to U.S. Supreme Court Chief Justice Warren Burger that a committee should be formed to address matters relating to the Pacific islands affiliated with the United States. On June 9, 1976, Burger wrote approvingly to Chambers, appointing Chambers to chair what was to become the Pacific Islands Committee. This committee was to "deal with matters relating to Guam, American Samoa, the Northern Marianas and the remaining Trust Territory of the Pacific," and consisted originally of Chambers, Judge Herbert Y.C. Choy, Judge Walter R. Ely, Jr., Judge Paul D. Shriver, and Charles H. Habernigg.²⁰ In 1977, committee members attended the Third South Pacific Judicial Conference in Papua New Guinea, where they had the opportunity to meet with judges from throughout the Pacific. Two years later, committee members attended the Fourth Conference in Rarotonga, Cook Islands, and recommended that the practice of sending surplus law books to Pacific island judicial officers be continued.

In 1982, Chambers resigned from the Pacific Islands Committee for personal reasons and was replaced as chair by U.S. Ninth Circuit Judge Anthony M. Kennedy, who noted that the geography of the Pacific "underscores the value of continued judicial interest in what is now a vast frontier for the evolution of constitutional government."²¹ Kennedy was appointed to the U.S. Supreme Court in 1988, and in 1990 he recommended

¹⁹The Pacific Islands Committee and the development of the judiciaries in the U.S.-affiliated Pacific island communities are discussed in more detail in Alfred T. Goodwin, "United States Law in the Pacific Islands," also in this issue.

²⁰Alfred T. Goodwin, "A History of the Pacific Islands Committee of the Judicial Council of the Ninth Circuit" (unpublished paper in the files of the author, 2004), 1-2.

²¹*Ibid.*, 6.

to Chief Justice William Rehnquist that the future work of the Pacific Islands Committee be assigned to the U.S. Ninth Circuit's Judicial Council. (It then consisted of Judges Jerome Farris, William C. Canby, and Samuel P. King, as well as Justice Kennedy.) The Pacific Territories Committee of the Ninth Circuit was thereby chartered on April 19, 1991, instructed to liaison with "Pacific jurisdictions in joint endeavors to improve the administration of justice in the Pacific Basin."²²

Initially chaired by Ninth Circuit Judge Alfred T. Goodwin, with Judges Canby, King, John Unpingco, and Alex R. Munson as members, the Pacific Territories Committee focused on providing legal resources for the Pacific island courts and securing better training for island judges. Judge Melvin T. Brunetti chaired this committee for a time, and then in 2000, Ninth Circuit Judge J. Clifford Wallace assumed the duties of committee chair. He later changed its name to the Pacific Islands Committee. Joining Judge Wallace on the committee at that time were Judges C.H. Hall, Unpingco, Munson, David Ezra, and Susan Oki Mollway. Judges A. Wallace Tashima, Dean D. Pregerson, and Charles Jones joined the committee later, and as of 2010, the committee was chaired by U.S. District Judge Consuelo Marshall, with Judges Richard Clifton, Joaquin V.E. Manibusan, Alex R. Munson,²³ Mary M. Schroeder, J. Michael Seabright, and Frances Tydingco-Gatewood as members.

The committee now functions as a standing committee of the Judicial Council of the Ninth Circuit and serves as a liaison with the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States.²⁴ The Pacific Islands Committee administers funds appropriated by Congress for the education of Pacific island judges and court administrators, and it has promoted a wide variety of judicial training programs for the judges in the U.S.-affiliated islands. It also helps with funding for periodic meetings of the judges within the U.S. political community through an organization called the Pacific Judicial

²²*Ibid.*, 10.

²³Judge Munson retired in February 2010 after serving as an "Article I" judge in the Commonwealth of the Northern Mariana Islands for twenty-two years, but he continued to sit on cases in that court until his replacement was named.

²⁴*An Introduction to the Pacific Islands Committee of the Ninth Circuit Judicial Council* (Dec. 2006), 2.

Council,²⁵ which has brought together judges from Guam, the Northern Marianas, American Samoa, Palau, the Federated States of Micronesia, and the Marshall Islands. The Marshall Islands have since dropped out of the council, seeking closer ties with the courts of the South Pacific, but the council continues to operate (chaired recently by CNMI Chief Justice Miguel Demapan, with the Education Committee chaired by Guam Supreme Court Justice Philip Carbullido) and organizes regular educational programs for the judges and their staff members.

The Pacific Islands Committee also identifies judges (usually from among its own members) to serve on the Supreme Court of American Samoa and the Supreme Court of the Marshall Islands when appellate panels are needed by those courts.²⁶ As Judge Goodwin explains in his article in this issue, the courts in the U.S.-flag island communities (Guam, the Commonwealth of the Northern Mariana Islands [CNMI], and American Samoa) have all evolved with the nurturing of the Ninth Circuit judges, but some further evolution is still expected. Guam and the CNMI have federal district courts, but these courts are considered to be "Article I" courts instead of "Article III" courts, and the district judges in those communities serve for ten-year terms, without the lifetime appointments that other federal judges have.²⁷ American Samoa still has no federal court

²⁵This organization is sometimes referred to as the Pacific Judicial Education Council to avoid confusion with the Pacific Judicial Conference. Meetings of the judges in the U.S.-affiliated islands have been held, for instance, in Palau in April 1998 and June 2005. See *The Wisdom of the Past, A Vision for the Future—The Judiciary of the Republic of Palau* (Palau, 2001), 56–59. These meetings in Palau were called the "Pacific Judicial Conference," creating some confusion with the Pacific-wide meetings described in this paper.

²⁶The ad hoc judges for the Supreme Court of American Samoa are, as a formal matter, appointed by the U.S. secretary of the interior, and the judges for the Supreme Court of the Marshall Islands are appointed by the Marshall Islands government, on recommendation of the Pacific Islands Committee. Judge Donald Cadra serves as the chief justice of the Supreme Court of the Marshall Islands, but the other members of the court's panels generally come from recommendations made by the Pacific Islands Committee. Magistrate Judge Barry Curren of the U.S. District Court for the District of Hawai'i has sat on a number of panels of the Marshall Islands Supreme Court.

²⁷The "Article I" district judges in Guam and the Northern Marianas do not have the capacity and status to accept assignments to sit on appeals to the Ninth Circuit. *Nguyen v. United States*, 539 U.S. 69 (2003). Judge Alex Munson has explained that being an "Article I" judge is problematic, because the judge is always criticized for ruling in favor of the United States (because others assume the judge is seeking reappointment); he has urged that since the Northern Marianas now have a permanent relationship with the United States, they should also have an Article III federal judge. Puerto Rico, which is also characterized as a commonwealth, has seven Article III federal judges. Interview, Saipan, Oct. 21, 2008; see Pub. L. 89-571 (1966).

at all, and persons charged with federal crimes there must be tried in Honolulu²⁸ or Washington, D.C.,²⁹ with juries selected from communities very different from those found in American Samoa itself. American Samoa's nonvoting delegate to Congress, Eni Faleomavaega, has introduced legislation to provide a federal district court for American Samoa, but no action has been taken on this proposal.

Appeals from the supreme courts of Guam and of the Commonwealth of the Northern Mariana Islands formerly could be taken to the U.S. Court of Appeals for the Ninth Circuit, but now appeals from these courts can be taken only by a petition for certiorari to the U.S. Supreme Court. With the support of the Ninth Circuit's Pacific Islands Committee, these courts have emerged from a rather ambiguous and subservient status to having an equivalent status within the U.S. judicial system to the supreme courts of the fifty states.

JUDGE J. CLIFFORD WALLACE

Judge John Clifford Wallace has played a central role in the Pacific Judicial Conferences for many years, helping to develop programs, raising funds, and dealing with the difficult issues involved in making sure the meetings are useful to all the participants. His commitment to an independent judiciary—a major, recurring theme of the Pacific Judicial Conferences—has been of special significance.³⁰

Born to a poor family, Wallace took advantage of public education and graduated from San Diego State University before earning his law degree from the University of California, Berkeley,

²⁸Kil Soo Lee, the former owner of an American Samoa garment factory, was tried in the U.S. district court in Honolulu in 2003 for numerous federal criminal violations, including involuntary servitude, extortion, and money laundering, and was sentenced to forty years in prison for his role in holding more than two hundred victims in forced servitude.

²⁹The lieutenant governor of American Samoa, Aitofele T.F. Sunia, and Senator Tini Lam Yuen were arrested in 2007 on fraud, bribery, and obstruction charges and, if their cases go to trial, will face a jury trial in Washington, D.C. The defendants allegedly engaged in a scheme to avoid the competitive bidding process by conspiring to split a large project for furniture construction for the American Samoa school system among companies owned and operated by the defendants.

³⁰See section on independent judiciary, *infra*.



Judge Clifford Wallace, Valda Ford, Jenee Wallace, and Tongan Chief Justice Anthony Ford (left to right) during the Seventeenth Conference in Nuku'alofa, Tonga, November 2007. (Courtesy of Valda Ford)

in 1955.³¹ After practicing as a litigator with a major law firm in San Diego for fifteen years, he was nominated to the U.S. District Court for the Southern District of California in October 1970 by President Richard Nixon. Less than two years later, on July 14, 1972, President Nixon appointed Judge Wallace to the U.S. Court of Appeals for the Ninth Circuit, where he has continued to serve until the present time. He served as chief judge of the Ninth Circuit from 1991 until 1996, when he took senior status on the court.³²

From a very early point in his judicial career, Wallace has been interested in judicial administration. He has been especially interested in promoting sound judicial administration and judicial independence in developing foreign countries, and

³¹For an interesting interview with Judge Wallace, see Harry Kreisler interviewing Judge J. Clifford Wallace, "The role of judges in democracies—Judges and the rule of law," <http://sciencestage.com/v/7435/the-role-of-judges-in-democracies-judges-and-the-rule-of-law-judge-j.-clifford-wallace-and-harry-kreisler.html>. See also the press release from the United States Courts for the Ninth Circuit issued upon Wallace's receipt of the Devitt Award for Judicial Service, <http://207.41.19.15/web/ocelibra.nsf/504ca249c786e20f85256284006da7ab/ccae4d498f03be70882571d4005abf98?OpenDocument>.

³²J. Clifford Wallace, *Judicial Staff Directory, Judicial Staff Biographies* (2009).

he has devoted about half his time to this effort since taking senior status. At the Seventeenth Conference in Tonga in 2007, he commented that "[n]o one will remember my opinions, but I think they will remember my contributions abroad."³³ His experiences abroad accelerated in the 1980s when Haydn Williams, then president of the Asia Foundation, heard Judge Wallace speak and decided to appoint him to be the foundation's senior advisor for judicial administration.³⁴ Soon after, Wallace found himself meeting with and advising the Supreme People's Court in China.³⁵

Judge Wallace has contributed in one form or another to the judiciaries of more than forty countries worldwide.³⁶ In Thailand, for example, he is known as the "father of the courts," because of his assistance in developing Thailand's judicial system.³⁷ In Pakistan, Wallace has encouraged judges to protect the rights recognized in the Pakistani constitution.³⁸ In Fiji in 2005, Wallace worked to promote the development of an independent judiciary by explaining that "investors will only come if the rule of law is stable."³⁹

Judge Wallace has contributed significantly to the scholarly literature on topics such as efficient judicial administration, judicial corruption, judicial independence, the resolution of intercourt conflicts, religious freedom, the Establishment

³³J. Clifford Wallace, in discussion with the author, Nuku'alofa, Tonga, Nov. 4, 2007.

³⁴"Frontier Justice—The Ninth Circuit Court of Appeals Is Second to One—and the U.S. Supreme Court," *San Francisco Chronicle*, Oct. 6, 1996.

³⁵*Ibid.*

³⁶"Judge J. Clifford Wallace and Dr. Jeneé Wallace Conclude Speaking Tour of Australia, New Zealand, and Papua New Guinea," *Australian Newsroom*, May 2, 2005, <http://www.lds.org.au/newsroom/article.asp?id=8E6D5BEF-B4CC-4963-BB08-394FCE30052F>.

³⁷"Guardian of Law Traditions," *West Australian (Perth)*, March 26, 2005. See also J. Clifford Wallace, "Judicial Restraint and Judicial Activism" (Oct. 2, 2008), <http://www.ulaw.tv/watch/525/judge-j-clifford-wallace---judicial-restraint-and-judicial-activism>.

³⁸*Ibid.*

³⁹"Fiji Needs Rule of Law," *Fiji Times*, Aug. 5, 2005.

Clause, and foreign judicial processes.⁴⁰ He believes that judicial independence is a universal human right and is "essential to the attainment of the judiciary's rule of law governance objective and the proper performance of its functions in a free society."⁴¹ In explaining the concept of judicial independence, Judge Wallace has stated that "[i]ndependence of the judiciary is not itself an important governance value. . . . [T]o justify judicial independence, there must be an emphasis on how the doctrine protects values held dear by society."⁴² One such societal value is that individual liberty cannot be subject to the will of the executive. "If the people are to have any realistic check on a powerful executive short of armed conflict, it must be by an independent judiciary authorized and able to decide cases contrary to the position of the government when required by law."⁴³ "[W]ith an independent judiciary, no one is above the law and no one is below the law. Without it, there is little hope for the rule of law."⁴⁴

An independent judiciary can emerge, however, only if the judges are able to earn the trust of the people:

Why should the people trust the judges to check the executive? What is so significant about donning the robe that necessarily proves that judges should trump the views of the people's elected leaders? These questions lead to a basic truth: Courts must create trust through judicial activity that warrants trust.⁴⁵

⁴⁰See J. Clifford Wallace, "Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves," *Florida State University Law Review* 22 (2002): 913; Wallace, "Judges Forum No. 2: An Essay on Independence of the Judiciary: Independence From What and Why," *New York University Annual Survey of American Law* 58 (2001): 241; Wallace, "The Framers' Establishment Clause: How High the Wall?" *Brigham Young University Law Review* (2001): 755; Wallace, "The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?" *California Law Review* 71 (1983): 913; Wallace, "International Law and Religion Symposium: Challenges and Opportunities Facing Religious Freedom in the Public Square," *Brigham Young University Law Review* (2005): 755; Wallace, "Judicial Education and Training in Asia and the Pacific," *Michigan Journal of International Law* 21 (2000): 849; Wallace, "Civil Pretrial Procedures in Asia and the Pacific: A Comparative Analysis," *George Washington International Law Review* 34 (2002): 1; Wallace, "Resolving Judicial Corruption While Preserving Judicial Independence," *California Western International Law Journal* 28 (1998): 341, 343.

⁴¹Wallace, "Resolving Judicial Corruption," 343.

⁴²Wallace, "Judges' Forum No. 2," 241.

⁴³*Ibid.*, 244.

⁴⁴Wallace, "Resolving Judicial Corruption," 343.

⁴⁵Wallace, "Judges' Forum No. 2," 244-45.

Judicial independence comes with the responsibility of the judges to limit their own power:

[T]he proper functioning of judicial independence is not solely an issue of how the political branches treat the judiciary; the judiciary has a co-equal responsibility to keep its judgments separate from the responsibilities of the political branches except, and only except, when the Constitution requires it to act.⁴⁶

THE JUDGES FROM AUSTRALIA AND NEW ZEALAND

One of the keys to the success of the Pacific Judicial Conferences has been the active participation and support provided by the judges of Australia and New Zealand. Two of the conferences have been hosted in Australia, the fifth in 1982 in Canberra and the twelfth in 1997 in Sydney, and the Seventh Conference was hosted in 1987 by New Zealand in Auckland. Sir Garfield Barwick, chief justice of Australia from 1964 to 1981, came to the First Conference in 1972 and the Fourth Conference in 1979; his successor, Sir Harry Gibbs, who was chief justice from 1981 to 1987, participated in the 1975, 1982, and 1984 conferences. Sir Anthony Mason, chief justice of the Australian High Court, participated in the 1977, 1982, 1989, and 1993 conferences. Chief Justice Michael E.J. Black of Australia's Federal Court started coming to the conferences in 1991 (when he was first appointed) and has been particularly active since then, participating as well in the 1993, 1997, 2001, 2003, 2005, 2007, and 2009 conferences. (Chief Justice Black retired from the Australian Federal Court in 2010.) Justice Bryan Beaumont, who had served as an appellate judge in Vanuatu, Fiji, and Tonga, as well as on the Australian Federal Court, attended the conferences in 1997, 1999, and 2001.

KEY CONCERNS AND ISSUES

Between 1972 and 2010, eighteen Pacific Judicial Conferences have been held, with the nineteenth scheduled for November 2010. Among the recurring themes discussed at these meetings have been (1) the independence of the judiciary; (2) the education of the judges; (3) the sharing of materials; (4) the

⁴⁶Ibid., 255.

possibility of a Pacific island regional court of appeals; (5) the use of expatriate judges versus local judges; and (6) the reconciliation of customary law and Western law.

The Independent Judiciary

Anthony M. Kennedy, when he was a Ninth Circuit judge, told the Sixth Conference in 1984 that "judicial independence has long been at the center of the constitutional process."⁴⁷ He explained that the 1328 statute of Northampton "provided that judgments of a common law court could not be corrected by a legislative act," and that Lord Coke's dictum several centuries later that the "King is subject to God and the Law" became accepted "as a sound constitutional principle."⁴⁸ The drafters of the U.S. Constitution sought to institutionalize this principle "by the creation of a structural system for a separate judiciary, lest the legislative branch dominate the constitutional process. . . . Even in recent months, federal courts have ruled that Congress may not diminish judicial salaries or, by the unlimited assignment of cases to nonjudicial officers, erode the judicial function."⁴⁹

The Eighth Conference in Kaua'i in 1989 addressed judicial independence in its opening panel and discussed with candor and useful insights a recent incitement-to-mutiny trial in Vanuatu,⁵⁰ the political difficulties in Fiji, and litigation in Palau regarding the Compact of Free Association with the United States.

In 1993, in Fiji, Justice Ian Sheppard of the Federal Court of Australia stressed that the essence of judicial independence is "impartiality in deciding court cases" and that this independence is fragile even in stable communities.⁵¹ It can be undermined, he

⁴⁷Anthony M. Kennedy, "Address to the South Pacific Judicial Conference" (Sixth South Pacific Judicial Conference, Saipan, CNMI, 1984). Kennedy also gave the keynote address to the Eleventh South Pacific Judicial Conference in Guam, February 5, 1995, after he had become an associate justice of the U.S. Supreme Court.

⁴⁸Ibid.

⁴⁹Ibid.

⁵⁰This case involved the prosecution of Ati George Sokomanu, Barak Tame Sope, Maxime Carlot, and Willie Jimmy for charges related to an insurrection. Gordon Ward, who was then in the Solomons, sat as trial judge and issued his opinion finding the accused guilty in March 1989, but his ruling was set aside in April 1989 by a court of appeals panel made up of Justice Arnold Amet, a judge in Papua New Guinea; Justice G. Martin, a judge in Tonga; and Justice E. Goldsbrough, a judge in Vanuatu.

⁵¹Ian F. Sheppard, "Independence of the Judiciary and Freedom from Political Reprisal" (Tenth South Pacific Judicial Conference, Yanuca Island, Fiji, May 23-28, 1993).

explained, in a number of ways, including (a) failure to provide sufficient resources for the court to function, (b) reduction of salaries to the point that qualified people are not attracted to the bench, (c) political appointment of unqualified or biased justices, and (d) removal or dilution of jurisdiction.⁵² Sir Timoci Tuivaga, when still chief justice of Fiji, explained at the Fourteenth Conference in 2001 that the judiciary is physically and financially the weakest of the three branches of government, because it holds neither the sword nor the purse.⁵³ Its strength, he said, is the confidence that is placed in it by the people.

Speaking at the Fifteenth Conference in Papua New Guinea in 2003, Barry Connell, chief justice of Nauru, said that ultimately the best guarantee of judicial independence lies in the integrity of the judiciary itself. In a democratic society, a delicate balance determines the scope that an independent judiciary may exercise. This balancing process will also involve some tension, which is not necessarily a bad thing, but it is the management of that tension that is important. If perfect harmony exists between judges and the executives, then the citizens need to worry. He wondered if the term *judicial autonomy* might be better than *judicial independence*, because it would make it clear that the judicial branch is not subject to the authority or control of any other branch.⁵⁴

In fact, the independence of the judiciary has been discussed at nearly all of the conferences and was the central focus of the Seventeenth Conference in Tonga in 2007,⁵⁵ where Chief Justice Michael E.J. Black of the Federal Court of Australia emphasized that “the independence of judges is granted and protected not for ourselves but for the people whom we serve.”⁵⁶ Structural elements are important, including “security of tenure, with removal only as an exceptional matter and only on the ground of misbehavior or incapacity” and “[s]ecurity of remuneration.”⁵⁷ Institutional independence is also important,

⁵²*Ibid.*, 21.

⁵³Sir Timoci Tuivaga, “Presentation” (Fourteenth Pacific Judicial Conference, Noumea, New Caledonia, Sept. 24–28, 2001).

⁵⁴Barry Bonnell, “A Model Legal Framework for Judicial Independence in the Pacific” (Fifteenth Pacific Judicial Conference, Papua New Guinea, June 23–27, 2003).

⁵⁵A panel discussion on the independent judiciary has been held at ten of the first sixteen conferences.

⁵⁶Chief Justice Michael Black, Federal Court of Australia, “Maintaining the Independence of the Judiciary—Much More Than Structures” (Seventeenth Pacific Judicial Conference, Nuku’alofa, Tonga, Nov. 8, 2007).

⁵⁷*Ibid.*

and the judiciary should have "the principal responsibility for court administration, including the appointment of staff."⁵⁸

Numerous speakers have emphasized that courts must be perceived as independent and that this perception is the key to ensuring public confidence in the justice system. The subtopics addressed include (1) tension between the judiciary and the executive and legislative branches; (2) failure to provide sufficient salaries; (3) judicial appointment and removal or dilution of jurisdiction; (4) lack of tradition; (5) role of the media and free press; and (6) detection of judicial corruption.

TENSION BETWEEN THE JUDICIARY AND THE EXECUTIVE/LEGISLATIVE BRANCHES

Ian Sheppard of the Federal Court of Australia explained at the Tenth Conference in 1993 that judicial independence involves both individual and institutional relationships to the legislative and executive branches. The perception of independence, he noted, is as important as the reality.⁵⁹ At the Fifteenth Conference in 2003 in Madang, Papua New Guinea, Sir Robert K. Brooks, who had served on the national and supreme courts of Papua New Guinea, said,

Independence of the judiciary is a myth unless judges are appointed for life tenure. Judges who have been appointed *without* life tenure are chosen by the executive branch, which almost always has a particular agenda, and the judges are simply removed if they do not bend their decisions towards fulfillment of the agenda.⁶⁰

Also at that Fifteenth Conference, Gordon Ward, then chief justice of Tonga, described the challenges of maintaining an independent judiciary in a constitutional monarchy. He explained that the Tongan Privy Council (which was authorized to enact legislation when Parliament was not in session) had passed a measure forbidding the importation of a New Zealand publication perceived as having disparaged the king or his ideas, and was considering a measure that would remove the power of the courts to review any enactment of the Privy Council or Parliament. The independence of the courts was

⁵⁸Ibid.

⁵⁹Ian Sheppard, "Presentation" (Tenth South Pacific Judicial Conference, Suva, Fiji, May 23–28, 1993).

⁶⁰Sir Robert K. Woods, "Minimum Standards for Judicial Independence: A Pacific Perspective" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

limited, he said, because the judges were selected by the executive branch and could be removed through impeachment by the executive and legislative branches:

Judges are not chosen by independent selectors and there are no written standards setting forth grounds for impeachment and removal of a judge. This lack of standards means, effectively, that accused judges are tried by the executive and the legislative branches, who are free to use any criteria they choose for impeachment and removal.⁶¹

Fiji Chief Justice Timoci Tuivaga explained at the 2001 conference in New Caledonia that “[j]udicial independence is very fragile. It is not safe even in countries where one would imagine it is safe and secure.”⁶² He cited incidents in other countries, including the United Kingdom, involving threats from a high government functionary to restrict judicial review by statute if the judges did not exercise what the official termed self-restraint, and in the United States, where a staffer to U.S. President Bill Clinton reportedly told a federal judge that if he did not change his ruling, the president would call for his resignation.

Tuivaga also pointed out that threats to judicial independence do not always come from the executive. Sometimes, for example, powerful business or criminal interest groups can influence judges, undermining judicial impartiality. Tuivaga gave the example of Colombia, where 122 judges, lawyers, and prosecutors were murdered between 1979 and 1995, apparently by the drug cartels.

The experiences of the judiciary in Fiji have dominated discussion at several of the conferences. At the 1989 conference, Tuivaga described how he and his colleagues survived the two military coups of 1987.⁶³ The first coup, in May, left some of the judiciary in place, but when the military stepped in again several months later, all judges were removed.⁶⁴ Tuivaga told

⁶¹Gordon Ward, “The Challenges of Maintaining an Independent Judiciary Under a Constitutional Monarchy” (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

⁶²Sir Timoci Tuivaga, “Presentation” (Fourteenth South Pacific Judicial Conference, Noumea, New Caledonia, Sept. 24–28, 2001).

⁶³Tuivaga, “Presentation” (Eighth South Pacific Judicial Conference, Kaua‘i, Hawai‘i, May 1–3, 1989).

⁶⁴Sir Vijay R Singh, “A Diminished Judiciary,” *Fiji Times*, Oct. 17, 2000, http://www.vanuatu.usp.ac.fj/journal_splaw/Special_Interest/Fiji_2000/Fiji_Singh1.html.

the participants that when the military government realized how difficult it was to run a government, it dissolved itself and brought back those with experience in governance, and asked him to start a completely new judiciary. This process took a while and a tremendous amount of effort, he assured his colleagues, but, as of 1989, the new government had kept a distance from the new judiciary.⁶⁵

In more recent years, the challenges facing the Fiji judiciary have increased. The 1997 constitution vested judicial power in a high court, a court of appeals, and a supreme court,⁶⁶ and ensured judicial independence.⁶⁷ Judges were to be appointed by the president upon recommendation of the Judicial Service Commission and were to serve to age sixty-five (high court) or seventy (supreme court), unless removed for reason of misbehavior or inability to perform the functions of office.⁶⁸

Beginning in 2000, "[t]he judiciary in Fiji has been deeply and bitterly divided."⁶⁹ In May of that year, Chief Justice Tuivaga, Justice Daniel Fatiaki, and Justice Michael Scott were said to have offered legal advice to President Ratu Sir Kamisese Mara at a time when Prime Minister Chaudhry and members of Parliament were held hostage in the parliamentary complex. Subsequently, Tuivaga was involved in the preparation of the Administration of Justice Decree,⁷⁰ which abolished the supreme court and extended the time in office of the chief justice by changing the mandatory retirement age of the chief justice from seventy to seventy-five years.

Other members of the judiciary and the legal profession viewed Chief Justice Tuivaga's actions with concern,⁷¹ and some suggested his action could be interpreted as being in violation of the 1997 constitution.⁷² Tuivaga responded by saying he had acted pragmatically to protect the operations of the courts:

⁶⁵Sir Timoci Tuivaga, "Presentation" (Eighth Pacific Judicial Conference, Kaua'i, Hawai'i, May 1–3, 1989).

⁶⁶Fiji Constitution, ch. 9, §117(1).

⁶⁷"The judges of the State are independent of the legislative and executive branches of government." Fiji Constitution, ch. 9, §118.

⁶⁸Fiji Constitution, ch. 9, §§117, 134, 137, 138.

⁶⁹"A Divided Judiciary: Justice Shameem v. Justice Scott," *Loyal Fijian-Fiji Independent News*, <http://loyalfijian.blogspot.com/2007/07/exclusive-divided-judiciary-justice.html>.

⁷⁰*Republic of Fiji Administration of Justice Decree* (2000) (repealed by Judicature Decree 2000).

⁷¹Brij Lal, *Islands of Turmoil—Elections and Politics in Fiji* (Canberra, 2006), 201.

⁷²LawAsia, *Report of Visit to Fiji by LAWASIA Observer Mission* (LawAsia, 2007), 8.

My predominant concern was not to render assistance as such to the *de facto* government but to ensure that the maintenance of law and order and justice in this country was not to be frustrated by an ineffective administrative court machinery that could easily have resulted otherwise without my intervention.⁷³

The Fiji judiciary eventually was invited to determine the legality of this interim government in a series of high-profile rulings.⁷⁴ On May 1, 2001, the supreme court unanimously ruled that “[t]he 1997 Constitution remains the supreme law of the Republic of the Fiji Islands and has not been abrogated.”⁷⁵ In October 2001, Tuivaga turned seventy. Although initially reluctant to retire, he eventually did, and Justice Daniel Fatiaki became the new chief justice in July 2002.

On December 5, 2006, armed forces commander Commodore Josaia Voreqe (Frank) Bainimarama overthrew the elected government of Prime Minister Laisenia Qarase in a bloodless coup d’état, and then in January 2007 the interim military government named Bainimarama prime minister. According to the U.S. State Department Annual Human Rights Country Reports, the interim government denied citizens the right to change their government peacefully, and the judiciary was subject to political interference. In January 2007, Commodore Bainimarama put Chief Justice Fatiaki on “leave” and prohibited him from leaving the country, pending a misconduct investigation launched against him, which was dropped in December 2008 as part of an agreement that involved Fatiaki’s formal resignation from office.⁷⁶

After Chief Justice Fatiaki’s forced leave in January 2007, the Judicial Services Commission “suspended” Fatiaki and appointed Anthony H.C.T. Gates to replace Fatiaki in an acting capacity. (Gates had previously ruled in 2000, as a member of the Fiji High Court, that the 1997 constitution had not been

⁷³Ibid.

⁷⁴*Chandrika Prasad v. Republic of Fiji* [2001], NZAR 385.

⁷⁵George Williams, “Feature: *Republic of Fiji v. Prasad*,” *Melbourne Journal of International Law* 5 (2001), <http://www.austlii.edu.au/au/journals/MelbJIL/2001/5.html>.

⁷⁶In November 2007, the interim attorney general had announced the appointment of three expatriate judges to hear allegations against Fatiaki, involving falsifying tax returns and acting outside judicial bounds during Fiji’s 2000 coup.

abrogated and was thus still in force,⁷⁷ in the case affirmed by the Fiji Supreme Court in 2001.)

In July 2007, Gordon Ward, president of Fiji's Court of Appeal, left the bench, declining to renew his contract through a sense of loyalty to the Fiji judges experiencing pressure from the military government, and his home was subsequently burned down under unexplained circumstances. In September 2007, "the entire panel of the Court of Appeal resigned, being, in their view, frustrated from continuing by the Acting Chief Justice."⁷⁸

The participants at the 2007 conference in Tonga discussed the difficulties faced by the Fiji judges in some detail. Sir Thomas Eichelbaum, who had served on the Fiji Court of Appeal from 1999 to 2007, noted that events might have "turned out differently had the judiciary been more united," and he stressed the importance of judges providing "mutual support" to one another in times of difficulty.⁷⁹ With the encouragement of the participants, the chair of the conference, Chief Justice Anthony Ford of Tonga, issued the statement to the press included above.⁸⁰

On March 5, 2008, Prime Minister Laisenia Qarase filed an action in the Fiji High Court posing the question for the court "whether the existence and exercise by the President of a power to appoint Ministers in the period of January 5 to January 15, 2007 is amenable to judicial review, and, if so, are the events which occurred in December 2006 relevant to the determination of that issue?"⁸¹ The high court, consisting of Acting Chief Justice Anthony Gates, Justice J.E. Byrne, and Justice D. Pathik, held that the existence of a national security situation is nonjusticiable and that the dissolution of Parliament and the direct rule by the president "are held to be valid and lawful acts in exercise of the prerogative powers of the head of State to act for the public good in a crisis," and that "to rule directly pending the holding of fresh, fair and accurate elections is upheld as valid and lawful."⁸²

⁷⁷*Chandrika Prasad v. Attorney-General of Fiji* [2000], 2 FLR 89; *Prasad v. Republic of Fiji & Another* [2001], 1 LRC 655, [2001] NZAR 21.

⁷⁸Sir Thomas Eichelbaum, "Interference with Judicial Independence in the Pacific" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7-9, 2007).

⁷⁹*Ibid.*, 5, 7.

⁸⁰See *supra* text at note 17.

⁸¹*Qarase and Others v. Bainimarama and Others*, FJHC 241, 39 [2008] (internal citations omitted), www.fijitimes.com/extras/qarase-vs-bainimarama-coup-case-judgement.pdf.

⁸²*Ibid.*

This ruling was reversed on April 9, 2009 by Fiji's court of appeals (consisting of three Australian lawyers who had never served as Australian judges, appointed by the Fiji military regime), which ruled that the Bainimarama government was illegal. The next day, Fiji's President Ratu Josefa Iloilo announced that he had abolished the Fiji constitution, assumed all governing power, and revoked all judicial appointments.⁸³ On April 17, 2009, President Iloilo signed a decree to reestablish the courts and said new judicial appointments would be made in the next few days. The following month, Anthony Gates (whose 2008 opinion as a high court judge had declared that the acts of the military government were legitimate) was named the new chief justice of Fiji. Judge Clifford Wallace presented a summary of these developments at the Eighteenth Conference in Tahiti in June 2009, and they were discussed by the participants, leading to the statement made by President Olivier Aimot, reproduced above.⁸⁴ At the time of this publication, the Fiji judiciary continues to be in turmoil, and in June 2010 Chief Registrar Ana Rokomoti was suddenly removed from her office without explanation.

The Republic of the Marshall Islands provides another example of a country that has struggled to maintain the independence of its judiciary. High court Chief Justice A.D. Tennekone explained at the Eighth Conference in 1989 that although the Marshall Islands constitution established an independent judiciary, expatriate judges were typically appointed for a maximum term of only four years (two years with an automatic renewal for two more, unless the government gave notice of termination after the first two years). Judges could apply for renewal after four years, but had to begin the application process anew. Moreover, the judiciary was part of the Internal Security Department (now the Ministry of Justice), the minister of which considered himself to be the head of the judiciary. Administrative needs and finances were controlled by the executive. Some ministers were making definite inroads on judicial independence, he said, mentioning specific threats to have him removed from the bench.

Judge Robert A. Hefner of Palau told the Eighth Conference that because of the short-term contracts, which are "subject almost completely to the will of the President and his cabinet," "what may appear to be on the surface an independent judiciary

⁸³"NZ Condemns Fiji Judge Sackings," *Stuff*, April 10, 2009, <http://www.stuff.co.nz/world/south-pacific/2327182/Fiji-president-fires-all-judges>; see also <http://www.theaustralian.news.com.au/business/story/0,28124,25588281-36418,00.html>, June 5, 2009.

⁸⁴See *supra* text at note 18.

[in the Marshalls is] in reality . . . a judiciary intimately tied to the wishes, desires, and pressures of the President who controls his cabinet."⁸⁵ Marshall Islands Supreme Court Chief Justice Harold Burnett, for instance, did not have his contract renewed in the late 1980s because of a decision he made in a long-festering dispute regarding the important *Iroiylablab* chiefly title, and Judge Hefner, "who sat on the three judge panel on a designated basis, has not been requested to sit on any more cases."⁸⁶ Judge Tennekone resigned later in 1989 and publicly accused the Nitijela (the Marshall Islands legislature) of judicial interference because they had threatened his removal from the bench if he made any decisions against any member of the Marshall Islands cabinet.⁸⁷

Judge Tennekone was replaced as chief justice of the high court by Philip Bird, who tried to promote a resolution of the dispute through traditional dispute-resolution techniques. That effort was only partially successful, however, and the Nitijela stepped in once again to resolve the matter, and declared that the lawsuit should be viewed as terminated.⁸⁸ Chief Justice Bird agreed that the Nitijela could determine the customary law applicable to the dispute, but he disagreed with the idea that the Nitijela had the power to order the court to dismiss the case, stating that insofar as the new law "can be said to direct this court to enter an order for dismissal, that section invades the province of the judiciary, and to that extent, is unconstitutional."⁸⁹ The Nitijela then unanimously approved a resolution to dismiss Bird as chief justice for his "clear failure to faithfully discharge the duties of his office and for abuses inconsistent with the authority of that office."⁹⁰ The resolution

⁸⁵Robert A. Hefner, "Judicial Independence in Micronesia—Fact or Fiction?" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, 1989).

⁸⁶*Ibid.*

⁸⁷Judge Tennekone was in the process of trying to adjudicate a dispute (*Kabua v. Kabua*, Civil No. 1984-98) over who held the *Iroiylablab* title, a case that had been pending for five years and had been repeatedly delayed. In a public statement explaining his decision to resign, Judge Tennekone warned the legal community that judges must be prepared to overcome attempts to jeopardize the independence of the courts and said, "All I have to say about threats is that one has to make a choice between being a judge and being a coward. I'm happy to choose the first one." Giff Johnson, "A Case of Justice vs. Tradition? Marshalls Lose Another Chief Justice and a Chief Still Has Top Title," *Island Business News* (April 1991), 16.

⁸⁸*Marshall Islands Customary Law Declaration Act of 1990*, Pub. L. No. 89, §§602–603.

⁸⁹Johnson, "A Case of Justice," 18.

⁹⁰*Ibid.*

stated that Chief Justice Bird had failed to understand customary law.⁹¹ Bird was removed from his responsibilities without a public hearing or an opportunity to respond to the charges of the Nitijela.⁹²

The American Bar Association quickly came to Bird's defense, stating that "[a] judge cannot be removed for performing his constitutional duty. . . . The Bar Association knows of no evidence which would support a finding . . . for the removal of Chief Justice Bird."⁹³ Bird subsequently agreed to resign as of March 5, 1991, when the Nitijela agreed to rescind the resolution removing him. Bird said he had resigned to "alleviate the growing constitutional crisis. . . . Were this my country, I would have seen the matter through to the end."⁹⁴ He stated later that "I think it is important that the constitutional parameters be established. Basic issues do cry out for resolution. Until they are resolved there are uncertainties and they make it hard for the judiciary to deal with matters."⁹⁵

At the Ninth Conference in 1991, the participants discussed the plight of Chief Justice Bird as a prime example of the problem of maintaining judicial independence in a small island community. Another example from the Marshalls was discussed at the Fourteenth Conference in 2001, involving a demand by the minister of justice for monthly reports from the courts. The Marshall Island judges viewed this request as a violation of judicial independence because it implied that the judicial system was under the supervision of the minister of justice, a presidential appointee.

At the 1989 Kaua'i conference, Judge Hefner described what he viewed as a volatile situation in Palau, where a controversial case led to a death, an arson fire, and a bombing, and the judge, who received no support from the bar at all, would certainly have been removed if he could have been.⁹⁶ (Chief Justice Mamoru Nakamura, who presided in that trial, said, however,

⁹¹Ibid.

⁹²Ibid.

⁹³Ibid.

⁹⁴Ibid.

⁹⁵Ibid.

⁹⁶Robert Hefner, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1-3, 1989).

that this was an isolated political incident and was not representative of the state of judicial independence in Palau.)⁹⁷

At the Tonga conference in 2007, Vincent Lunabek, chief justice of Vanuatu, presented a paper about how to strengthen judicial independence, stressing the need for judges to make it clear to their communities that they are able to operate independently and have the capacity to declare acts and regulations to be in violation of the country's constitution.⁹⁸ Such actions will inevitably create tensions with the other branches, he said, but judges can protect their role by stressing that "their task is to review the legality and not the merits of administrative decisions."⁹⁹ Sir Thomas Eichelbaum, who had just finished serving for eight years on the Fiji Court of Appeals, emphasized that "the judiciary must never be seen as taking part in matters that are properly within the realm of politics," noting that "Fiji and Vanuatu provide stark examples of how easy it is for Judges to infringe; even experienced Judges, in the case of Fiji."¹⁰⁰

Judges can also earn respect for their role, said Chief Justice Lunabek, if "we are prompt in our decision-making, eliminate back logs, and provide rational reasons for our decisions."¹⁰¹ He stressed that the judiciary must control its own staff and budget and that it can promote its independence through a media liaison officer, who can explain the court's work to the public, and by establishing a complaint procedure to allow citizens to bring concerns to the court's attention. The process of filing and evaluating complaints was addressed in detail in 2007 by Consuelo Bland Marshall, U.S. district judge for the Central District of California.¹⁰² She explained how complaints were handled in U.S. courts and concluded by saying that a "system

⁹⁷Mamoru Nakamura, "Comment" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1-3, 1989). This incident was described in some detail in *Palau—A Challenge to the Rule of Law in Micronesia* (Report of a Mission by William J. Butler, Hon. George C. Edwards & Hon. Michael D. Kirby, 1988), which described "government complicity" in "[a]n organized attempt to threaten the Judiciary" and "a possible appearance that Chief Justice Nakamura yielded to that pressure" by vacating a previous order and disqualifying himself after "the receipt of intimidating letters and a petition threatening his removal." *Ibid.*, 40-41, 44.

⁹⁸Vincent Lunabek, "What Can Judges Do to Strengthen Judicial Independence?" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7-9, 2007).

⁹⁹*Ibid.*, 3.

¹⁰⁰Eichelbaum, "Interference with Judicial Independence," 6.

¹⁰¹Lunabek, "What Can Judges Do," 3.

¹⁰²Consuelo Bland Marshall, "The Need for a Method to Check on the Judges—Who Watches the Watchman?" (Seventeenth Pacific Judicial Conference, Tonga, Nov. 7-9, 2007).

of filing complaints, if properly investigated, is a way in which the judiciary can remain independent and still preserve accountability. . . . 'In the end, judicial independence can be preserved only if the judges exert the moral leadership and strength of character required to ensure judicial accountability.'"¹⁰³

Also in 2007, Miguel S. Demapan, chief justice of the Commonwealth of the Northern Mariana Islands, provided a survey of the Codes of Judicial Conduct in fourteen jurisdictions in the Pacific.¹⁰⁴ He found that all the surveyed jurisdictions shared a "[g]enuine concern to keep the judiciary in high regard" and "to keep the judiciary ethical."¹⁰⁵ At the "top in their lists is the judge's duties to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office."¹⁰⁶

In his 2007 paper, Sir Thomas Eichelbaum noted that limits on remuneration may reduce the possibility of encouraging the best candidates to seek judicial positions. He argued strongly for appointments to be made "by a body independent of government," and he stated that "appointments for a fixed period are undesirable," especially when "there is a possibility of reappointment."¹⁰⁷ Judges can promote the integrity of the judicial branch by issuing judgments in a timely fashion, and he noted that "[a]mong some Judges in the Fiji High Court—not those present here—there is scandalous dilatoriness in the delivery of reserved judgments."¹⁰⁸

The paper on judicial independence delivered in 2007 by Paul de Jersey, chief justice of Queensland, Australia,¹⁰⁹ discussed in some detail the Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region,¹¹⁰ which

¹⁰³Ibid., 6 (quoting from J. Clifford Wallace, "Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives," *California Western International Law Journal*, 28 [1998]: 341, 344).

¹⁰⁴Miguel S. Demapan, "Presentation on Judicial Canons" (Seventeenth Pacific Judicial Conference, Tonga, Nov. 7–9, 2007).

¹⁰⁵Ibid., 3.

¹⁰⁶Ibid., 5–6.

¹⁰⁷Eichelbaum, "Interference with Judicial Independence," 1–2.

¹⁰⁸Ibid., 4.

¹⁰⁹Paul de Jersey, "Beijing Statement of Principles of the Independence of the Judiciary" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7–9, 2007).

¹¹⁰See <http://lawasia.asn.au/>: "LAWASIA is an international organisation of lawyers' associations, individual lawyers, judges, legal academics, and others which focuses on the interests and concerns of the legal profession in the Asia Pacific region."

was signed by six chief justices from Pacific jurisdictions (along with fourteen others) in 1995 and was later signed by three other Pacific chief justices.¹¹¹ De Jersey stressed that "judicial independence means that judges may rule against the government without influence or fear in cases that come before the court," and he quoted Judge Wallace's statement that "[a] judiciary that does not independently review the actions of other branches [of government] detracts from the people's belief in their government's legitimacy."¹¹²

FAILURE TO PROVIDE SUFFICIENT SALARIES

Lack of sufficient funding is ubiquitous among the Pacific island judiciaries and contributes to loss of judicial independence. Sir John Muria, chief justice of the Solomons, told delegates at the Fifteenth Conference in 2003, for example, that he had not been paid for the past five months. The executive branch had no money, and when it did assemble some, the judiciary was not the first priority for funding.¹¹³

Independent judiciaries require sufficient funding and compensation. According to Ian Sheppard of the Federal Court of Australia, without such funding, justice goes up for sale, and judicial independence is undermined.¹¹⁴ Sir Thomas Eichelbaum noted in 2007 that low salaries deter qualified candidates from seeking judicial positions¹¹⁵ and that judicial recruitment may thus be limited to the independently wealthy or the inexperienced.¹¹⁶

¹¹¹Those signing from the Pacific were Olivier Aimot (then president of the New Caledonia Court of Appeal), Sir Thomas Eichelbaum (then chief justice of New Zealand), Sir Arnold Amet (chief justice of Papua New Guinea), Charles D'Imecourt (chief justice of Vanuatu), Tiavaasue Sapolu (chief justice of Western Samoa), and Sir Gerard Brennan (chief justice of Australia). Those from the Pacific who signed later included Sir Timoci Tuivaga (chief justice of Fiji), Sir John Muria (chief justice of the Solomon Islands), and Nigel Hampton (chief justice of Tonga).

¹¹²Paul de Jersey, "Beijing Statement of Principles" (2007), 4 (quoting from J. Clifford Wallace, "An Essay on Independence of the Judiciary: Independence from What and Why?" *N.Y.U. Annual Survey of American Law* 58 (2001): 241, 251).

¹¹³Sir John Muria, "The Struggle for a Separate Judiciary Budget in the Solomon Islands" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003). Judge Muria also noted that a large hole in the roof of his courthouse was left unrepaired for a substantial period of time.

¹¹⁴Ian Sheppard, "Presentation" (Tenth Pacific Judicial Conference, Yanuca Island, Fiji, May 23–28, 1993).

¹¹⁵Lunabek, "What Can Judges Do," 1.

¹¹⁶See Judge Paul A. Magnuson, *The Structural Elements of an Independent Judiciary: Financial, Organization, Political* (May 27, 2005), 11, www.internationaljudicialconference.org/PDF/13/Magnuson.pdf (internal quotations omitted).

Inadequate compensation increases the chances of outside corruption. When a judge has not been paid for five months, that judge will be tempted to take a bribe to survive financially. Such a situation undermines the judiciary and results in the loss of faith by the citizens. Sufficient judicial funding and compensation ensures that the highest qualified persons will seek judgeships and that outside political pressure will not impact the impartial and neutral decision-makers on the bench.

Chief Justice Carl Ingram of the Marshall Islands High Court has observed that important indices of the independence of the judiciary include the ability of the judiciary to control its own budget (which should be sufficient to provide for reasonable facilities, an adequate staff, and proper training of the staff), adequate resources for the compensation package for the judges, and sufficient lengths of terms of service for the judges.¹¹⁷ Robin Millhouse, chief justice of Kiribati, told the 2003 conference that in Kiribati "[t]he Prime Minister approves the judiciary's budget, which may compromise the chief justice and induce him to cooperate with the executive branch."¹¹⁸

JUDICIAL APPOINTMENT (AND REMOVAL)

In order to achieve the impartial administration of justice, some form of institutional autonomy is imperative. For some justices, the election of judges is "unthinkable if we are to maintain any semblance of judicial independence."¹¹⁹ For others, however, it is the selection or promotion of judges based on how they are likely to decide, rather than on the basis of their professional expertise, that impinges on judicial independence.¹²⁰

At the 1989 conference, Associate Justice Grover Rees III of the High Court of American Samoa, offered his views that the people, through their elected representatives, have a right to select judges, and that where one judge might strike down a given statute, another judge could reasonably rule a different way.¹²¹ Ninth Circuit Judge William C. Canby commented that

¹¹⁷Carl Ingram (chief justice, Republic of the Marshall Islands), in discussion with the author, June 20, 2009, Tahiti.

¹¹⁸Robin Millhouse, "Problems Establishing Judicial Independence in Small Jurisdictions" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

¹¹⁹Ian Sheppard, "Presentation" (Tenth South Pacific Judicial Conference, Yanuca Island, Fiji, May 23–28, 1993).

¹²⁰Tuivaga, "Comment" (Fourteenth South Pacific Judicial Conference, Noumea, New Caledonia, Sept, 24–28, 2001).

¹²¹Grover Rees III, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989).

consideration of philosophical views as a criterion in judicial selection is perfectly proper and helps to ensure that law will reflect the values inherent in a society. He pointed to the U.S. process of selecting federal judges, with constitutionally mandated presidential appointment and Senate confirmation, as an example.¹²² He noted that each system of selecting judges (election, executive appointment, or merit selection by an "independent" panel) threatens judicial independence to some extent, because whoever selects the judge is indebted to somebody else. In any case, he said, it is not so much the method of selection as the method of removal that is key to meaningful judicial independence. He did not believe that life tenure is really necessary to assure judicial independence, because "lawyers are ornery enough to have their own opinions no matter what." What is important is that people have the perception that a judge will be around forever and that they may have to learn to live with his judicial opinions, and that they not see the judicial process as just another process to be overridden.

Another participant agreed, saying that although a judge may be under an obligation to the selectors, if enough insulation exists once that judge is on the job, then the judge may feel free to disappoint the selectors. If, however, the judge has to be reviewed and reappointed regularly, independence is much harder. Judge Canby agreed and related the story of telling an elected judge that as long as the judge had integrity and decided cases according to the law, it would be the electorate's job to decide whether the judge should keep doing it. The response was, "That's a lot like having a crocodile in the bathtub. You may feel you should ignore it, you may try to ignore it, but you can't ever quite get it out of your mind."¹²³

Robin Millhouse, chief justice of Kiribati, explained at the 2003 conference that under his country's constitution, judicial tenure was limited to a fixed-term appointment.¹²⁴ Although such fixed terms could constitute a threat to judicial independence, this limited tenure was justified by the limited availability of legal talent in Kiribati and the small size of the community, which made judicial impartiality very difficult, leading to the decision to bring in judges from the outside. But when a contract was negotiated with an outside judge, neither the judge nor the Kiribati community could know for sure what

¹²²William Canby, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1-3, 1989).

¹²³Ibid.

¹²⁴Millhouse, "Presentation" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23-27, 2003).

it would be getting. As of 2003, Millhouse had served one full term, with an extension for another two years. He said he had never had any kind of pressure put on him, not even hinted at or implied in any way, but he was always aware that he did not know what would happen at the end of this term. He assured the group that he was comfortable enough financially that he did not worry about whether his term would be renewed, but he wondered about someone who might not be as comfortable. He also noted that an appointed judge could give three months' notice of intent to leave, but otherwise, whether the judge was good or bad, Kiribati would have the judge for the duration of the contract, unless the judge was removed for misconduct or incapacity after an inquiry.

Some Pacific island countries will give their own citizens judicial life tenure but will appoint expatriate judges to a fixed term of only a few years. In Samoa, for example, citizens can hold office to age sixty-eight, while expatriate judges are appointed for a term of years. Judges may not be removed except by the head of state on a resolution supported by two-thirds of the total of members of the Legislative Assembly on the ground of stated misbehavior or infirmity of body or mind.¹²⁵

Gordon Ward, then chief justice of the Solomon Islands, pointed out at the 1989 conference that another important and less visible element in judicial independence is the question of who appoints the general administrative staff of the courts: "The judiciary should have a clear say in the appointment of people right down through the system so that the executive cannot gain control of the judiciary by a backdoor means."¹²⁶

Ward also explained at the 1989 conference that, although most Pacific nations have judicial independence written into their constitutions, many have ways of getting around it. In the Solomons, for instance, a judge may be removed easily by an administrative act of the minister of immigration, who, while the judge is out of the country, may simply have him declared a prohibited immigrant.¹²⁷

LACK OF TRADITION OF AN INDEPENDENT JUDICIARY

At the Fourth Conference, in the Cook Islands in 1979, Professor J.F. Northey, dean of the faculty of law, University of Auckland (New Zealand), commented on the particular struggle to uphold the independence of the judiciary in countries

¹²⁵Western Samoa Constitution, arts. 65, 68–69.

¹²⁶Ward, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989).

¹²⁷*Ibid.*

with no tradition of a separation of powers.¹²⁸ Northey noted that most of the new states had some elements of judicial independence incorporated into their constitutions. But where no tradition has existed, judicial autonomy can easily be eroded. In some cases, he pointed out, there may be a want of independence on both sides, with the executive relying on a sympathetic judiciary at the same time that the judiciary looked to a benevolent executive. Encroachment is not always blatant, and the judiciary may simply undertake a task at the request of the executive, which may use judges for purposes other than their primary function and sometimes in politically sensitive situations.

Edward C. King, chief justice of the Federated States of Micronesia, related to the 1989 Kaua'i conference some of the problems inherent in guaranteeing judicial independence when no tradition of an independent tribunal is found in customary practice.¹²⁹ Judicial candidates, he said, should be asked about their political views, specifically with respect to the self-government of the nation and the extent to which the colonizing nation's laws should be incorporated and utilized over the aspirations, values, and traditions within that nation: "I am suggesting that it may well be that we have an obligation to help our own nations decide how to go about selecting judges, and suggest inquiries in these areas."

THE ROLE OF THE MEDIA

The importance of the media to judicial independence was addressed at the 2003 conference in Papua New Guinea by Gerard Fey, president (chief justice) of the New Caledonia Court of Appeal.¹³⁰ Focusing on the French system but suggesting parallels with other legal systems in the Pacific, he asked conferees to ask themselves whether the media were a counter-balancing power or a fourth branch of government. He answered his own question by saying that the media, as "witnesses and denouncers of dysfunction," were an important counterbalancing power that contributed effectively to guaranteeing judicial independence in a democratic government.

The fact that debate has occurred in open court has meant that the media can analyze the process and can translate its results to the public. This media presence, he said, was a

¹²⁸J.F. Northey, "Presentation" (Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, May 15-19, 1979).

¹²⁹Edward C. King, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1-3, 1989).

¹³⁰Gerard Fey, "Presentation" (Fifteenth Pacific Judicial Conference, Medong, Papua New Guinea, June 23-27, 2003).

fundamental guarantee against an arbitrary judge, because the attention from the media forces the judge to demonstrate his or her impartial judgment, independence, and competence. Thus, the media can contribute to preventing arbitrary and unjust decisions. Judge Fey cited several instances where media publicity about judicial injustice righted a wrong.

Fey noted that the media can, however, sometimes have a negative impact on the independence of the judiciary, such as when journalists have developed a good relationship with a particular judge and then put that judge in the limelight. The incentive to make decisions that encourage continued favorable coverage creates a risk that the judge will end up losing independence. A judge, Fey declared, must in all circumstances remain outside of the media debate generated by a case on which he sits. Although it remains important for the judicial system to communicate with the media, such communication should only be in the context of an organized service within the judicial system.

Live coverage of trials via cameras in the courtroom, Fey said, can also create risks for judicial independence. Cameras can transform the participants, including the judge, into actors, with potentially negative consequences. They can also create the risk that persons watching selected parts of a trial may misunderstand the trial and may come to premature or inappropriate conclusions. Some judicial remedies can be exercised against the press for violations of private life, defamation where the honor or reputation of an individual has been unfairly attacked, and infringements on the presumption of innocence or the confidential nature of a prosecutor's investigations.

Judge Salamo Injia of the Papua New Guinea Supreme Court told the same 2003 conference that he was not convinced the media could be counted on to safeguard judicial independence. He understood that the media could play a constructive role in communicating correct information to the public, which is critically important, but worried that the media did not always fulfill that role regarding coverage of the judiciary. Reporters were not required to attend court, and when they did, they generally were not there for the entire case, sometimes relying on information from the parties or their lawyers rather than legal records. He referred to the many problems he said he had seen in the media's misunderstanding of court decisions, including incorrect reporting, perceived biases, and insensitive and dramatized reporting.¹³¹

¹³¹Salamo Injia, "Presentation" (Fifteenth Pacific Judicial Conference, Medong, Papua New Guinea, June 23–27, 2003).

According to Judge Injia, leaving fundamentals of good governance to the understanding of those involved is a palpable risk. The judiciary and the media need to sit down as equal partners and engage in meaningful dialogue toward setting guidelines for minimum standards to respect each other's role and independence and, at the same time, develop public judicial education or awareness programs.

Chief Justice Michael E.J. Black of the Federal Court of Australia illustrated the importance of transparency and public confidence in court procedure when he delivered the keynote address at the Seventeenth Conference in Tonga in 2007. He explained that the structures that work toward ensuring judicial independence are important but not sufficient in themselves, and he emphasized the need for judges to provide and encourage public education about courts and their work. He noted the importance of publishing decisions and easily accessible case summaries for important decisions, recognizing the contribution made by the establishment of the web resource "PacLII."¹³² Finally, Black highlighted the significance of courtesy to the public in perceptions of judicial independence and the need for judges constantly to strive toward a vision to improve service delivery and fulfillment of judicial responsibility.¹³³ He noted, for instance, that "[w]hen I joined the Federal Court, one of the first things I did was to order the removal of a crude sign which announced to anyone visiting our courthouse in Melbourne: 'No change for phone.' It revealed an attitude of mind that was quite unacceptable."¹³⁴ In terms of promoting public support, he explained, courtesy "and even cleanliness of the premises" may be crucial, and that these elements may be even more important "in the smaller more intimate island communities of the Pacific."¹³⁵

DETECTING JUDICIAL CORRUPTION

Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals discussed the importance of judicial integrity at the 2003 conference,¹³⁶ asking where, in the absence of judicial integrity,

¹³²Michael E.J. Black, "Maintaining the Independence of the Judiciary—Much More than Structures" (Keynote Address to the Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 8, 2007); PacLII is discussed *infra*, text at notes 151 and 152.

¹³³*Ibid.*, 9.

¹³⁴*Ibid.*

¹³⁵*Ibid.*, 10.

¹³⁶J. Clifford Wallace, "Presentation" (Fifteenth Pacific Judicial Conference, Medong, Papua New Guinea, June 23–27, 2003).

would the corruptors and the corrupted be tried for their misdeeds? If justice is for sale, he declared, there is no real rule of law. The problem is in detecting judicial corruption accurately, investigating it fairly, and eradicating it effectively without eroding the independence of the judiciary. Tension is inevitable between enforcing judicial integrity and judicial independence.

Wallace enumerated the basic principles that he believes should apply to any process for ensuring judicial accountability and integrity:

- The process should be within the judiciary, in line with the need to guard judicial independence. Control of the process should not be left to the political branches.
- The process should be open, with any citizen having the ability to complain against a judicial officer or raise issues of alleged corruption or wrongdoing.
- The process should be transparent enough to assure the judiciary is not merely protecting its own.
- The process must be fair, assuring the judges themselves of due process rights.
- The process must be flexible enough to deal with situations requiring a response short of removal of a judge from the bench.
- The process should focus on helping the judge to become a better judge. Complaints may unearth a problem that can be solved, strengthening the system and the judiciary.

Even though judges generally know what is required of them, it helps to publish codes of conduct and ethics. A code of conduct establishes a basic conduct below which judges will be subject to sanctions, while ethical goals are aspirational, intended to encourage judges to be their best.

At the 2007 conference, Robin Millhouse, chief justice of Kiribati and Nauru, suggested establishing a Pacific-wide body to consider allegations of corruption brought against judges. He suggested three judges “drawn from different Pacific jurisdictions to consider charges against the judge in a fourth jurisdiction. In other words, peer review at the most senior level.”¹³⁷ An example of such an approach occurred in 2002 when Arthur Ngiraklsong, chief justice of Palau, was assigned to be acting High Court judge in the Marshall Islands to sit on a criminal case against Marshall Islands Judge Charles Henry, who was accused of double dipping in his travel forms. (This

¹³⁷Millhouse, “Can a Model for Judicial Accountability Be Developed in the Pacific?” (Seventeenth Pacific Conference, Nuku’alofa, Tonga, Nov. 5–7, 2007).

trial never occurred, because Judge Henry never returned to the Marshalls, and no extradition proceedings against him were pursued, but Judge Henry was impeached and removed from office in 2003.)

Education of the Judges

These conferences have repeatedly focused on the importance of judicial education. Both expatriate judges with extensive legal training and experience (but, in some cases, limited familiarity with the cultures of the island nations in which they served) and local judicial officials whose legal training and experience are, in some cases, limited have recognized the importance of training.

How best to accomplish the judicial education of both expatriate and local judges has been an issue of importance and debate over the life of the conferences. Andon Amaraich, chief justice of the Federated States of Micronesia (FSM), spoke at the 2003 conference about the challenges of providing special judicial education for lay judicial officers in Pohnpei, Chuuk, Kosrae, and Yap, the four states of the FSM, discussing problems that were familiar to many of the participants.¹³⁸

Amaraich explained that the lay judicial officers were very knowledgeable about the customs and traditions of their culture but lacked knowledge of substantive laws and foreign laws. The cost of providing formal legal training was increased by the geographic dispersion and remote location of the states, which has meant that everything has had to be imported. These problems are especially complex in the FSM because of the nation's political organization. Each of the four FSM states has its own unique culture and language (although English is an official language), and this diversity requires much translation. Although the underlying legal principles have been derived from the U.S. legal system, local courts also give consideration to Micronesian custom and tradition. The court structure is unique because the national government is a federation in which each state court acts independently of the national court, with the result that five autonomous judicial systems operate independently and simultaneously. Each operates under a different set of rules, applies a different body of law, and has a separate system of administration. Developing a program of judicial education that is relevant to all has been a real challenge.

¹³⁸ Andon Amaraich, "Presentation" (Fifteenth Pacific Judicial Conference, Medong, Papua New Guinea, June 23–27, 2003).

Chief Justice Amaraich discussed the significance of some of the training programs put together by the U.S. Ninth Circuit's Pacific Islands Committee for national and state court judges. The Pacific Island Committee and the National College in Reno, Nevada, sponsored several programs in 2002, for example, for judicial officers from the FSM and other Pacific jurisdictions. The training faculty included judges from the United States who had some previous experience in the Pacific region or who had been to the FSM. The topics included the rule of law, the role of judges, judicial decision-making, contract law, tort law, and evidence.

Training also occurs in the FSM itself and in affiliated jurisdictions. The FSM has been an active participant in the Pacific Judicial Education Program, which has been funded by donors who have had an interest in seeing that the lay judicial officers in the Pacific island nations receive adequate training in the law. Some workshops have been held for municipal judges in Pohnpei and Yap, in which judges have participated in mock courtroom scenarios dealing with hypothetical court situations. The FSM national coordinator to the Pacific Judicial Education Program has been working on a bench book project as a resource for the Pohnpei Supreme Court and the other state courts.

In the 1980s, many Micronesian judges, particularly those without formal law school training, attended short courses taught by members of the faculty at the William S. Richardson Law School, University of Hawai'i at Manoa, who used Micronesian cases and materials to develop judicial skills. Because judges in small islands are faced regularly with profound issues of first impression and basic choices of direction, they need educational opportunities that focus on their unique situations, rather than examining only the challenges facing judges in developed communities.

At the Ninth Conference in 1991 in Tahiti, Edward C. King, predecessor to Amaraich as chief justice of the FSM Supreme Court, proposed the establishment of a Pacific Institute of Judicial Administration (PIJA).¹³⁹ King envisioned that this judicial institute would provide judicial administration via research and technical assistance and would serve as a clearinghouse for information. It would provide judicial education, staff training, and translation services. In addition, it would help with com-

¹³⁹Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991.

munication among the judiciaries by publishing a Pacific island reporter, bringing together relevant cases and decisions.¹⁴⁰

The institute would also help to establish appellate panels, create a system for judicial discipline, help to provide continuing legal education for attorneys, and assist in the establishment of standards and bar exams. It would help to codify laws and possibly help start up a Pacific islands law journal. It could even function as an association for the Pacific judiciaries to help them act and buy collectively.

Chief Justice King envisioned this institute as a nonprofit corporation with a board of directors that would be controlled by the Pacific judiciaries. Funding would be from foundations, at least in the beginning, with the Asia Foundation having indicated that it might be able to help financially. Over the long term, he said, he saw the institute as very nearly self-supporting from contributions from various Pacific island judiciaries. Because the institute would not carry out all the functions but rather would serve as liaison and coordinator, a large staff and headquarters would not be needed.

Subsequent discussion of the proposal seemed generally positive, but with some voicing reservations. Chief Justice Fariq Muhammad of Kiribati said he liked the idea very much. Chief Justice G.W. Martin of Tonga shared some concerns, although he was not entirely critical of the idea. All of the things the institute would do, he noted, were already being done with varying degrees of success, and he wondered how the institute would do them better. He also suggested that the smaller states might not want to be overseen by an international organization. Judge Wallace said that the fear of being dominated by larger countries could be countered by electing members to the board only from smaller nations, to make sure it functioned in their interest. Chief Justice Tuivaga of Fiji added that the institute would impose nothing and would not interfere, but would be available to help when asked. Gordon Ward, then chief judge of the High Court of the Solomon Islands, said that the institute's headquarters would best be placed in some central location in the South Pacific, rather than in Hawai'i, no matter how convenient Hawai'i might be in some ways.¹⁴¹

The group decided against voting on a motion to establish the institute formally or even formally to pursue the idea, since the conference had no charter and no rules, and the only

¹⁴⁰Edward C. King, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21-24, 1991).

¹⁴¹"Discussions" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21-24, 1991).

thing its membership had ever voted on was where to hold the next conference. Some conference members expressed strong interest in the project and offered to help Justice King develop the idea further. An ad hoc working group was set up informally, with Chief Justice King as chair, to explore this idea in more detail.¹⁴²

Two years later, at the 1993 conference, Chief Justice King, president of the newly incorporated Pacific Institute of Judicial Administration (PIJA), together with the chair of the working committee, Fiji Chief Justice Sir Timoci Tuivaga, talked about the work that had been done on the concept of the institute since it was proposed at the 1991 conference in Tahiti.¹⁴³ A board had been formed to develop this idea, and articles of incorporation were filed in Hawai'i for PIJA, signed by nine incorporators—Edward C. King; Samuel P. King, U.S. district judge in Hawai'i; Jose Dela Cruz, chief justice of the Commonwealth of the Northern Mariana Islands; Sir Bari W. Kidu, chief justice of Papua New Guinea; Trevor Rees Morling, Federal Court of Australia; Chief Justice Andon Amaraich, FSM Supreme Court; Alberto C. Lamorena III, Guam Supreme Court; Chief Justice Clinton R. Ashford, Marshall Islands Supreme Court; and Chief Justice Tuivaga of Fiji.

Under the proposal, topics for judicial seminars might include sentencing and alternatives to incarceration, evidence, integration of principles derived from custom and tradition into the system of justice, alternative forms of dispute resolution, crimes of violence, white collar and juvenile crimes, issues of commercial law and economic development in the Pacific courts, environmental law, land issues, and others. Judicial administration programs for chief justices, justices, magistrates, clerks, registrars, administrators, probation officers, court reporters, and secretaries could include case flow management and reducing delays, processing appeals, separation of powers and functions with respect to relationships between judiciaries and other parts of the government, and the operation and maintenance of court reporting transcribers.

Technical assistance under PIJA could include the design and implementation of plans for computerization of the court, assessment of a court system with confidential recommendations, preparation of bench books, and design of statistical reports. PIJA could also serve a clearinghouse role, helping with circulation of judgments as a tool for research, publish-

¹⁴²Ibid.

¹⁴³"Discussions" (Tenth South Pacific Judicial Conference, Yanuca Island, Fiji, May 23–28, 1993).

ing a newsletter for Pacific judiciaries as the first step toward a legal journal for the Pacific, providing legal education for selected jurisdictions, helping to locate outstanding students, and helping them gain admission to law schools. The concept was discussed at length with the group, gaining momentum as it went along.

The Pacific Institute of Judicial Administration never developed beyond the planning stage, however, because the delegates at the 1995 conference failed to provide the support necessary to move forward.¹⁴⁴ Perhaps the judges from Australia and New Zealand were reluctant to have this institute based in the United States, since they had provided leadership in the Pacific and wanted to continue to do so, and the French judges may not have been enthusiastic about supporting an English-speaking judicial administration center. Judge Wallace wanted to support this idea but did not want it to become a source of conflict with other countries.

The issue of judicial training and PIJA was considered once again at the Twelfth Conference in 1997. A survey was conducted by Richard Grimes of the Institute of Justice and Applied Legal Studies at the University of the South Pacific, examining fifteen jurisdictions, with 132 judges responding.¹⁴⁵ One key finding was that, although some valuable courses and training were available across and beyond the region, training was generally piecemeal in nature and needed greater coordination and planning to be effective. The survey also indicated that successful training must be based on national needs in terms of delivery, language, substantive law, procedure, custom and tradition, and that in-country training from local experts and personnel was a prerequisite to effective administration.

Recommendations of the report included:

- Structure: creation of a judicial training center, preferably in Vanuatu because of its central position in the region, the English and French connections there, and the availability of a well-stocked law library.
- Short term: preparation of bench books, training manuals on law and procedure for court administration, preparation of training manuals on computer technology, in-country training courses to supplement the bench books/manuals, establishment of an e-mail train-

¹⁴⁴"Discussions" (Eleventh South Pacific Judicial Conference, Tumon, Guam, Feb. 5–10, 1995).

¹⁴⁵Richard Grimes, "Survey" (Twelfth South Pacific Judicial Conference, Sydney, Australia, April 14–18, 1997).

ing "listserve," development of a regional orientation program, organization of skills workshops, creation of a regional faculty of training experts, appointment of national training officers, holding of a regional conference on judicial training.

- Long term: establishment of a law reporting system, development of a model computer system for court records, standardization of qualifications, development of a structured training program building on short-term achievements, establishment of a regional Council for Legal Education.

Sources of potential support and funding identified in the Grimes report included possible aid from the governments of Australia, New Zealand, the United States, and the United Kingdom, as well as possible funding opportunities from Canada, France, Japan, Korea, and independent charitable foundations.

The chief judges indicated general support for this report.¹⁴⁶

By the Thirteenth Conference in Apia, Samoa, in 1999, the Pacific Judicial Education Program (PJEP) was getting under way. PJEP was a five-year program—funded primarily by Australia and guided particularly by Justice Bryan Beaumont of the Federal Court of Australia—which had been supported two years earlier at the Twelfth Conference in Sydney. The judges present listened as Livingston Armytage, Australian consultant in judicial and legal development, discussed effective judicial training.¹⁴⁷

The needs for judicial training throughout the Pacific region are profound, widespread, and diverse, declared Armytage. The judiciary needs to be strengthened in exercising its role as guardian of the principles of good governance, accountability, and transparency. The court's role is to protect citizens from political oppression, commercial exploitation, and the abuse of fundamental human rights, including violence against women. Ultimately, strengthening the rule of law, he continued, promotes economic development by protecting financial investment and trade. Furthermore, he said, "there are no shortcuts to addressing the fundamental deficits in the professional competence of lay justices, magistrates, court officers, and paralegals."

Judicial officers themselves, most of whom have a law degree (although the extent of professional training and experi-

¹⁴⁶"Discussions" (Twelfth South Pacific Judicial Conference, Sydney, Australia, April 14–18, 1997).

¹⁴⁷Livingston Armytage, "Presentation" (Thirteenth South Pacific Judicial Conference, Apia, Samoa, June 28–July 2, 1999).

ence varies throughout the region), need continuing education in case management, team leadership, coaching and mentoring, judicial information technology and computer skills, judicial information systems, human rights and gender equity, managing complex litigation and commercial disputes, evidentiary issues, major fraud, and customary law. Expatriate judicial officers also need local training in law, custom, and culture, as well as coaching and mentoring. Good lawyers, he noted, do not necessarily become good judges. Going from adversary to adjudicator means changing one's attitude, learning and using new skills, and sometimes severing old ties. In addition, he added, generic needs of the judicial service remain, including education in the operation and use of judicial information systems, computer training in word processing and electronic legal research methods, and training in court recording. Armytage had a very important and specific recommendation for each of the chief judicial officers of the Pacific island nations: lobby each government for endorsement of the need to allocate 1.5 percent of each national law and justice budget for judicial training.

Since late 2004, the Federal Court of Australia, with funding from the Australian government overseas aid agency AusAID, has been providing interim assistance to South Pacific judiciaries while the Pacific Judicial Development Program was being designed. The Pacific Judicial Development Program was formed to strengthen governance and the rule of law in fifteen participating Pacific island countries and is funded jointly by AusAID and the New Zealand equivalent, NZAID.

Sharing of Materials

The value in sharing information and experiences was recognized by the participants at the First Conference in 1972 and has been emphasized frequently since then. The limited availability of relevant legal materials was a serious concern and burden for many judiciaries in the Pacific. Only one legal periodical produced in the South Pacific has been published outside of Australia and New Zealand, and few, if any, textbooks have been devoted to the law of the independent states that have emerged since 1970.

In the mid-1980s, FSM Chief Justice Edward C. King approached West Publishing at their headquarters in St. Paul, Minnesota, but West was not interested in establishing a reporting system for the Pacific, because they did not believe they would be able to obtain opinions from all the jurisdictions in a timely fashion and did not want to attempt to operate out-

side the United States.

Information-sharing, however, began to be recognized as an attainable goal with the advent of the internet and its growing availability in the islands.¹⁴⁸ At the Eighth Conference on Kaua'i in 1989, most participants agreed that their greatest common need was to share information and opinions with one another.¹⁴⁹ The participants discussed the need for a publishing company to develop a digest or research material that would allow them to keep abreast of what their colleagues are doing, examine each other's approaches, and learn from one another. The participants agreed that the experiences of other Pacific islands were probably more relevant to them than the experiences of the metropolitan powers. Sir Mari Kapi, deputy chief justice of the Supreme Court of Papua New Guinea, suggested that in order to move these conferences beyond mere discussions into something of more practical significance, they would need a sponsor to finance a series of law reports for the Pacific.¹⁵⁰

The goal of sharing opinions and other legal resources finally became a reality with the creation of the Pacific Islands Legal Information Institute (PacLII): "The PacLII, in partnership with the University of the South Pacific School of Law, promotes free access to South Pacific laws and materials (case law, legislation, treaties, Law Reform Commission documents, etc.) via the Internet."¹⁵¹ The foundation of PacLII is the Australian Legal Information Institute (AustLII), which assists PacLII in markup processing, database structure, search engine facilities, and other aspects of technical infrastructure.

PacLII garners new legal information such as statutes, amendments, regulations, and recent judgments by maintaining contact with the courts and governments in the region, which supply cases and legislation as they are released in print and electronic format. PacLII works closely with the University of the South Pacific School of Law library to scan copies of print opinions for publication on the website.¹⁵² The impact that PacLII has had on the judiciaries in the Pacific has been swift and important. PacLII facilitates knowledge-sharing and knowledge-management mechanisms among the judges and

¹⁴⁸"Discussions" (Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, May 15-19, 1979).

¹⁴⁹"Discussions" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1-3, 1989).

¹⁵⁰*Ibid.*

¹⁵¹The Pacific Islands Legal Information Institute (PacLII), <http://www.pacalii.org/pacalii/FAQ.html#Heading37>.

¹⁵²*Ibid.*

legal practitioners in the Pacific.

For many years, Australia has participated in a significant program of "library twinning" in the Pacific. The Federal Court of Australia operates three programs to provide assistance to court and legal libraries in the South Pacific, including administering a five-year AusAID grant of \$104,500 to provide library assistance. The Federal Court of Australia has also established libraries for the supreme courts of Vanuatu and Tonga, and it provides assistance to the libraries of the High Court and Court of Appeal of Fiji and the Supreme Court of Kiribati. Australia's library support initiative also includes sending law librarians to the supported countries to assist with library maintenance and advice.

Regional Court of Appeals

During the colonial period, in the 1960s and early 1970s, a Western Pacific Court of Appeal was based in Fiji and was used by various island communities, but countries declined to use it as they gained independence. The idea of a new regional court of appeal persists—it was raised at the First Conference in Samoa¹⁵³ and has been discussed periodically since then. Participants at that first meeting thought that a regional court could help address common problems such as the need to interpret, report, and transcribe judicial proceedings in several languages, the need for agreements among various Pacific island nations to enforce court judgments, and the need to extradite and exchange prisoners. Western Samoan Chief Justice Barrie C. Spring noted that a regional court of appeal "would have the advantage that the sitting members would be aware of the customs, traditions, and way of life of the peoples of the South Pacific, and, in my view, this would greatly assist in the determination of appeals."¹⁵⁴

In 1982, Mere Pulea Kite, barrister at law and special assistant to the vice-chancellor, University of the South Pacific in Fiji, presented a paper on the idea of a regional court of appeal.¹⁵⁵ Kite acknowledged that the concept needed more research and refining, but she emphasized that at least in some countries of the region, a second-tier appellate court is needed in the interests of justice and protection for the community. Kite suggested options, and even names, for a Pacific regional

¹⁵³"Discussions" (First South Pacific Judicial Conference, Apia, Samoa; and Pago Pago, American Samoa, Jan. 10–13, 1972).

¹⁵⁴*Ibid.*

¹⁵⁵Mere Pulea Kite, "Presentation" (Fifth South Pacific Judicial Conference, Canberra, Australia, May 24–26, 1982).



Group photo from Eighth Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, in 1989.

court of appeal, and her presentation led to a provocative discussion among the participants.

One possibility, she explained, would be to establish a court of appeal without a fixed location that would assemble when needed, thus avoiding the political and financial problems of locating a centralized headquarters in any one country. A second possibility would be to establish a court located centrally in the region, with a library and a registrar. Kite recognized the questions of costs, staff training, and other issues, but noted that "a regional court would not only be one of the greatest unifying factors in regional cooperation but it could be of great value to the administration of justice in the Pacific."¹⁵⁶

In the discussion, E.F. Gianotti, associate justice for the High Court of the Trust Territory of the Pacific, expressed a view that may also have been held by others: "Personally, I feel that a Court of Appeal in the Pacific, North, South, or West, would be a good thing. However, I do not think there is a proverbial snowball in hell chance of it ever being formed."¹⁵⁷ Gianotti explained that Pacific governments and their courts tend to be jealous of their jurisdictions, not wanting someone to come from outside and monitor their activities.

J.D. Dillon, acting chief justice for the Cook Islands, worried that a regional central court would deprive the independent countries of the opportunity to have an appellate court sitting in their own jurisdiction, but he did not feel that these concerns were insurmountable. Dillon suggested starting off with a pool of eminent jurists from Australia and New Zealand, using English common law as the basis for judgments in those countries using English common law, and thus avoiding the problems of conflicting sources of law from U.S. and French jurisprudence.¹⁵⁸

Sir Ronald Davison, chief justice of New Zealand, noted that New Zealand has provided facilities and judges throughout the region and would be willing to continue to render assistance to island nations on request, so far as possible. But, he added, "New Zealand is unlikely to subject itself to the jurisdiction of a regional court."¹⁵⁹

Davison observed, however, that practical problems could be overcome by negotiation among the governments concerned, so that the first steps of the process could be taken to develop what could evolve into a regional court of appeal: "It appears to

¹⁵⁶*Ibid.*

¹⁵⁷"Discussions" (Fifth South Pacific Judicial Conference, Canberra, Australia, May 24-26, 1982).

¹⁵⁸*Ibid.*

¹⁵⁹*Ibid.*

me that there is certainly a large volume of good will amongst the nations of this area which would wish to see a regional court established."¹⁶⁰

Sir Harry Gibbs, chief justice of Australia, added to the discussion by stating that the chances of the Australian appeals being taken to a regional court of appeal were nonexistent, because the Australian constitution would forbid it. Gibbs added, however, that if a regional court were to be established for those nations wanting one, he was sure that Australian judges would be available to sit, if asked.¹⁶¹

Olivier Aimot, who served as a judge in the three French Pacific communities—Wallis and Futuna, New Caledonia, and French Polynesia—has explained that a regional court of appeal would not be suitable for the French Pacific islands for several reasons:

- The civil law applicable in the French islands derives from two distinct sources—“*droit privé*” (private law) and “*droit publique*” (public law), which have different jurisdictions and judges, even in appeals.
- French judges do not have the power to declare a law to be unconstitutional (although this limitation is in the process of changing).
- The geographic distances separating the three French island communities (and all the other island communities) would create difficulties and costs.
- Customs are different in the three French Pacific communities, and they are applied differently. Traditional Melanesian practices differ from traditional Polynesian practices, and each values its political autonomy and institutions.¹⁶²

Despite the lively discussions held at the conferences, a regional court of appeals remains merely a concept. Any move toward a more comprehensive regional integration will require both new regional treaties and national constitutional and legislative changes. As observed in 2007 at the Pacific Plan Action Committee Meeting in Nuku'alofa, Tonga, “[n]ew relationships between member countries as they interact regionally will necessitate high-level legal advice as well as judicial institutions equipped to interpret and referee them. It therefore seems

¹⁶⁰Ibid.

¹⁶¹Ibid.

¹⁶²Olivier Aimot, “Comments” (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 5–9, 2007).

self-evident that development of governments' legal capacity, and the institutions which house it" is inevitable.¹⁶³

At the 2007 conference in Tonga, Gerard Winter, who had previously served on the High Court of Fiji for four years, gave a presentation about his current effort to promote a regional court for the Pacific.¹⁶⁴ He had been tasked by the Pacific Forum at its 2007 meeting in Tonga the previous month to study this possibility, along with the idea of creating a Pacific Law Commission and a Pacific Judges Register. He suggested that the first step might be to form a regional pool of jurists equipped to serve in Pacific island courts. He intended to study all possibilities for a Pacific court of appeal, including one that would cover the whole region or simply a subregion of the Pacific, and would discuss whether it would apply local law or some regionwide Pacific law and international law. Many participants agreed that the concept of a regional court of appeals is sound, but they pointed out that it ignores the proud independence of individual countries.

Even without a formal regional court, elements of a regional judiciary can be found by the substantial interchange of judges between various countries (such as Gordon Ward, described in more detail below, and others who have moved in recent years among Papua New Guinea, the Solomons, Fiji, Vanuatu, and Tonga), as well as by the practice of bringing judges from one court to another to fill in appellate panels. Alex R. Munson, who was the "Article I" U.S. district judge in Saipan from 1988 to 2010, has been, for example, appointed by the Ninth Circuit to sit in Guam, and the Guam federal judge (Frances Tydingco-Gatewood) is assigned to cases in Saipan when there are recusals. Munson has also been given a lifetime appointment by the president of Palau to serve as a judge there when needed, and he generally goes to Palau twice a year for cases. The judges of the supreme courts of Guam and of the Commonwealth of the Northern Mariana Islands similarly sit on each other's panels periodically. Chief Justice Arthur Ngiraklsong of Palau occasionally sits on the Supreme Court of the Federated States of Micronesia and on the Supreme Court of the State of Yap. Judge Daniel N. Cadra is both the chief justice of the Supreme Court of the Marshall Islands and a land court judge in Palau.

¹⁶³Pacific Islands Forum Secretariat, Pacific Plan Action Committee Meeting (Nuku'alofa, Tonga, September 24, 2007), http://www.paclii.org/PIDP/resources/PJC/Should_there_be_one_Overall_Final_Court_of_Appeal_in_the_Pacific.pdf.

¹⁶⁴Gerard Winter, "One South Pacific. One Regional Court" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 5–7, 2007).



Group photo from Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, 2007

Expatriate or Local Judges?

Some island communities, such as Samoa, American Samoa, Papua New Guinea, Vanuatu, the Federated States of Micronesia, Palau, Guam, and the Northern Marianas, have tried to staff their judiciaries with local judges, while others, including Fiji, Tonga, the Solomon Islands, the Cook Islands, Kiribati, Nauru, Niue, the Marshall Islands, French Polynesia, and New Caledonia have tended to use expatriate judges. Each system has advantages and perhaps also disadvantages.

At the First Conference in 1972, Justice C.C. Marsack of the Fiji Court of Appeals explained that in a trial presided over by a judge from another culture, the judge may not understand how a "reasonable man" in the local culture might react to a provocation:

Often a highly trained judge hasn't been in a territory long enough to make a reasonable assessment of what constitutes a reasonable man. . . . [I]n many cases substantial justice cannot be done . . . unless proper allowance is made for local conditions and customs in the islands and, most importantly, for the essential differences in human character and general outlook between the average islander and the ordinary reasonable man of British jurisprudence. . . . Perhaps the solution lies in the setting up of a judicial system such as that in force in Western Samoa, where local assessors form part of the court in serious crimes, and can explain fully to the trial judge the reasons actuating them in arriving at their verdict; and where, in all other trials, the Judge may have associated with him Samoan Judges who can give him valuable assistance in the matter of the character and outlook of the Samoans, and of the age-old customs by which their lives are largely regulated.¹⁶⁵

In the Second Conference in 1975, Harold W. Burnett, chief justice of the Trust Territory of the Pacific, acknowledged that even though he had lived in Guam for an extended period prior to his appointment to the Trust Territory High Court and had served on that court for seven-and-one-half years, he was still searching for an understanding of Micronesia and its people and was becoming less and less convinced that he was ever going to achieve it.¹⁶⁶

¹⁶⁵C.C. Marsack, "Cultural and Ethnic Disparities and Their Effect on the Judicial Process" (First South Pacific Judicial Conference, Samoa, Jan. 10-13, 1972).

¹⁶⁶Harold W. Burnett, "Comment" (Second South Pacific Judicial Conference, Honolulu, Hawai'i, 1975).

This issue was much discussed in the early years of the Federated States of Micronesia (FSM). Edward C. King, an American who had worked for Micronesian Legal Services for a number of years, was appointed to be chief justice of the FSM Supreme Court in 1980, and he worked hard to develop an independent judiciary for the new country and to address the complicated legal issues that came before the court.¹⁶⁷ During the summer of 1986, King announced that he wished to retire from the court as of early 1988 so that a Micronesian could become chief justice, and in his announcement he suggested that the forthcoming period of transition would be an appropriate time to develop strategies to deal with a series of problems that had surfaced during his tenure. FSM President Tosiwo Nakayama then convened a Judicial Systems Conference, held on Joy Island in Pohnpei State in September 1986, to discuss the future of the FSM judiciary. This meeting brought together the governors, legislative leaders, and judges of the country for an in-depth discussion.

The participants at this Joy Island meeting affirmed the important role an independent judiciary can play in providing the stability and predictability needed for economic development, but they were not able to agree on the level of autonomy the judicial branch should have regarding administering its own budget. They discussed the role of customary law in FSM jurisprudence and the division of responsibilities between the courts of the four states and the courts of the national government. The second day of the conference was devoted primarily to the transition to a new Micronesian chief justice through the appointment of new Micronesian associate justices, and discussion focused on the preparation needed for this transition and whether the new chief justice should be someone with formal law school training. Most of the participants agreed that formal judicial training would not be necessary if a person had adequate experience practicing law, and some thought a justice could be selected from a "statesmen's class" consisting of persons who had been active in building the nation. All agreed that a chief justice should have the qualities of high moral integrity, impartiality, common sense, proper judicial temperament, and patience, and should be able to unite the judiciary and the nation. Many participants were reluctant to rush into a new appointment and wondered if Chief Justice King could delay his resignation.¹⁶⁸

¹⁶⁷Bruce M. Turcott, "The Beginnings of the Federated States of Micronesia Supreme Court," *University of Hawai'i Law Review* 5 (1983): 361-90.

¹⁶⁸Jon Van Dyke and Peter Haynes, "Report on the Judicial Systems Conference for the Federated States of Micronesia" (1986).

Building on these 1986 discussions, Andon Amaraich from Chuuk was appointed to be associate justice in 1990 and became chief justice in 1993, following the resignation of Chief Justice King. Chief Justice Amaraich had never attended law school, but he had served as assistant clerk to the Truk (Chuuk) District Court in 1955–56, and thereafter as chief public defender in Chuuk for ten years.¹⁶⁹ He also played many roles in the development of the FSM and was viewed as one of its founding fathers. Chief Justice Amaraich passed away in January 2010, and Associate Justice Martin G. Yinug (from Yap) was nominated in the spring of 2010 to replace him as chief justice of the FSM Supreme Court, and Beauleen Carl-Worswick was nominated at that time to be the new associate justice.

In small island communities, it is unrealistic to expect a judge to stay apart from the community, and it is not desirable that the judge try to do so, but sometimes local pressures can be significant. Western Samoan Chief Justice Barrie Spring explained at the First Conference in 1972 that Samoan judicial officers were often subjected to great *aiga*, or family pressure, and sometimes asked to be excused from sitting on a particular case because of pressure or threats.¹⁷⁰ President Olivier Aimot of French Polynesia explained at the 2007 conference in Tonga that “if judges are natives to the island where they fulfill their duties, the island nature of such an environment makes the isolation of the judge from his social context a totally illusive issue; if they come from another country they should . . . immerse themselves in the local context in order to better understand all the specificities and . . . the behavior and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.”¹⁷¹

The debate between employing local and expatriate judges does not lead to a clear answer in favor of one approach over the other, and some jurisdictions use both types of judges. Some of the very distinguished expatriate judges who have been serving in the Pacific islands include Anthony Ford, who was chief justice of Tonga; David Williams, chief justice of the Cook Islands; and Robin Millhouse, chief justice of Kiribati and

¹⁶⁹A discussion of a case handled by Andon Amaraich as a public defender in the 1950s described him as “a quiet, brainy young man from the Mortlocks.” Willard C. Muller, *Faces of the Islands* (Hillsboro, OR, 2002), 200.

¹⁷⁰Chief Justice Barrie C. Spring, “The Judicial System of Western Samoa, Including Its Relationship to the Executive and the System of Legal Education” (First South Pacific Judicial Conference, Samoa, Jan. 10–13, 1972).

¹⁷¹Olivier Aimot, “The Bangalore Principles of Judicial Conduct—Are They Applicable in the Melanesian and Polynesian Islands of the Pacific?” (Seventeenth Pacific Judicial Conference, Tonga, Nov. 7–9, 2007).

Nauru. Some countries, such as Palau and the Federated States of Micronesia, primarily use local judges but occasionally utilize expatriates as part of their judiciary. The Marshall Islands was using expatriate judges with short, two-year terms of office for a number of years, but more recently has given Carl Ingram, chief judge of the high court, a ten-year term (2003–13), and has also given a ten-year term (also 2003–13) to Daniel N. Cadra, chief justice of the supreme court, who is based in Alaska but travels to the Marshall Islands every six months to hear cases.¹⁷² Some have raised concerns about the use, in some situations, of retired expatriate judges, who are barred from sitting in their home countries because of their age but continue to sit in Pacific island communities well into their eighties.

A related issue is whether the small island communities should have separate trial and appellate courts or should utilize the same judges for both roles. In Palau and the Federated States of Micronesia, the justices of the supreme court sit as trial judges, and, if their ruling is appealed, the other justices form an appellate panel. In the Marshalls, on the other hand, different justices form the supreme court when appeals are taken. The Palau voters recently approved a constitutional amendment calling for the implementation of “the separation of the Justices of the appellate division” “when the Olbiil Era Kelalau [the Palau Legislature] appropriates funds for additional justices to serve on the appellate division.”

An examination of several of the judges who have played active roles in the Pacific illustrates the complexity of this issue. We start first with one of the most active expatriate judges, then turn to two distinguished local judges, and conclude with a French judge who has spent much of his career in the Pacific.

GORDON WARD

Frederick Gordon Ward began his career as a barrister in England, litigating cases for twelve years¹⁷³ during the 1960s and 1970s¹⁷⁴ before moving to Fiji and working first as a magistrate in 1979–80 and then as chief magistrate in 1980–86. In 1986, he left his position in Fiji and became the chief justice of the High Court of the Solomon Islands, where he remained until he joined the

¹⁷²Judge Cadra also sits on the land court in Palau.

¹⁷³Angie Toussaint, “In the NEWS: Governor Formally Appoints New Supreme Court Chief Justice,” WIV4 news broadcast, May 2, 2008, <http://wiv4.wordpress.com/2008/05/02/in-the-news-governor-formally-appoints-new-supreme-court-chief-justice/>.

¹⁷⁴“Justice Ward Sworn In,” *Fiji Times*, July 8, 2004, 2.

Tonga judiciary in 1992.¹⁷⁵ Ward was the last British judge brought to the Tonga judiciary under an agreement dating back to 1905 that allowed Britain to appoint Tongan judges.¹⁷⁶ He served as chief justice of Tonga from 1992 until 1995, when the agreement between England and Tonga expired, and then served for three years as the resident judge on the British bases in Cyprus.¹⁷⁷ In 1998, he was reappointed chief justice of Tonga, this time commissioned by the Tongan government itself.¹⁷⁸ During his tenure in Tonga, he also sat on the Court of Appeal of Fiji in the 2000 *Prasad* case,¹⁷⁹ when the court upheld Fiji's 1997 constitution in a case brought by deposed Prime Minister Mehendra Chaudhry, who had challenged the abrogation of that constitution.¹⁸⁰

Ward faced unique situations in Tonga because the Tongan government is a constitutional monarchy. Until recently, the Tongan king wielded direct authority over the country, but Ward supported the efforts of pro-democracy reformers and tried to carve out a measure of judicial independence. "While the reformers' true target has always been the monarchy, their efforts have proven to be most influential on strengthening the role of the Tongan judiciary to act as a counter-balance to the King's power."¹⁸¹ In 1996, for example, after the king had ordered a newspaper publisher and a pro-democracy politician to be imprisoned for contempt of Parliament, Ward ruled that the two prisoners must be released on constitutional grounds. His ruling was followed, and the men were released.¹⁸²

Later, in 2003, the king issued orders banning a pro-democracy newspaper, the *Taimi 'o Tonga*. The newspaper sued in court and Chief Justice Ward held, in *Lali Media v. Lavaka Ata*, that the ban was unconstitutional. In his opinion, Ward stated that when the constitution was enacted in 1875, King Tupuo I stat-

¹⁷⁵*Ibid.*

¹⁷⁶"Tonga's Chief Justice Leaving Post Early," *BBC Summary of World Broadcasts*, April 21, 2004.

¹⁷⁷"Justice Ward Sworn In," *Fiji Times*, 2.

¹⁷⁸*Ibid.*

¹⁷⁹"Fiji: Legal Teams Arrive for Start of Constitution Appeal," *BBC Worldwide Monitoring*, Feb. 18, 2001.

¹⁸⁰International Bar Association, *Dire Straits, A Report on the Rule of Law in Fiji* (2009), http://www.fijilive.com/archive/showpdf.php?pdf=2009/03/322_03_2009_March_Dire_Straits-A_report_on_the_rule_of_law_in_Fiji.pdf, 16.

¹⁸¹John Maloney and Jason Reed Struble, "A New Day in Tonga: The Judiciary, The Reformers and the Future," *Journal of South Pacific Law* 11:2 (2007): 151, 159-60 (describing the court's reasoning in *Taione v. Kingdom of Tonga*).

¹⁸²Matthew Dearnaley, "King Reasserts Newspaper Ban," *New Zealand Herald*, March 14, 2003.

ed, "[I]t is my wish to grant a Constitution and to carry on my duties in accordance with it and those that come after me shall do the same and the Constitution shall be as a firm rock in Tonga forever."¹⁸³ The king's actions in banning the newspaper were ruled to be unconstitutional because the proper processes to make such a decree had not been followed, and the justifications for the decree were not sufficient under the law.¹⁸⁴

In this situation, however, the king of Tonga did not respect Ward's decision. Instead, King Tupuo IV amended the constitution to legitimize actions taken by the king to protect national security, public interest, morality, or cultural traditions of the kingdom, and further stated that "it shall be lawful to enact laws to regulate the operation of any media."¹⁸⁵ The newspapers challenged the king's authority to amend the constitution in such a manner. The supreme court ruled, in *Taione v. Kingdom of Tonga*, that the amendments violated the Entrenchment Clause, which held that any amendments passed by the king or the Legislative Assembly must not violate the "laws of liberty." The court further held that the amendments did in fact violate the laws of liberty and that they were unconstitutional. In April 2004, before Ward had issued his decision, he offered his resignation and gave three months' notice (announcing also that he had agreed to join the Court of Appeal of Fiji), but the three months provided the time necessary to hear *Taione* and issue the opinion. Although Ward worried that he had failed to establish judicial authority and protect the concept of free speech,¹⁸⁶ in fact the king and the country of Tonga respected his ruling in *Taione*, the amendments were struck down, and the *Taimi 'o Tonga* was reinstated. Thus Ward succeeded in setting a firm and lasting precedent for the protection of freedom of speech in Tonga.¹⁸⁷

After Ward's resignation in Tonga took effect, he was sworn in as president of the Court of Appeal of Fiji on July 7, 2004,¹⁸⁸ where he faced even more significant challenges to judicial autonomy. During one high-profile appeal, the police inexplicably barred media personnel from entering Justice Ward's courtroom and covering the case. Ward made clear that he had not ordered

¹⁸³Sione Latukefu, "The History of the Tongan Constitution," http://www.planet-tonga.com/HRDMT/Articles/Convention_92/Sione_Latukefu.shtml.

¹⁸⁴Maloney and Struble, "A New Day in Tonga," 159–60.

¹⁸⁵*Ibid.*

¹⁸⁶"Tonga Chief Justice Quits," *Radio New Zealand Int.*, April 22, 2004, <http://www.rnzi.com/pages/news.php?op=read&id=9596>.

¹⁸⁷Maloney and Struble, "A New Day in Tonga," 163.

¹⁸⁸"Justice Ward Sworn In," *Fiji Times*, 2.

the interference and condemned the actions of the police, and promised that he would make certain that seats were reserved for media personnel in the future.¹⁸⁹

Ward served in Fiji during a time of particular political turmoil that culminated in the 2006 coup that installed Commodore Bainimarama and his military government. In June 2007, the interim attorney general in Fiji called on Ward to resign for calling the events of 2006 a coup.¹⁹⁰ Although some people supported Ward,¹⁹¹ in July 2007 he refused to renew his contract, because he felt to do so would endorse the 2006 coup and subsequent events. Soon after, as mentioned earlier, Ward's home in Fiji burned down under unexplained circumstances. Initial reports were that the blaze was a result of arson,¹⁹² but after only minimal investigation the case was dropped, and no information was ever released.¹⁹³

Ward then moved to the Turks and Caicos Islands, a British territory in the Caribbean, where he is now the chief justice and where he has continued to face controversial questions.¹⁹⁴ He was also appointed chair of Tonga's Constitutional and

¹⁸⁹Imran Ali, "Police Stop Media from Appeal Case," *Fiji Times*, Nov. 4, 2004, 4.

¹⁹⁰"Interim AG Calls on Judge to Quit," *PacNews*, June 11, 2007.

¹⁹¹"You Have Gone Too Far, Qarase Tells A-G," *Fiji Times* (Australia), June 12, 2007, 1.

¹⁹²"Blaze Guts Judge's Home," *Fiji Times*, Aug. 27, 2007, 5.

¹⁹³International Bar Association, *Dire Straits*, 44.

¹⁹⁴On August 15, 2009, Great Britain suspended the government of the Turks and Caicos Islands as well as the right to a jury trial and asserted direct authority over the island nation after allegations of widespread corruption and mismanagement. ("Britain Seizes Control of Scandal-hit Dependency; Allegations of 'Political Amorality' Against Former Turks and Caicos Leader," *The Independent* [London], Aug. 15, 2009; "Britain Imposes Direct Rule of Turks and Caicos Isles," *CNN International*, Aug. 15, 2009) An investigation led by former British judge Sir Robert Auld into Michael "Iron Mike" Misick, the former premier of the Turks and Caicos Islands, found widespread corruption in the form of indecent relations between the island nation's politicians and foreign land developers. ("Islanders Split as Whitehall Takes Over Turks and Caicos," *The Observer* [England], Aug. 16, 2009) The investigation also found that the nation's tourism budget was being used largely to subsidize Misick's personal lifestyle. ("Britain Seizes Control of Scandal-hit Dependency") The queen of England retains governors in all of its Caribbean dependencies, and has the constitutional authority to reassert direct rule in certain situations. [Peter Clegg, "Governing the UK Caribbean Overseas Territories: a Two-Way Perspective" [2009], <http://www.psa.ac.uk/2009/pps/Clegg.pdf>] Gordon Wetherell, current governor of the Turks and Caicos Islands, stated that he expects elections for a new democratic government to be held in April 2011. ("Elections Scheduled for April 2011 Says Overseas Territories Director," *Turks and Caicos News*, Feb. 8, 2010) Judge Ward has been in the middle of a number of difficult cases during this period of turmoil.

Electoral Commission,¹⁹⁵ which issued a long report on November 5, 2009, recommending changes that would give the voters control of the Tongan parliament.¹⁹⁶

ARTHUR NGIRAKLSONG

A contrast to Judge Ward, who has moved from court to court throughout his career, is Chief Justice Arthur Ngiraklsong of Palau, who joined the Palau judiciary in 1986 and has skillfully built the Palau judiciary into an effective and independent branch of his country's government.¹⁹⁷ Ngiraklsong was born and raised in Palau but spent a number of years away from his home country being educated in the United States and gaining employment experience. He earned a B.A. in political science from the University of Hawai'i at Manoa and a master's degree from the University of Missouri before earning his J.D. from the Rutgers-Camden School of Law in 1974. Later, in 1980–81, he completed a one-year special program as a visiting scholar at Harvard Law School, focusing on the adoption of Western legal systems by non-Western societies.¹⁹⁸

Ngiraklsong began his legal career in 1975 as a staff attorney for the Micronesian Constitutional Convention in Saipan, where he helped draft the new constitution for the Federated States of Micronesia. (Palau subsequently opted out of the FSM to become an independent country.) From 1976 to 1979, he worked as a staff attorney for the Congress of Micronesia, followed by a stint as legislative counsel to the Federated States of Micronesia.¹⁹⁹ He then worked as an assistant attorney general in Guam for five years, specializing in civil litigation. In 1986, he was appointed by President Lazarus Salii to be an associate justice of the Palau Supreme Court,²⁰⁰ and then in 1992 he was elevated to the position of chief justice by President Ngiratkel Etpison, after Chief Justice Mamoru Nakamura passed away.²⁰¹

¹⁹⁵"Tonga Appoints Members of Political Reform Commission," *PacNews*, Nov. 27, 2008.

¹⁹⁶Tongan Constitutional and Electoral Commission, *Final Report*, Nov. 5, 2009. The commission recommended that the Tongan Legislative Assembly (Fale Alea) change from having only nine of its thirty members elected by the public to a system whereby seventeen out of its twenty-six members would be elected by the public (with the other nine elected by the nobles).

¹⁹⁷See Palau Supreme Court, *The Quest for Harmony: A Pictorial History of Law and Justice in the Republic of Palau* (Palau, 1995), 48.

¹⁹⁸*Ibid.*

¹⁹⁹*Ibid.*

²⁰⁰*Ibid.*

²⁰¹*Ibid.*

Chief Justice Ngiraklsong has always believed that a primary function of the courts is to provide for "a fair, just, and efficient way for citizens to resolve the conflicts that are an inevitable part of life."²⁰² In order to carry out that mission effectively, he has maintained a firm belief in the importance of judicial integrity and consistency, explaining that "[j]udges must be respected for their integrity, intelligence, and dedication. If they are not, the court is not effective and people lose faith in their government because the concept of justice becomes hollow."²⁰³ With these goals in mind, Ngiraklsong has worked hard to construct and preserve judicial integrity and independence during the early stages of Palauan independence and development. For example, in 2008 Ngiraklsong squared off against four members of the House of Delegates who tried to run for a fourth term despite the established law that limits members of the national congress to three terms. Ngiraklsong upheld the law and "chastised the lawmakers for testing a law that he said was clear in its intent and purpose."²⁰⁴ He held that "[i]t is well established that where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise."²⁰⁵

One of the most difficult cases Ngiraklsong has had to deal with involved an assault and battery with a baseball bat committed by one of Palau's two high chiefs, Ibedul Yutaka Gibbons, against a U.S. attorney who had wanted to observe a housing meeting chaired by the ibedul.²⁰⁶ Ibedul Gibbons said the meeting was closed; when the attorney refused to leave, Gibbons retrieved the bat from his car and assaulted the attorney, breaking his arm and causing other physical harm. Despite the serious injuries, Palau public opinion tended to support the ibedul, because Palau chiefs have historically enforced their will through physical means. Nonetheless, Ngiraklsong found him guilty of assault and sentenced him to three years, with one year in prison. The verdict led to widespread public and political condemnation, and only one prominent official, Senator Joshua Koshiba, supported Chief Justice Ngiraklsong, stating that "the rule of law should be applied and the high chief should be jailed." After more than four thousand Palauans signed a petition supporting Ibedul Gibbons, President Tommy E. Remengesau officially pardoned Gibbons and suspended his sentence. Nonetheless,

²⁰²*The Wisdom of the Past, a Vision for the Future*, dedication page.

²⁰³*Ibid.*

²⁰⁴"Palau Supreme Court Upholds Term Limit Law," *PacNews*, Oct. 8, 2008.

²⁰⁵*Ibid.*

²⁰⁶"Micronesia in Review: Issues and Events," *The Contemporary Pacific*, March 22, 2005.

Ngiraklsong, for his part, applied the law equally to both the common man and the prominent public official, and the Palau courts also ruled in the related civil case that Gibbons had to pay a substantial amount to the attorney.

Chief Justice Ngiraklsong has, through his decisions, helped develop and modernize the country of Palau, while preserving cultural and societal traditions. For example, Palauan custom provides that land is held in the names of clans, but Ngiraklsong upheld the modern view that individually owned land passes to the owner's heirs on his death rather than back to his clan.²⁰⁷ In doing so, Ngiraklsong also reserved a place in the law for tradition by recognizing that, while individuals may pass land to heirs, an *eldech duch*, or gathering where a clan decides the disposition of a clan member's property,²⁰⁸ can by law decide whom those heirs will be.²⁰⁹ This ruling helped preserve Palauan culture while making the country more accessible to global integration and foreign investment.

Because of Chief Justice Ngiraklsong's reputation for integrity and leadership on the bench, he is sometimes asked to lend his expertise to the judiciaries of other countries. He was, for example, asked to preside over the High Court of the Republic of the Marshall Islands in a high-profile case in which former Judge Charles Henry was accused by the republic's government of a number of judicial misconduct offenses, including embezzlement, libel, and abuse of government funds.²¹⁰ He has also periodically acted as a temporary justice for the Supreme Court of the Federated States of Micronesia and the courts of the state of Yap.²¹¹

In building the Palau judiciary, Ngiraklsong has sought to identify Palauans with the qualifications to serve as judges, whenever possible, but has also used judges and lawyers from the United States, when needed. His associate justices now consist of four Palauans—Kathleen Salii, Lourdes Materne, Honora Dudimch, and Rosemary Skebong—and one American, Alexandra F. Foster, who joined the court in 2008 to replace As-

²⁰⁷*Remengesau v. Sato* [1994], PWSC 1; SC Civil Appeal No 5-93 (1994).

²⁰⁸"Law and Investment in Palau: A Brief Overview for Prospective Foreign Investors," *Indiana International & Comparative Law Review* 17 (2007): 49.

²⁰⁹See *Remengesau v. Sato*, <http://www.pacii.org/pw/cases/PWSC/1994/1.html>.

²¹⁰"Former Chief Justice Faces New Charges," *PacNews*, Aug. 5, 2003.

²¹¹See *United Church of Christ v. Hamo* [1989], FMSC 13; 4 FSM Intrm. 095 [App. 1989]; *Dabchur v. Yap* [1987], FMYSC 1; 3 FSM Intrm. 203 [Yap S Ct. App. 1987]; *Rumar v. Federated States of Micronesia*, [1988] FMSC 13; 3 FSM Intrm. 308 [Pon. 1988]; *Jano v. King* [1992], FMSC 11; 5 FSM Intrm. 326 [App. 1992], <http://www.pacii.org/cgi-bin/sinosrch.cgi?query=Ngiraklsong&results=50&submit=Search&rank=on&callback=on&meta=%2Fpacii&method=all>.

sociate Justice Larry Miller. Except for Chief Justice Ngiraklsong, all the other Palau justices are currently female.²¹²

In November 2009, Ngiraklsong signed a cooperation agreement with the supreme courts of Guam, the Philippines, and the Northern Mariana Islands aimed at strengthening mutual cooperation, support, and knowledge between these island communities.²¹³ The agreement creates joint committees composed of members of each country's courts to implement cooperative endeavors such as judicial training.²¹⁴

PATU TIAVAASUE FALEFATU SAPOLU

Patu Tiavaasue Falefatu Sapolu was appointed chief justice to the Supreme Court of Western Samoa (now Samoa) in July 1992.²¹⁵ Before this appointment, he had served as acting chief justice once (in 1990) and as attorney general twice (1983–85 and 1987–89), and had maintained an active private practice.²¹⁶

Chief Justice Sapolu has been an influential voice in Samoa on a number of controversial topics, exercising judicial restraint but nonetheless making difficult decisions, when necessary. On the topic of abortion, Sapolu has recognized—in a case in which he felt obliged to sentence a nurse to thirty months' imprisonment for providing an abortion for another woman—that the current laws of Samoa forbidding abortions in all circumstances except where the mother's life is in grave danger result in underground, unregulated, and often unsafe abortions.²¹⁷ Sapolu said that he personally believed the law should be relaxed, and that the case showed a clear need for legally sanctioned abortion services based on the number of women who had contacted the defendant with requests for abortions, but he nonetheless followed the governing law and adminis-

²¹²The Palau Supreme Court has also used part-time associate justices from other jurisdictions, who have included Alex R. Munson, U.S. district judge for the Northern Marianas (now retired from that court); Janet Healy Weeks, formerly on the Guam Supreme Court; and Edward C. King, former chief justice of the Federated States of Micronesia.

²¹³"SC Chief Signs Cooperation Pact with Guam, Palau and Northern Mariana Islands," *Philippines News Agency*, Nov. 5, 2009.

²¹⁴*Ibid.*

²¹⁵*The Contemporary Pacific* (Spring 1994), <http://scholarspace.manoa.hawaii.edu/bitstream/10125/13372/2/v6n1-198-200-politicalrev.pdf.txt>.

²¹⁶*ANZ Banking Group Ltd v. Ale* [1991], WSSC 3; [1980–1993] WSLR 468 (1991), <http://www.pacii.org/cgi-bin/disp.pl/ws/cases/WSSC/1991/3.html?query=Ryan>.

²¹⁷"Samoa Chief Justice Backs Abortion Law Relaxation," *PacNews*, Aug. 18, 2004.

tered the required sentence, demonstrating judicial restraint and adherence to the law.²¹⁸

With regard to religion, Chief Justice Sapolu has presided at a time when his country is divided between traditional religious practices and the freedom to choose one's own religion. Proponents of traditional Samoan religious practices have often tried to force members of their community to adhere to traditional beliefs, but Sapolu has consistently protected freedom of religion and stressed tolerance. In an article addressing the issue, Sapolu stated that the freedom of religion "includes the freedom to change one's religion and the freedom not to have any religion at all." The chief justice further stated that limits to the freedom of religion come into play only when "a religious practice or observance involves a crime such as murder, rape, theft, and so on." He concluded by stating that "[f]reedom of religion requires tolerance, understanding and respect for the religious beliefs of others. Not all people will ever share or subscribe to the same beliefs, including religious beliefs. Such is life and the world we live in."²¹⁹

Chief Justice Sapolu has frequently found himself at odds with politicians and the executive branch and has consistently upheld the rule of law in the face of pressures to do otherwise. In September 2006, he convicted Su'a Rimoni Ah Chong of bribery after Ah Chong gave a new television set to one of the electors two days before the election was to be held.²²⁰ Sapolu noted in a later case that electoral corruption is common and perhaps even accepted in Samoa and "does not seem to attract any social stigma against the guilty candidates."²²¹ With regard to electoral corruption, he explained "that my experience over the years with election petitions which involve allegations of electoral corrupt practice is that it is not uncommon that both the successful candidate at the general election and the unsuccessful candidate who petitions are found guilty of the same offence."²²² He has suggested that electoral reform may be

²¹⁸Ibid.

²¹⁹Patu Tiavaasue Falefatu Sapolu, "Intolerance Draws Nearer," *Samoa Observer*, March 4, 2010, http://samoaoobserver.ws/index.php?option=com_content&view=article&id=20786:intolerance-draws-nearer&catid=51:editorial&Itemid=103.

²²⁰"Samoan Party Leader Guilty of Election Bribe," *BBC Worldwide Monitoring*, Sept. 27, 2006.

²²¹*Samoa Party v. Attorney General* [2009], WSSC 23 [2009], <http://www.paclii.org/cgi-bin/disp.pl/ws/cases/WSSC/2009/23.html?query=Chief%20Justice%20Sapolu>.

²²²Ibid.

necessary to remedy the problem, because the law did not seem to be functioning as an effective deterrent.²²³

Among the challenges Sapolu regularly faces is the task of reconciling Western law with traditional Samoan practices. He has, in his decisions, tried to preserve Samoan culture while guiding the nation through a period of modernization. In a speech titled "The Samoa Experience" presented at the 2007 conference in Tonga,²²⁴ Sapolu explained that he tried to find the right balance by focusing on the similarities between the two sets of laws.²²⁵ He reasoned that "if there is any area where custom in the context of Pacific Island States jurisdictions and introduced law may be able to co-exist and interact with one another, it is in the principles of fairness and reasonableness associated with judicial review as well as the principles and notions of good conscience to be found in equity."²²⁶

In trying to reconcile the two sets of laws, Sapolu has carved out places within Western law where customary law can still play a useful role. For example, in 2007, a man from the Vaisala village went to the Falealupo village and shot a sixty-three-year-old man in the back of the head.²²⁷ The Vaisala villager was convicted of attempted murder, but in the sentencing Sapolu took into account the fact that the village of the accused had performed a traditional *ifoga* (apology) by banishing the man from their village and presenting the victim's village with gifts, money, and their sincere remorseful apology, which was accepted by the Falealupo village.²²⁸ The maximum penalty for attempted murder in Samoa is life imprisonment, but traditional Samoan culture would have considered peace and harmony restored between the parties after the *ifoga* was offered and accepted.²²⁹ Chief Justice Sapolu struck a balance between these competing doctrines by reducing the penalty to four-and-one-half years, noting that although the *ifoga* was accepted, "the seriousness of the offence commands a custodial sentence."²³⁰

²²³Ibid.

²²⁴The Pacific Judicial Development Program, <http://www.paclii.org/PJDP/PJC.shtml>.

²²⁵Tiavaasue Falefatu Sapolu Patu, "The Samoa Experience" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7, 2007), http://www.paclii.org/PJDP/resources/PJC/The_Samoa_Experience.pdf.

²²⁶Ibid.

²²⁷*Police v. Titi* [2007], WSSC 91 (2007), <http://www.paclii.org/cgi-bin/displ/ws/cases/WSSC/2007/91.html?query=Falealupo>.

²²⁸Ibid.

²²⁹Ibid.

²³⁰"Samoa Court Gives Jail Term to Gunman for Trying to Kill MP on Savaii," *PacNews*, Dec. 12, 2007.

Sapolu's ability to act decisively and thoughtfully may have been strengthened by an awkward situation that occurred when he first became a judge. While serving as acting chief justice in 1990, he maintained his private practice, which spurred criticism in the media because of potential conflicts of interests.²³¹ That same year, a murder case came before the court in which Sapolu's sister, a member of his law firm, represented the defendant.²³² Complicating matters even more, after Sapolu had been appointed acting chief justice, his deputy at the attorney general's office had been appointed acting attorney general and was representing the prosecution. Sapolu met with the acting attorney general and his sister to obtain their consent to hear the case; when neither objected, he presided over the case.²³³ After the *Samoa Times* criticized his decision to keep jurisdiction over the case, Sapolu then held the publication and its editor in contempt of court, stating that "the Court in this kind of contempt is not concerned with the truth or falsity of the publication [but rather] the protection of the integrity of the institution of fair trial and the confidence of the public in that institution."²³⁴ The contempt order was appealed to the Court of Appeal of Western Samoa, which reversed in an opinion that chastised the conduct of Sapolu for his handling of his employment affairs and his attempted suppression of free speech. The appellate court ruled that it was Sapolu's conduct, and not the magazine article, that compromised public confidence in Samoa's judicial branch, and that the public debate that resulted was protected by Samoa's constitution.²³⁵

This early stumble occurred at the beginning of Chief Justice Sapolu's long and distinguished career, and he clearly learned from it and moved on. In October 2009, he recused himself from a drug and weapons-possession case, after the defendant requested the recusal based on the fact that Sapolu was chair of the parole board that had released the defendant from prison several years earlier.²³⁶ Recently, Sapolu chaired a committee consisting of lawyers and judges to draft legislation to implement alternative dispute resolution processes that would help

²³¹ *Petaia v. Supreme Court of Western Samoa* [1990], <http://www.pacii.org/cgi-bin/disp.pl/ws/cases/WSCA/1990/1.html?query=Sapolu>.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ "Samoa Chief Justice Steps Aside over Former Parole Board Role," *New Zealand International*, Oct. 30, 2009; "CJ Steps Down in Filipaina Hearing," *Samoa Observer*, Oct. 28, 2009.

the courts cope with their high caseload and provide greater access to justice for the Samoan people.²³⁷ Since the enactment of the Alternative Dispute Resolution Act of 2007 in November of that year, Sapolu has worked to implement and refine the act.²³⁸ He is also working to build relationships abroad. In September 2009, he met in Beijing with Wang Shengjun, chief justice of the Supreme People's Court of China, to discuss their respective judicial systems and to foster further communication and cooperation.²³⁹

In 2010, Samoa opened a completely new court complex consisting of two supreme courts, two district courts, a land and titles court, and new administrative facilities²⁴⁰ designed by Chinese architects and financed with Chinese money. The opening in January 2010 was attended by a delegation from China led by Chen Changzhi, deputy chairman of the National People's Congress, who said, "Samoa is very special to China, and China is ready to assist Samoa in whatever way [we] can."²⁴¹

THE FRENCH APPROACH AND OLIVIER AIMOT

France views the Pacific island communities that fly the French flag (French Polynesia, New Caledonia, and Wallis and Futuna) as integral parts of France, where French law applies and French judges preside.²⁴² Certain talented young French law graduates are trained for the judiciary and then spend their careers rotating around French provinces. The movement of the judges is designed to reduce the corruption that might result from a close link to the community in which they sit. The French Pacific islands are part of this rotation, and so the courts of these islands are staffed by individuals trained in the French judicial system who come for a period of years and then move on to another French community.

Olivier Aimot came from this training and tradition, but he has spent much of his judicial career in the Pacific and thus

²³⁷Pacific Islands Law Officers' Network, *Country Report*, Dec. 10, 2007, [http://www.pilonsec.org/www/pilon/rwpattach.nsf/VAP/%28756EDFD270AD704EF00C15CF396D6111%29~Samoa+Country+report+-+26th+annual+meeting.pdf/\\$file/Samoa+Country+report+-+26th+annual+meeting.pdf](http://www.pilonsec.org/www/pilon/rwpattach.nsf/VAP/%28756EDFD270AD704EF00C15CF396D6111%29~Samoa+Country+report+-+26th+annual+meeting.pdf/$file/Samoa+Country+report+-+26th+annual+meeting.pdf).

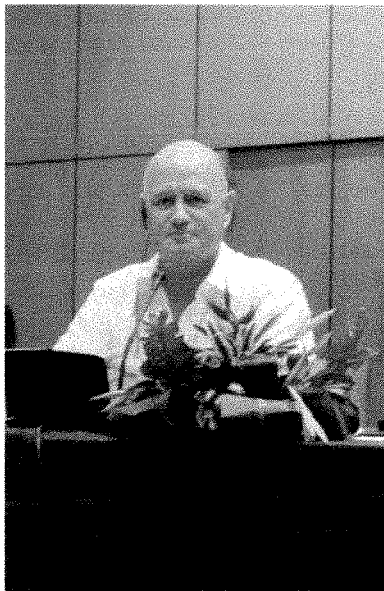
²³⁸*Ibid.*

²³⁹*Chief Justices of China, Samoa Meet in Beijing*, Xinhua General News Service, Sept. 3, 2009.

²⁴⁰"New US\$15 Million Court House Opens in Samoa," *Pacific Islands Broadcasting Association*, Jan. 28, 2010.

²⁴¹*Ibid.*

²⁴²New Caledonia is a possible exception to this statement, because it is in the process of evolving into a more autonomous status.



Chief Justice Arthur Ngiraklsong, left, has built the Palau judiciary into an effective and independent branch of his country's government. (Courtesy of Jon Van Dyke) While Olivier Aimot, right, served as chief justice of the Court of Appeal of Papeete, Tahiti, he hosted the Eighteenth Pacific Judicial Conference. (Courtesy of Eighteenth Pacific Judicial Conference, Papeete, Tahiti)

has had a particularly important impact on the development of the judiciary in the French islands. After his initial law studies, he studied at the École Nationale de la Magistrature [ENM], the French national school to train judges and prosecutors, from 1969 to 1971. He served as a prosecutor for three years in France, and then in 1975, when he was thirty-one, he became a judge in Wallis and Futuna, where he remained for four years. He then served for three years in French Guyana, followed by three years in Clermont-Ferrand in the Auvergne region of central France and one year in Agen in southwestern France. Then, in 1992, he returned to the Pacific as first president (chief justice) of the Court of Appeal of Noumea in New Caledonia, where he remained until 1998. Next was another five years as a judge in Rennes, in northwestern France, and then back to the Pacific as first president (chief justice) of the Court of Appeal of Papeete, Tahiti, in French Polynesia, where he remained until 2009 (extending his stay so he could host the Eighteenth Pacific Judicial Conference there). President Aimot has had an important personal impact on the jurisprudence of

the French Pacific islands, and he has worked hard to bridge the barrier between the French-speaking and English-speaking Pacific islands.

Customary Law and Western Law

As they have emerged from colonialism to independence, each Pacific island country has addressed how to integrate its customary and traditional legal concepts into its constitutional structure based on Western ideas.²⁴³ At the Third Conference in Papua New Guinea in 1977, the chair of the Papua New Guinea Law Reform Commission, Bernard Mullu Narokobi, delivered a passionate speech on adaptation of Western law to the customs and tribal laws of his new country and the problems and frustrations the commission faced. He explained that when Papua New Guinea became independent on September 16, 1975, Western legal, political, and ceremonial institutions were adopted without consideration of Papua New Guinea's traditions and customs:

The dispute settlement mechanisms which promoted harmony, group justice, compromise, concern for the succeeding generations, compassion, mercy, forgiveness, and popular participation were replaced with narrow legalism based on professional ethics, sectarianism, the police, and the court room conflict. . . . The overall effect of Western law was to take away the pride, self-respect, dignity, self-reliance, and the sovereignty of the people, replacing these with the self-assumed authority of the gun and the foreign ruler. . . . No PNGan with a sense of pride in himself and his culture can accept the present legal situation where, in order to find his rights, he has to read the Anglo Saxon books; in order to defend his client, he has to read Western jurisprudence, Western laws and Western legal culture based on Western wisdoms and prejudices. This unjust situation must cease, and as far as I am concerned, the sooner the better.²⁴⁴

²⁴³See generally Guy Powles and Mere Pulea, eds., *Pacific Courts and Legal Systems* (Suva, Fiji, 1988); Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law*, 2^d ed. (New York, 2007); Michael A. Ntumu, ed., *South Pacific Islands Legal Systems* (Honolulu, 1993); *Pacific Courts and Justice* (Suva, Fiji, 1977); Henry P. Lundsgaarde, ed., *Land Tenure in Oceania* (Honolulu, 1974).

²⁴⁴Bernard Mullu Narokobi, "Presentation" (Third South Pacific Judicial Conference, Port Moresby, Papua New Guinea, 1977).

He observed that the Western-based law and legal institutions were over-centralized, over bureaucratized, and over-professionalized: "This is convenient for the court and the lawyers, but unsatisfactory for the people."²⁴⁵

Some elements of Western law, including its emphasis on the individual, are, he noted, directly contrary to the traditions of Papua New Guinea. His culture, he explained, values interdependence over individual independence. It places heavy emphasis on the values of mediation, consensus, and compromise, as well as popular participation in the dispute-settlement process. Community solidarity and mutual responsibility are important cornerstones of the culture: "The concept of joint responsibility among Melanesians is no more repugnant to the idea of personal responsibility than the concept of corporate liability in company law."²⁴⁶

Among the accomplishments of the newly independent Papua New Guinea, Narokobi explained, was the establishment of a Law Reform Commission, directed under the constitution to investigate underlying law "in order to more systematically formulate our own common law." The commission reintroduced native customs as a source of law, particularly in the areas of marriage, adultery, and the transmission of property of a native who dies intestate, but in other areas the application of native custom remains clouded with fear and distrust. Notions of "reasonableness" of an act were very problematic, Narokobi said, because of the difficulty in determining what standards would be used to determine what is reasonable. His frustration was clear:

Papua New Guinea is nearly two years old as a nation state. But we are born to an ancient tradition. Our ancient wisdoms may even be older than the recorded history of Egypt. It is a return to our rich, rightful, and assured past. We cannot be ourselves without our past. We cannot adapt Western laws until we first adopt our own laws.²⁴⁷

The Law Reform Commission, which he chaired, concluded that Papua New Guinea should embark on a deliberate policy of developing its own jurisprudence, based largely on its own customs and perceptions. Change, he insisted, is needed. The courts must be staffed with Papua New Guineans, and he reminded delegates that the English, the Americans, and the

²⁴⁵Ibid.

²⁴⁶Ibid.

²⁴⁷Ibid.

Australians did not have trained lawyers and judges when they started their democratic governance. Papua New Guineans too, he said, should have the freedom to err in order to grow as human beings. "My heart bleeds and longs for the day when our Papua New Guinea norms, customs, sanctions, and perceptions, and the methods we use to come down in favor of one party rather than another in a situation of human conflict, would be given its fullest significance."²⁴⁸

In some constitutions, Narokobi said, the place of custom is expressly recognized, and the two systems can coexist. Where jurisdiction is not specifically spelled out, legal questions can arise when a local court applies custom, for example, and an appeal is taken to another court that applies another system of law.²⁴⁹

At the Sixth Conference in Saipan in 1984, Anthony M. Kennedy, then a judge on the Ninth Circuit, helped to put the problems emerging nations were confronting in drafting and implementing new constitutions into a historical framework. He acknowledged that he and other U.S. federal judges have tended to evaluate other constitutions and judicial systems by comparison with the U.S. system. He admitted that although U.S. federal judges are inclined to consider the U.S. system the ideal, "[i]t is important for us to remember, of course, that our system was not handed to us on a mountaintop. Our Constitution was drafted by practical men, highly skilled in the art and science of constitution making. . . ."²⁵⁰

The judicial structures in the U.S.-affiliated Pacific territories, he said, provide a convenient perspective from which to study two of the principles that underlie most of the constitutional structures within the Anglo-American tradition. The first principle, one he termed of "vast importance" for constitutional evolution, is judicial independence. Some structural independence is built into the U.S. system under the U.S. Constitution. These structural guarantees reinforce the ideas that respect must be given to the judgments of the courts and that the courts must operate impartially. The structure of appellate courts, however, posed a problem for many of the island communities of the Pacific, because few have the caseloads or professional infrastructure to support a full-time appellate bench. "The design and maintenance of independent appellate

²⁴⁸Ibid.

²⁴⁹Ibid.

²⁵⁰Anthony M. Kennedy, "Address to the South Pacific Judicial Conference" [Sixth South Pacific Judicial Conference, Saipan, Commonwealth of the Northern Marianas, Aug. 27-29, 1984].

courts in the Pacific region is a subject open to new and innovative approaches."²⁵¹

The second principle Judge Kennedy discussed as underlying constitutional structures in the United States was the legitimacy of local law. He reminded the participants that the framers of the U.S. Constitution confronted an issue not unlike the issue of customary versus statutory law, which most of the new nations of the Pacific have grappled with. The solution in the United States was to design a structural mechanism to accommodate local law by recognizing the sovereignty of the states:

Though the balance between national and state power has never been constant and even now is subject to stress, federal courts as a routine matter decide cases by the specific application of state law principles. Respect for the legitimacy of state rules of decision is central to our constitutional tradition.²⁵²

In fact, he told the group, "our tradition has been so shaped by federal experience that the Congress of the United States and the Pacific judicial systems in the American territories recognize the importance, if not the necessity, of accommodating local law principles."²⁵³ The integrity of local law, he maintained, and how to weigh a local cultural component against an asserted constitutional right, was a question deserving of careful consideration by the delegates, most of whom had found this issue, in one form or another, before them more than occasionally.²⁵⁴

Judge Kennedy referred directly to the "vitality of local law and cultural distinctiveness" in American Samoa. By agreement, the *fa'a Samoa* (the Samoan culture and the Samoan way) was to remain intact. The *matai* title and chieftain system was preserved and recognized by the courts and other governing authorities.²⁵⁵ He expressed concern that if a U.S. federal court were to have specific territorial jurisdiction over American Samoa, then Samoan customs might be subordinated to other national policies.

Guam and the Commonwealth of the Northern Mariana Islands have U.S. district courts staffed by "Article I" judges who

²⁵¹*Ibid.*, 4.

²⁵²*Ibid.*, 5.

²⁵³*Ibid.*, 6.

²⁵⁴*Ibid.*, 5.

²⁵⁵*Ibid.*, 7.

are appointed for a ten-year term, not for life. Nonetheless, Kennedy observed, each court had a tradition of independence, authority, and competence equivalent to that of district courts in the fifty states.²⁵⁶

An approach utilized by the framers of the U.S. Constitution that would be useful for those writing constitutions for the developing nations of the Pacific, he suggested, was to remain flexible and be open to innovation:

If we are true to our heritage, then we must remember that the development of judicial and political structures is a pragmatic exercise. The American Constitutional idea, therefore, is not antithetical to innovation and experiment; it is premised on that concept. Thus it is with great interest that we observe, and where possible contribute, to the development of the political and judicial institutions of the Pacific.²⁵⁷

One area of law presenting tensions between customary and Western law is land disputes. This concern was addressed at the 1991 conference in Tahiti.²⁵⁸ Gaston Flosse, then president of French Polynesia, welcomed the delegates to this discussion, reminding them of the various national land claims in the Pacific region. Conference chair M. Thierry Cathala, first president (chief justice) of the Court of Appeals of French Polynesia, described the role and function of the Cour de Cassation in the French judicial system. The creation of titles of landownership in French Polynesia was then explained by R. Calinaud, judge of the Court of Appeal of Papeete. Disputes over land had become more numerous and complex over the years, he said, but the main problem was the uncertainty about land rights because of European settlement in the area. Prior to the arrival of the Europeans, land ownership in French Polynesia was based on either the clan or the *marai*, a kind of collective family ownership. European arrivals brought demographic, economic, technical, sociopolitical, and intellectual changes, having different impacts for the kingdom of Tahiti, the Leeward Islands, the Marquesas, and the other islands that now form French Polynesia. In each island community, a transition period was marked by the abolition of customary taboos and the introduction of new prohibitions and penalties, promoted by the mis-

²⁵⁶*Ibid.*, 8.

²⁵⁷*Ibid.*, 2.

²⁵⁸Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991.

sionaries to contain foreign settlement through bans on land sales and mixed marriages and regulations of leases. Later, Judge Calinaud explained, when the territories were opened to colonization, new laws were established with the ultimate motivation "to favor European or half-caste settlement, and the establishment of plantations."²⁵⁹

In 1847, the decision was made to award title of land to those who had held it "since the end of paganism," dismissing all prior claims and quarrels of the past. This decision, said Calinaud, "was well defined, far-reaching and not open to question on account of its religious implications."²⁶⁰ A registry was subsequently set up for all privately held land, so that all Polynesians would become individual landowners with unquestionable titles. Then, in 1866, the Civil Code, which provided greater freedom for land sales, was enacted.

The Catholic Church also had a role in land issues in another part of the French Republic, Wallis and Futuna, according to Justice M. Bernard Henne, president of the Tribunal of First Instance for those islands. Land, he explained, remains vital to Wallisian status. The Polynesian tradition of hospitality required that a newcomer be given land, which happened when the first missionaries arrived. But in 1870, the bishop was able to facilitate the approval of a code governing land ownership that prohibited the sale or donation of land to any seafaring alien. This provision is still in force, so gifts and sales of land are now restricted. Currently, Justice Henne said, disputes are still settled by the chieftainship, with the king as the final authority. He can settle the matter, but then can change his mind and start all over again, so land disputes sometimes never reach a final resolution. This uncertainty creates problems for the Catholic Church, which has wanted to protect its vested interests and customary authority to maintain whatever small powers it has, and for the French authorities, who frequently cannot go forward with infrastructure development because land litigation remains unresolved.²⁶¹

French settlement in New Caledonia has created somewhat different land problems. Fote Trolue and Hilaire Gire, judges in Noumea, explained how the issues of land evolved through colonial and modern history, and how land disputes were

²⁵⁹R. Calinaud, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

²⁶⁰*Ibid.*

²⁶¹M. Bernard Henne, "Presentation" (Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

traditionally resolved.²⁶² Kanaks, the indigenous people of New Caledonia, were a clan society, based on groups of families. The concept of the group was overriding. Communities contained land-owning and land-using clans, and traditionally land was not for sale. Kanaks viewed themselves as belonging to a specific piece of land, not that the land belonged to them. The land was related to the clan, and the tribe was just an administrative unit. This system was challenged in 1855, when France declared sovereignty over the land, and the European encroachment upon Kanak land began. The claims to land by Europeans triggered native uprisings and, in turn, reprisals from the French government.

The colonial government set up two types of land: (1) reserve lands, which were governed by customary law, and (2) ordinary lands, governed by French law. The boundaries of the reserves were drawn by the colonial government, which ignored the Kanaks' attitudes toward the land and the traditional boundaries of the former Kanak kingdoms. Under this regime, until the Kanaks became French citizens in 1947 they could leave reserve lands only by getting a special permit. Because of the way the reserve lands were defined and because of the rapid changes in Kanak society, decisions based on interpretations of traditions and customs have often not been accepted or respected. Land disputes have become ugly, the judges said, and the traditional dialogue over land disputes has given way to violence as if customary law authorities no longer existed.²⁶³

M.G. Lucazeau, procureur général of the Cour d'Appel of New Caledonia, explained that in 1982, lawmakers set up a "customary law court." This tribunal was not really a customary institution but was instead a hybrid state court, presided over by a professional magistrate, assisted by two representatives of the customary areas involved in the dispute. It tried to bridge the gap between the machinery of custom and the machinery of adjudication embodied by an ultimate authority. But, he added, it had not operated with much success, because of the difficulty in reconciling custom with the court procedure open to litigants.²⁶⁴

At the 2007 conference in Tonga, President Olivier Aimot explained that the customs of Pacific island communities may sometimes "clash" with "the very individualist nature of the

²⁶²Fote Trolue and Hilaire Gire, "Presentation" (Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

²⁶³*Ibid.*

²⁶⁴M.G. Lucazeau, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

Universal Declaration of Human Rights."²⁶⁵ The Bangalore Code of Judicial Conduct, which emerged in the early years of the twenty-first century, may, therefore, "be too detailed, too restrictive and at times hard to apply to small ethnic entities that are still so profoundly attached to their very vivid traditions."²⁶⁶ But he also noted that traditional forms of dispute resolution were evolving with the introduction of Western ideas. In the Polynesian islands of Wallis and Futuna, where Judge Aimot served in the late 1970s, the chiefs undertook both executive and judicial functions because "all justice comes from the king who, himself, holds it from God."²⁶⁷ But with "[t]he intrusion of the western way of life . . . new attitudes . . . have worn down the chiefs' credibility and their ability to make decisions, some of which were unexpected and suspected to have originated from a generous gift from one of the litigants."²⁶⁸ Just as in France during the French Revolution, he noted, "the Wallisians and the Futunians too have lost the trust they had placed in their customary judges," leading perhaps to a desire to establish a more formal system of adjudication, to ensure "the trust of the people in their judges" which is, "beyond any other consideration, a fundamental element to the smooth running of any society and its judicial system."²⁶⁹

As a formal matter, customary law cannot be invoked to resolve disputes in French Polynesia, where French law applies just as it does in France,²⁷⁰ but in New Caledonia, custom can be invoked in disputes among the Kanaks, particularly

²⁶⁵Olivier Aimot, "The Bangalore Principles of Judicial Conduct," 7.

²⁶⁶*Ibid.*, 11.

²⁶⁷*Ibid.*, 10.

²⁶⁸*Ibid.*, 11.

²⁶⁹*Ibid.*

²⁷⁰French legal tradition has tended to reject custom as it has tried to centralize its polity. "Custom? For Montesquieu, it was the 'reasoning of fools,' and the revolutionary legislator, like our current law manuals, sought to effect it as a source of the law." Norbert Rouland, "Custom and the Law," in *Custom and the Law*, ed. Paul de Deckker and Jean-Yves Faberon (Canberra, 2001), 1.

President Aimot has explained that even though custom cannot be used as a source of law in French Polynesia, the state of mind of the Polynesians is different from that of the Europeans, so the application of the law is not the same. The feeling for the land is much stronger, for example, and that must be taken into account. Even within French Polynesia, there are differences between Tahiti and the small islands of the Tuamotu, and between the Americanized island of Bora Bora and the traditional island of Rapa (Australes).

Olivier Aimot, "Customary Legal Proceedings in Wallis and Futuna," in *Custom and the Law*, 156.

with regard to disputes brought to the custom councils involving land ownership.²⁷¹ In Wallis and Futuna, the laws adopted in 1961 state that the customs must be respected as long as they are not opposed to the general principles of French law.²⁷² Traditional dispute-resolution procedures are still utilized in Wallis and Futuna, including the exchange of gifts as part of the process:

Although theoretically not compulsory it is strongly recommended that the parties [to a dispute] prepare an umu (traditional meal, consisting of taro or yam, kape, and cooked pork), accompanied either by a kava root or a wrapped bottle. To present the gifts, they are expected to wear traditional attire. The members of the fono [a gathering held every Sunday after mass, attended by the district chief, ministers, and village chiefs] hear the parties and, if it is likely to facilitate a solution, they will go to the places concerned.²⁷³

After Vanuatu gained its independence from France and the United Kingdom in 1980, it adopted a constitution that "mandates that custom is the principal source in the development of an appropriate dispute resolution methodology for Vanuatu" and that "[c]ustomary law shall continue to have effect as part of the law of the Republic."²⁷⁴ Tonga does not recognize cus-

²⁷¹New Caledonia Organic Law of 1999, Title I.

²⁷²Wallis and Futuna Laws of 1961, art. 3; see generally Olivier Aimot, "Customary Legal Proceedings in Wallis and Futuna," in *Custom and the Law*, 156-69. Aimot wrote,

To sum up, customary authority [in Wallis and Futuna] was almost in the legal domain until 1933, then it was separated but remained largely dominant from 1933-61, when it became limited, at least in the texts if not in fact, to a section of the civil domain. Since then, the ways it is implemented have been contested increasingly often by those to whom it applies.

This long confrontation between slowly weakening customary authority and the authority of the Republic [of France], would lead us to conclude that common law is gradually replacing local law. Paradoxically, this is taking place at a time when the rights of peoples to their own cultural identity is increasingly being recognised.

Ibid., 159.

²⁷³*Ibid.*, 161.

²⁷⁴Vincent Lunabek, "Developing Culturally-Appropriate Dispute Resolution Procedures: The Vanuatu Experience" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23-27, 2003) (referring to articles 51 and 95[3] of the Vanuatu Constitution).

tomary law, as a formal matter, because it never lost its sovereignty completely and has been free to develop its own law.²⁷⁵

The history of land rights and ownership in Palau was explained at the Ninth Conference in a paper submitted by Mamoru Nakamura, chief justice of the Supreme Court of Palau. In the late nineteenth century, German colonizers introduced the concept of individual ownership of land to Palau by confiscating all unused or unclaimed land and then requiring each Palauan male to plant one hundred coconuts in an assigned area. If the Palauan complied with this requirement, he was recognized as owner of the land on which the trees were planted. The Japanese, after World War I, expanded the concepts of individual ownership and of public- or government-owned land. Within ten years, more than 80 percent of the land became recognized as government or public land. After their land registration program, the Japanese produced a land book that became a main source of information about land ownership and continues to be used by the courts in Palau.²⁷⁶

After World War II, the U.S. administration began to return confiscated land to private ownership by the individual or the clan. These efforts continued under the Palauan constitution, which says specifically that all lands previously taken by occupying powers for less than an adequate compensation shall be returned to the private owners. This provision has had limited success, however, and the process has not been completed.

One of the problems has been the breakdown of the traditional dispute-resolution system, so that people now tend to take their unresolved disputes to the courts rather than to the clan. Another problem has been lack of technology; record-keeping traditionally was done manually, rather than through a computerized system for land registration. A third problem has been the large volume of cases. Palau contains 18,000 parcels of land and some 15,000 people, with another 5,000 Palauans living outside the country. Still another problem has been that Palau had only one certified surveyor to formalize the boundaries of each parcel. Finally, the Japanese land books, or *tochidaicho*, could not be found at all for three of the sixteen Palauan states.²⁷⁷

Edward C. King, chief justice of the Federated States of Micronesia, was skeptical about the real value of the Japanese land books, which he said were used by the courts as a safety

²⁷⁵Attorney general of Tonga, "Welcoming Address" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7, 2007).

²⁷⁶Nakamura, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21-24, 1991).

²⁷⁷*Ibid.*

belt to avoid more litigation. He expressed the view that the Japanese were trying to expand their land holdings throughout the Pacific and Asia, which made transactions after 1938 somewhat suspect.²⁷⁸

Grover Rees III, associate justice of the High Court of American Samoa, said that Samoans have not wanted to register their lands. They have not trusted the process and believed they could establish their boundaries with their neighbors better, to the mutual satisfaction of all, if they kept the matter out of the courts and out of the registrar's office.²⁷⁹ Registration has been very slow, according to Michael Kruse, chief justice of the High Court of American Samoa. A statute has been on the books for many years establishing an administrative proceeding requiring parties to attempt mediation before they go to court over land issues, but most parties have looked on the mediation process as nothing more than a formality.²⁸⁰

Fariq Muhammad, chief justice of Kiribati, said Kiribati had experienced many problems over land surveys. The size of land parcels varies, boundary disputes are frequent, and views differ on how land rights should be given to the people.²⁸¹

Fiji Chief Justice Sir Timoci Tuivaga noted that Fiji was ceded by the high chiefs of Fiji to Great Britain in 1874, and the British Crown then recognized the rights of the native Fijians and implemented legislation to protect those rights. This system, he said, has worked well.²⁸²

In Papua New Guinea, 97 percent of all land is still in the hands of the indigenous people, said Sir Buri Kidu, chief justice of Papua New Guinea, but mining rights remain in dispute. The British system adopted by Papua New Guinea gave the government ownership of all mineral resources, even though the land itself belonged to the customary owners. This division was in direct conflict with customary and traditional practices.²⁸³ The central government of Papua New Guinea has been reluctant to apply a land registration system because such a system would subject landowners to taxes from both the central and provincial governments. He said the government has set up special land courts to settle certain boundary disputes between clans. The law has required mediation first, presided over by

²⁷⁸"Discussion" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21-24, 1991).

²⁷⁹*Ibid.*

²⁸⁰*Ibid.*

²⁸¹*Ibid.*

²⁸²*Ibid.*

²⁸³*Ibid.*

an appointed land magistrate and a number of chiefs or leaders from the relevant area, followed by a court proceeding.

Australia, which also bases its law on British common law, handles land issues differently, as described by John Toohey, justice of the High Court of Australia. When the British Crown acquired sovereignty over Australia, the land became the property of the Crown. It was not until the 1960s that the commonwealth government, following an amendment to the constitution, began to pass legislation in regard to aboriginal title to land. The 1966 Aboriginal Land Rights Northern Territory Act set up a system by which claims could be made by groups of aboriginal people. It defined the class of traditional owners and established that claims, under this law, could be made only to land which was "unalienated" (land in which no one has an interest other than the Crown). Although this stipulation has created conflicts, it remains possible to adopt a test of historical association with the land and thus to obtain title to it. And, he added, "the view has been taken that if the land is to be granted, it will not be granted to individuals to avoid possibility of fragmentation of interests over a long period of time. Land can be leased to members of the community, but it cannot be sold." He said the aboriginal people helped to draft the Land Rights Act, and reaction has generally been positive.²⁸⁴

The interaction between customary and Western law presents itself in numerous other ways. The Western Samoan chief justice explained at the First Conference in 1972 that Western Samoa had adapted the jury system in serious criminal trials involving a potential punishment of five years or more by using a panel of four lay assessors to incorporate traditional law into decisions of the court.²⁸⁵ Conviction requires a vote of at least three of the assessors and the trial judge, who does not deliberate with the assessors, so he will not have undue influence over their decision. At the 1975 conference in Honolulu, Harold W. Burnett of the Trust Territory of the Pacific Islands explained that he had also used assessors on occasion but had come to use them less because of the lack of agreement on

²⁸⁴John Toohey, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991). Justice Toohey's paper was delivered a year before the epoch-making decision of *Mabo and Others v. Queensland* (No. 2) [1992] HCA 23; [1992] 175 CLR 1, in which the High Court of Australia held that sovereignty did not displace the right of indigenous people to possession, occupation, use, and enjoyment of land to which they had maintained continuous traditional connection since before European occupation.

²⁸⁵Barrie C. Spring, "The Judicial System of Western Samoa, Including Its Relationship to the Executive and the System of Legal Education" (First South Pacific Judicial Conference, Samoa, Jan. 10–13, 1972).

what the relevant custom in a particular case might be.²⁸⁶ The principal value of using assessors, he said, was to help evaluate witnesses whose testimony was provided in a local language. At that same conference, Sir Harry Gibbs of the High Court of Australia observed that the assessor system was introduced by the British, because they used expatriate judges throughout their empire.²⁸⁷ Sir Sydney Frost, chief justice of Papua New Guinea, added that assessors are used there because of the great diversity of languages and customs in the country. Fiji has used professional assessors, a select group of thirty-five citizens, who sit in panels of three or five in murder trials to give advice to a single judge.²⁸⁸

Also in 1975, the U.S. Court of Appeals for the District of Columbia considered the applicability of the Sixth Amendment (entitling defendants to jury trials) to American Samoa,²⁸⁹ and instructed the U.S. District Court to determine whether the jury system was “practicable” in light of “the Samoan mores and *matai* culture with its strict societal distinctions.”²⁹⁰ William B. Bryant, chief judge of the U.S. District Court for the District of Columbia, received testimony from eight Samoans, four U.S. government officials, and noted anthropologist Margaret Mead. None of those testifying wanted the jury system to be implemented immediately,²⁹¹ but Judge Bryant nonetheless ruled that it should be introduced right away, in light of the educational advancements in American Samoa, the “adaptability and flexibility” of Samoan society, and the islanders’ ability to accommodate and assimilate U.S. legal institutions.²⁹²

²⁸⁶“Discussion” [Second South Pacific Judicial Conference, Honolulu, Hawai‘i, July 16–19, 1975].

²⁸⁷*Ibid.*

²⁸⁸Gerard Winter, “Discussion” [Seventeenth Pacific Judicial Conference, Nuku‘alofa, Tonga, Nov. 7, 2007].

²⁸⁹The U.S. Supreme Court ruled in 1902 that the Sixth Amendment right to a jury trial was not among the “fundamental” constitutional rights that extended to all territories under U.S. sovereignty. *Territory of Hawai‘i v. Mankichi*, 190 U.S. 197, 217–18 (1902) [permitting a conviction of a defendant for manslaughter by a 9–3 vote].

²⁹⁰*King v. Morton*, 520 F.2d 1140 (D.C.Cir. 1975).

²⁹¹Arnold H. Leibowitz, “American Samoa: Decline of a Culture,” *California Western International Law Journal* 10 (1980): 220, 262–63 [citing from the record].

²⁹²*King v. Andrus*, 452 F.Supp. 11 (D.D.C. 1977); Timothy S. Robinson, “Federal Judge Approves Jury Trials for Samoa,” *Washington Post*, Jan. 4, 1978, A8. See generally Stanley K. Laughlin, Jr., “Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional,” *University of Hawaii Law Review* 27 (2005): 331–75.

Juries are also now used in, for example, American Samoa, the Cook Islands, the Republic of the Marshall Islands, Guam, and the Commonwealth of the Northern Mariana Islands (if the defendant faces a potential punishment of five years' imprisonment or more or a \$2,000 fine),²⁹³ and Palau recently adopted a constitutional amendment to start utilizing juries in serious criminal cases.²⁹⁴

The Seventh Conference in Auckland in 1987 focused on crime and violence, and discussion focused on how to use traditional leaders to assist with probation and traditional penalties (such as community service) where appropriate.²⁹⁵ Grover Rees III, associate justice of the High Court of American Samoa, described the *ifoga* tradition in Samoa, whereby an offender's family group formally apologizes to the victim's side, offering something of value in hopes of concluding or reducing the hostilities.

At the Twelfth Conference in Sydney in 1997, FSM Chief Justice Andon Amaraich explained that the nature of island life involves repeated daily contacts and close relationships of the residents, which require an emphasis on conflict avoidance and the promotion of harmony.²⁹⁶ In Micronesia, "[d]ecisions on a small scale having to do with living arrangements in a village, clan, or in some societal subgroup" have traditionally been left to traditional leaders, but the more formal adversarial court system was adopted in the 1975 FSM constitution "to protect the rights of the individual against encroachment by the various levels of government in the FSM" and to "define the roles of the various branches of government," decisions that "are not well suited to the traditional mechanisms of conflict resolution."²⁹⁷ The "adversarial,

²⁹³See *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984).

²⁹⁴The provision adopted by the Palau voters after the Second Palau Constitutional Convention says,

The Olbiil Era Kelulau [the Palau Legislature] may provide for a trial by jury in criminal and civil cases, as prescribed by law; provided, however, that where a criminal offense is alleged to have been committed after December 31, 2009, and where such criminal offense is punishable by a sentence of imprisonment of twelve (12) years or more, the accused shall have the right to a trial by jury, as prescribed by law.

²⁹⁵"Discussion" (Seventh South Pacific Judicial Conference, Auckland, NZ, March 3-5, 1987).

²⁹⁶Andon L. Amaraich, "Adapting a Western System of Jurisprudence to an Emerging Island Nation: The Micronesian Experience" (Twelfth South Pacific Judicial Conference, Sydney, Australia, April 13-18, 1997), 98.

²⁹⁷*Ibid.*, 96.

rule oriented, system of jurisprudence" has also been adopted to promote economic development, "in order to give those who wish to do business in our country the predictability of outcome needed by business development activities."²⁹⁸ The adversarial system has necessarily been adapted, however, because a winner-take-all system of deciding disputes does not always work, and a system of mediation or equitable balancing (where each side in a land dispute, for instance, receives "some equitable share of the disputed property") is seen as more culturally appropriate.²⁹⁹

Numerous Pacific courts have struggled with how an apology ceremony should affect a subsequent criminal prosecution and sentencing. The FSM Supreme Court has ruled that prosecutions should not be dismissed just because an apology has taken place, but that "the appropriate way to take the traditional apology into account was at the time of sentencing."³⁰⁰ Similarly, if an assailant has received a traditional punishment, that should be considered at the time of sentencing, but only if the punishment was "carried out as required by tradition and custom" and not as "the result of mere vigilantism."³⁰¹

Custom and tradition, the court noted, are always challenging to apply because "they are not written or codified."

Customs and traditions are revealed to us through human practice and oral description and must always be elucidated through the oral testimony of witnesses. They are almost never the subject of agreement and thus the court must weigh the conflicting testimony of witnesses in order to reach a decision about their effect in any particular case. Customs and traditions also vary from state to state and even from island to island, making it extra difficult for uniform application. Our courts have found that the application of tradition and customs are inappropriate in cases having to do with transactions and behavior which are distinctively non-traditional and non-local, such as cases involving business licenses and contracts, foreign shipping agreements and international extraditions.

²⁹⁸Ibid.,105.

²⁹⁹Ibid.,99.

³⁰⁰Ibid.,101 (referring to the decisions of the FSM Supreme Court in *FSM v. Mudong* and *FSM v. Benjamin*).

³⁰¹Ibid.,103 (referring to the decision of the FSM Supreme Court in *Tammed v. FSM*).

We are not done with the tasks before us. Our job is continual, and we must always keep in mind those two goals of promotion of economic endeavors, and protection of customs and tradition, and balance our decisions so that one does not become eclipsed by the other.³⁰²

CONCLUSION

That these Pacific Judicial Conferences are continuing regularly after forty years is the strongest indication that they have proven their worth. Great progress has been made in enabling the judiciaries of the small islands of the Pacific to keep abreast of judicial developments across the region, and support has been provided to isolated judiciaries under stress. Some topics reoccur regularly, however, indicating that some important problems remain.

At the Fiji Conference in 1993, Gordon Ward, then chief justice of Tonga, raised some fundamental questions that still hang over these conferences. How big should each conference be? Should the number of judges from each jurisdiction be limited? To what extent should persons who are not judges be invited? Will comments made at the conference be totally confidential, or will they appear eventually in academic conferences or lecture notes? Should the media be allowed to report on anything more than the opening speeches and the social events? Should the conference be structured with formal presentations, or should there be more emphasis on discussions? Should the conference remain a large forum, or should there be subgroups based on the size of the country or the origin of its legal system? Are the conferences useful to the judges from the larger countries (Australia, New Zealand, and the United States) as well as to the judges from the smaller countries? Will the conferences continue indefinitely? What are the future goals of the conferences?

³⁰²*Ibid.*, 106–107. It can also be noted that Hawai'i Supreme Court Chief Justice William S. Richardson, who was an active participant in the early conferences, sought during his tenure to meld the legal concepts employed by Hawaiian communities before Western contact with the very different Western legal values that were brought to Hawai'i, in cases such as *In re Application of Ashford*, 50 Hawai'i 314, 440 P.2d 76 (1968) [beach access]; *McBryde Sugar Co. v. Robinson*, 54 Hawai'i 174, 504 P.2d 1330 (1973), affirmed on rehearing, 55 Hawai'i 260, 517 P.2d 26 (1973) [water rights]; *County of Hawaii v. Sotomura*, 55 Hawai'i 176, 517 P.2d 57 (1973) [beach access]; *State v. Zimring*, 58 Hawai'i 106, 566 P.2d 725 (1977) [public rights to land created by volcanic lava]; *Robinson v. Ariyoshi*, 65 Hawai'i 641, 568 P.2d 287 (1982) [water rights]; and *Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Hawai'i 1, 656 P.2d 745 (1982) [customary and traditional access and gathering rights].

Should there be a secretariat or headquarters? What subjects should be addressed at future conferences?³⁰³

These topics will continue to be addressed at forthcoming conferences. After the Nineteenth Pacific Judicial Conference in Guam in November 2010, the twentieth is scheduled for 2012 in the Solomon Islands. The judges from small island communities have benefited from having a chance to think deeply about the appropriate role of the judicial branch; they have learned from one another and have gained strength in their judicial roles from the friendships developed at these conferences.

³⁰³Gordon Ward, "Presentation" (Tenth South Pacific Judicial Conference, Yanuca Island, Viti Levu, Fiji, May 23-28, 1993).

BOOK REVIEWS

Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska, by Stuart Banner. Cambridge: Harvard University Press, 2007; 388 pp.; illustrations, notes, index; \$35.00 cloth.

This sweeping volume, written by Stuart Banner, the Norman Abrams Professor of Law at UCLA, has the broad ambition of narrating the colonial land experience in the "Anglophone Pacific world" (p. 1). Banner carefully examines the differences in indigenous peoples' land rights among ten different colonial jurisdictions during the nineteenth century: Australia, New Zealand, Hawai'i, California, British Columbia, Oregon, Washington, Fiji, Tonga, and Alaska. This "comparative history of colonization" (p. 323), with an emphasis on "land acquisition policy" (p. 4), is virtually unprecedented in the literature.

The central thesis of Banner's volume is that the process of colonial settlers' acquiring land in the nineteenth-century Pacific Basin was largely dictated from the periphery—based on the peculiar characteristics and circumstances of each colony—rather than by any central command from London or Washington (reflecting the views of the two great Pacific imperial powers, Great Britain and the United States). While Banner briefly reflects (pp. 10–12) on the "Atlantic antecedents" of British land acquisition in North America, especially the Royal Proclamation of 1763 and the U.S. Supreme Court's 1823 decision in *Johnson v. M'Intosh*, the real debate in colonial land policy in the nineteenth century was whether to have the colonies acquire land from indigenous peoples by treaty, or whether simply to declare all land in a colony to be *terra nullius* and thus open for occupation by settlers.

Albeit for different reasons and at different times, Australia, British Columbia, and California each adopted a *terra nullius* policy, essentially deciding that indigenous peoples had no real claim to land ownership (although occasionally recognizing rights of occupancy). At the opposite end of the spectrum, jurisdictions like New Zealand, Oregon, and Washington utilized treaties and agreements with specific tribal units as the means to legitimize land acquisition. The Fiji and Alaska colonies reflected a middle ground where either administrative proce-

dures militated against the worst effects of colonization (as in Fiji), or purchases were made of indigenous peoples' rights of occupancy in all land and not just land actually being used (as in Alaska). Finally, there was the experience of the unified Pacific kingdoms, Hawai'i and Tonga. In Hawai'i, it was the native kingdom itself that instituted land reform, with the great Māhele of 1845–55, and moved toward fee simple ownership (available also to foreign settlers) almost as a way to inoculate itself in the event of its later colonization. The Tonga kingship maintained an absolute ban on selling land to foreigners and thus successfully protected itself from colonization. In each of these ten case studies, Banner carefully relates the main events and personalities of colonial land policy. The book proceeds at a breakneck pace, but the author somehow manages to make a coherent narrative out of these dissonant experiences.

What accounts for these disparate colonial land acquisition policies? Banner theorizes (pp. 5–7, 316–18) that three factors go far in at least partially explaining the differences. The first is whether the indigenous peoples in a particular colony, pre-contact, were engaged in widespread and sustainable agriculture or, rather, were hunter-gatherers. In places such as Australia, California, British Columbia, Oregon, Washington, and Alaska, where the colonizers perceived (correctly or not) that indigenous peoples had no material culture of agronomy or husbandry, it was easier to stipulate a policy of *terra nullius* or to impose a sham system of treaties. New Zealand, Hawai'i, Fiji, and Tonga each had well-documented agricultural economies at the time of contact, so western settlers were obliged to acquire title by treaty or agreement, often with an indigenous polity.

That leads to Banner's second distinction: the degree to which a colony, at the time of contact, had a high degree of indigenous political organization. As already noted, Hawai'i and Tonga were unified kingdoms and could (to some degree) control their own fates, even in the face of relentless colonization moves by the United States and Britain. In contrast, the Maoris of New Zealand and the distinct Fiji kingdoms—despite their high degree of organization and (in the case of the Maoris) their military prowess—were subjected to divide-and-conquer tactics. In Banner's view, the scattered tribes of Aborigines in Australia, the Native Americans of California, Oregon, and Washington, and the First Peoples of British Columbia and Alaska did not stand a chance.

Banner's third distinction turns on whether white settler intrusion into Pacific polities preceded actual assertions of colonial sovereignty, or vice versa. Where settlers preceded the flag (as in New Zealand, Fiji, California, and Oregon), they designed their own acquisition system, whether contract purchases

with organized polities (in New Zealand and Fiji) or the naked assertion of ownership under a *terra nullius* policy (on the U.S. West Coast). When the colonial government arrived before the settlers, the typical default rule was treaty acquisition, with the exception of Australia and British Columbia. This mosaic of policies—both their economic justifications (pp. 75, 81, 126–27) and practical considerations “on the ground”—confirms Banner’s observation that “colonial land policy was highly path dependent” (pp. 46, 318).

Possessing the Pacific is legal history at its best. This volume is no dry recitation of documentary evidence. On the *tour d’horizon* that Banner offers, we meet some great characters—Governors James Douglas and Arthur Gordon, lawyer Henry Halleck, King George Tupou I of Tonga, and King Kamehameha III of Hawai‘i—who really did understand the meaning of land to indigenous peoples and sought to turn back what seems today the inevitable tide of colonial history and the loss of a native way of life in the Pacific.

If I have any criticism of this volume, it is that the author could have explored the modern implications of his subject in greater depth. He acknowledges these implications in places (pp. 3–4, 192–93) and concludes that “the method by which land was acquired during the nineteenth century continues to influence the relationship [between governments and indigenous peoples] today” (p. 316). Indigenous land litigation in these Pacific polities has “new importance in recent decades” and “continue[s] to shape our lives today” (p. 320). Nevertheless, despite Banner’s carefully articulated differences in colonial land policies, he concludes (pp. 319–20) that almost all the jurisdictions he surveyed ended up in the same position: the nearly complete loss of indigenous land rights. This is a sober lesson from an important book.

David J. Bederman
Emory University School of Law

Broken Trust: Greed, Mismanagement & Political Manipulation at America’s Largest Charitable Trust, by Samuel P. King and Randall W. Roth. Honolulu: University of Hawai‘i Press, 2006; 324 pp.; illustrations, appendices, index; \$26.00 cloth; \$16.00 paper.

Few of the six million visitors each year to the state of Hawai‘i learn much about the Bishop Estate, a name they hear dropped from time to time by locals to express frustration, and sometimes rage, toward the economic entity that controls vast

real property holdings and economic power in the state. For much of the half-century following statehood, it was almost impossible to buy land, because the state's largest private land owner refused to sell to any but cronies of the trustees. All others who desired to possess real estate could do so only by leasing it. Scarcity caused and maintained extraordinary land prices statewide. Patient Hawaiians tolerated land monopoly, but in time a segment of the public came to suspect, with good cause, that elected officials of the state government were enriching themselves and their favorites by systematically looting the estate. Despite occasional protest marches by alumni of the Kamehameha Schools—the beneficiary of the trust—the news media and the public officials maintained a dignified silence as the trustees and their political cronies enriched themselves at the expense of the nation's largest private charity.

Election to public office was frequently followed by conspicuous ascension into the ranks of the landed elite, but the network of self-perpetuating trustees and their political cronies kept their methods well concealed. Even after this book stripped away the elaborate secrecy that had surrounded the mismanagement of the trust, the public had reason to wonder how much more corruption would be discovered if public officials took their oaths of office seriously.

Like any well-written mystery, this book commands the reader to keep turning the pages. Once introduced to the cast of characters, the reader likely will have difficulty putting the book aside for other tasks as he or she realizes how much more is yet to be revealed. Even the end seems unwelcome, because more chicanery is afoot, as the world of local politics keeps renewing itself.

The two authors constitute a fortuitous alignment of experience and talents. The Honorable Samuel P. King traces his own ancestry back to the Polynesians who met Captain James Cook for the first contact with Europeans. Professor Randall W. Roth began the book project while a professor at the University of Hawai'i, and discovered that the trustees of the prestigious trust were consistently violating nearly every common law rule of trust law, as well as ethical standards of lawyers and judges. Judge King served his country in the U.S. Navy during World War II and the islands as territorial attorney general before his war service, and he served his state as a circuit judge after a period of private practice; his pro bono activities included chairing the state's bar admission process. Employing their combination of intellectual skill and a keen understanding of the network of fraud and concealment among the trustees and their political protectors, the authors first produced a committee report that a courageous managing editor published in the *Honolulu Star Bulletin*. That report was later expanded

into this book, no substantive revelation of which has yet been disproved. The book is blessed by an absence of footnotes. But readers who want to see more proof can find it in a website: <http://www.brokentrustbook.com>.

Alfred T. Goodwin
Senior U.S. Circuit Judge

First Among Nisei: The Life and Writings of Masaji Marumoto, by Dennis M. Ogawa. Honolulu: University of Hawai'i Press, 2007. 273 pp.; appendices, photographs, index; \$25.00 paper.

This slender volume, written mostly in the first person, autobiographical style, will be more of interest to students of Hawaiian and Japanese-American history than to lawyers and legal scholars. For, although it touches incidentally on developments in Hawaiian law and on Marumoto's contributions to the law, it is best read and appreciated as a rich and detailed account of early immigrant life in the Hawaiian Japanese-American community. It also chronicles the gradual change in Hawaiian social and civic life over the course of Marumoto's life that led to today's widespread acceptance of Japanese Americans and other ethnic minorities as part of the fabric of Hawai'i's political and cultural institutions.

The authored text consists of only 71 pages. The remainder of the book consists of letters written by Marumoto at various stages of his life (85 pp.), his 1935 congressional testimony in favor of statehood (pp. 67–76), four appendices (83 pp.), fifteen pages of photographs (pp. 251–66), and an index.

Masaji Marumoto, born in Honolulu in 1906 of immigrant Japanese parents, was appointed by President Dwight Eisenhower as an associate justice of the Hawaii Territorial Supreme Court in 1956. He was the first Asian and the first non-haole to be appointed to that court in ninety-four years.¹ Upon Hawai'i's admission to statehood in 1959, he was appointed to the Hawai'i Supreme Court by Governor William F. Quinn. He resigned his seat in 1960 to reenter private practice, but was again appointed an associate justice of that court by Governor John A. Burns in 1967. He served until his retirement in December 1973. Because this is not a law-oriented book, it

¹When the court was first established in 1846, "one justice of Hawaiian blood" was appointed in 1846, who served until 1862 (p. 157).

contains little information about Marumoto's judicial opinions or other legal writings, or his contributions to the law.²

Marumoto's pre- and early-World War II efforts raise anew the question concerning the different treatment of Japanese Americans in Hawai'i in the aftermath of the attack on Pearl Harbor, as opposed to the mass internment of all persons of Japanese ancestry, totaling more than 110,000, on the West Coast of the mainland (p. 81). "In Hawai'i, even closer to the war, only 1,441 Japanese out of 159,534 were detained, and 461 of those were later released, so that net internments of Hawai'i Japanese totaled 980, less than one percent of the Japanese population" (p. 81).³ There were, of course, a number of reasons why, unlike on the mainland, there was no mass internment of Japanese Americans in Hawai'i. They include, as reported in *Personal Justice Denied*, the lack of transportation to the mainland; the expected political backlash from introducing 150,000 more Japanese into the mainland population; the importance of the Japanese, who constituted 35 percent of the population, to the continued functioning of the Hawaiian economy;⁴ and, of course, the fact that the imposition of martial law had given the army unprecedented control over the entire civilian population, not just Japanese Americans. Still, as the commission recognized, "personal judgment was as important as institutional predisposition in the decisions of 1942." *Id.* ch. 11, pp. 10–11.

Marumoto developed an extraordinary personal friendship with Robert Shivers, the special agent in charge (SAIC) of the newly opened Honolulu office of the FBI. That office was opened in 1939 "to guard against espionage activities by the Japanese and to study how to handle Hawai'i's large Japanese population in case of hostilities" (p. 77). Shivers remained the SAIC until May 1943. According to Shivers, "Not a single person could be interned or released from internment without my approval" (p. 81). And,

²His dissenting opinion in *In re Ashford*, 440 P.2d 76, 78 (Haw. 1968) (Marumoto, J., dissenting) is included as Appendix 3 (p. 211). But it is included more for its "deep understanding of Hawaiian history, language and customs" than for any significant legal point. Marumoto also served on the National Conference of Commissioners on Uniform State Laws from 1949 to 1956.

³These figures do not coincide with other authoritative reports: "Out of nearly 158,000 ethnic Japanese in Hawaii, less than 2,000 were taken into custody during the war." *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (December 1982), ch. 11, p. 15, available at http://www.nps.gov/history/history/online_books/personal_justice_denied/chap.11.htm.

⁴For example, more than 90 percent of carpenters, who were "absolutely essential" to rebuilding the defenses destroyed by the Pearl Harbor attack, were of Japanese ancestry. *Personal Justice Denied*, ch. 11, p. 8.

"Between 1939 and December 7, 1941, he [Shivers] had developed an abiding faith in the loyalty and patriotism of Hawai'i's Japanese residents—124,351 of them citizens, 35,183 aliens" (p. 81).

Delos Emmons, commanding general of the Hawaiian Department—unlike his West Coast counterpart, General DeWitt—was opposed to mass internment.⁵ Shivers' opposition to internment, combined with the opposition of Emmons, enabled the two to resist strong importuning to the contrary from Washington. It is also fair to conclude that Marumoto's close friendship with Shivers, and Shivers' exposure to the Japanese community in Honolulu through Marumoto's efforts (pp. 77–82), were major factors in Shivers' opposition to mass internment.⁶

*First Among Nisei*⁷ is an apt title for this work. Not only was Marumoto the first Asian justice on the Hawai'i Supreme Court; he was the first Asian admitted to Harvard Law School⁸ (p. 40) and, in 1954, the first Asian to be president of the Hawaii Bar Association (p. 156). Ogawa⁹ also lists numerous other civic "firsts" among Marumoto's accomplishments.

Along the way, we meet some old friends. It was, for example, Samuel P. King, chief judge emeritus of the federal district court in Hawai'i, who, as president of the Hawaii Bar Association in 1952, urged Marumoto to run for vice president (which assured that he would be elected president the following year). We also learn that Marumoto served on a gubernatorial commission to compile the *Revised Laws of Hawaii* in 1955 with Sam King and Herbert Choy.

All in all, this book is a worthy contribution to the history of Japanese Americans in Hawai'i.

Wallace Tashima
United States Circuit Judge
U.S. Court of Appeals for the Ninth Circuit
Pasadena, California

⁵See *Personal Justice Denied*, ch. 11.

⁶Reiterating his position in congressional testimony in January 1946, Shivers stated, "There was not one single act of sabotage committed against the war effort in the Hawaiian Islands during the course of the entire war" (p. 82).

⁷*Nisei* is the Japanese word meaning second generation and refers to second-generation Japanese Americans born of Japanese immigrant parents.

⁸Preceding other early Asian graduates of Harvard Law School, including John F. Aiso, who graduated in 1934 and was an associate justice of the California Court of Appeal, and Herbert Y.C. Choy, who graduated in 1941 and was a judge of the Ninth Circuit Court of Appeals.

⁹Professor and chair, Department of American Studies, University of Hawai'i, Honolulu.

The Trial of Pierre Laval, by J. Kenneth Brody. New Brunswick, NJ: Transaction Publishers, 2010; 287 pp.; notes, bibliography, index; \$39.95 cloth.

To World War II historians and to trial lawyers generally, this book relating the trial and conviction of Pierre Laval, a leader of the French government prior to World War II, will be of interest and should be studied, particularly for its analysis of the distinction between treason and patriotism.

The book tells the gripping story of the fall from grace of Pierre Laval and his eventual trial, conviction, and execution. Prior to the German victory over France in May 1940, Pierre Laval was well known in the world. He had held the world's attention during France's efforts to avoid World War II. He served as Marshal Pétain's deputy premier and heir-apparent in the Vichy French regime during the German occupation for six months in 1940 and then as prime minister from April 1942 until the Liberation. Laval, who had been France's premier and foreign minister in the 1930s, was shot as a traitor after a scandalously brief trial in October 1945 that was so flawed that it gave him no chance of mounting a proper defense.

Yet in 1945 there was very little public outcry and there were few Laval defenders, perhaps because of his personality and public perception. Not a Nazi nor a Nazi sympathizer, Laval was a negotiator, a wheeler-dealer, considered wily and devious, whose record of collaboration with the German occupier made him an easy scapegoat for the suffering and disgrace of a defeated nation.

The Trial of Pierre Laval describes in detail the ten-day trial in October 1945 by a predetermined tribunal and a French public obviously wanting his head. The author had the good fortune to be able to conduct an in-depth interview of Maître Yves Frederic Jaffré, one of the lawyers who acted as Laval's defense counsel (but who had declined to participate in the prejudicial handling of the trial), for his comments on the daily trial proceeding as it staggered to its grizzly end. Laval's failed defense sought to portray him as a French patriot who believed that, as the head of the captive government of occupied France, he could serve his country best by ameliorating a severe occupation.

The author's case that Laval's trial was a travesty of justice appears unanswerable, as the book relates in detail the open prejudice and vocal hostility of the jury, the laxity of the judge, the failure to observe every basic rule and right of criminal procedure. In a fair hearing, could Laval have mounted a credible defense? The author specifically cites

Laval's effort to protect the Jews, especially French Jews; his continuing obstruction of German labor drafts; his denial of any military aid to Nazi Germany; and his defense of Alsace-Lorraine.

Brody is correct in urging that, if Laval, in participating in the formation of the Vichy government and later in serving in it, were guilty of capital crime, then his co-defendants in France would have been legion and would have included most of the political and administrative classes of the Third Republic that collapsed in 1940.

Indeed, they would have included the judge and the attorney general, faithful servants of Vichy. In the most dramatic moment of the trial, the defendant turned upon them crying, "But you were all working for the Pétain government then, all of you." It was true; the attorney general had even sat on a panel that denaturalized French Jews, leading to expropriation, deportation, and often death.

It was in fact the Republic's democratically elected National Assembly that set up Vichy by a vote of 569 to 80. No wonder that Laval, languishing in his prison chains, mused, "I did anything I could so that France should suffer the least. And it's me who's here in these four walls. *Merde, alors.*"

The book presents a gripping daily story of the highs and lows of Laval's testimony and the fearful odds he faced in trying to convince an already determined trial court and jury that he should be acquitted. The author skillfully builds the defense that Laval might have made in an impartial proceeding. As Maître Jaffré has written in reviewing this book, the final verdict rests with history.

In his *Aftermath*, the author quotes from Laval's appeal to General de Gaulle on the eve of his death regarding his conviction as a traitor to France:

"I am not discouraged, I have made no protest even when my honor and my very life were made the plaything of a strange justice. . . . I have been a submissive defendant, calm and correct in the face of the threat of sanctions.

"I had hoped at the trial there would be a full investigation of the facts to replace the preliminary examination which was refused. . . .

"I cannot ignore the fate that awaits me. I prefer to run the risk rather than to associate by my presence at a proceeding so grossly arbitrary and brutal without precedent. . . ."

There was no reply.

The drama of the trial, the way the author takes the reader through the daily pangs of the trial, and its final result make

this book one that should be read by historians, the general public, and lawyers alike.

Norman J. Wiener
Portland

ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

Anderson, Steve A. "McLoughlin's Grand Jury: A Miscarriage of Justice on the Fur Trade Frontier," *Columbia* 22 (Winter 2008–2009).

Arinaga, Esther K., and Caroline A. Garrett. "A Murder, a Trial, a Hanging: The Kapea Case of 1897–1898," *Hawaiian Journal of History* 42 (2008).

Azuma, Eiichiro. "Race, Citizenship, and the 'Science of Chick Sexing': The Politics of Racial Identity among Japanese Americans," *Pacific Historical Review* 78 (May 2009).

Beck, David R.M. "'Standing Out Here in the Surf': The Termination and Restoration of the Coos, Lower Umpqua and Siuslaw Indians of Western Oregon in Historical Perspective," *Oregon Historical Quarterly* 110 (Spring 2009).

Blanton, Carlos Kevin. "The Citizenship Sacrifice: Mexican Americans, the Saunders-Leonard Report, and the Politics of Immigration, 1951–1952," *Western Historical Quarterly* 40 (Autumn 2009).

Blue, Ethan. "The Strange Career of Leo Stanley: Remaking Manhood and Medicine at San Quentin State Penitentiary, 1913–1951," *Pacific Historical Review* 78 (May 2009).

Campney, Brent M.S. "W.B. Townsend and the Struggle against Racist Violence in Leavenworth," *Kansas History* 31 (Winter 2008–2009).

Cann, Damon M. "Religious Identification and Legislative Voting: The Mormon Case," *Political Research Quarterly* 62 (March 2009).

Chapple, Simon. "Writing Law into 'New Western History': Law and Order in Wyoming and New Mexico," *Australasian Journal of American Studies* (Ipswich) 27 (Dec. 2008).

Clay, T.A. "A Call to Order: Law, Violence, and the Development of Montana's Early Stockmen's Organization," *Montana* 58 (Autumn 2008).

Craver, Earlene. "On the Boundary of White: The Cartozian Naturalization Case and the Armenians, 1923–1925," *Journal of American Ethnic History* 28 (Winter 2009).

DeJong, David H. "'Left High and Dry': Federal Land Policies and Pima Agriculture, 1860–1910," *American Indian Culture and Research Journal* 33:1 (2009).

Dilg, Janice. "'For Working Women in Oregon': Caroline Gleason/Sister Miriam Theresa and Oregon's Minimum Wage Law," *Oregon Historical Quarterly* 110 (Spring 2009).

DuBois, Ellen Carol. "Seneca Falls in Santa Cruz: Eliza W. Farnham and the Varieties of Women's Emancipation in Nineteenth-Century California," *Common-Place* 9 (Jan. 2009).

Dykstra, Robert R. "Quantifying the Wild West: The Problematic Statistics of Frontier Violence," *Western Historical Quarterly* 40 (Autumn 2009).

Fletcher, Matthew L.M. "Red Leaves and the Dirty Ground: The Cannibalism of Law and Economics," *American Indian Law Review* 33:1 (2008–2009).

Hackler, Rhoda E.A. "'Earnest Persuasion but Not Peremptory Demand': United States Government Policy toward the Kingdom of Hawai'i, 1820–1863," *Hawaiian Journal of History* 42 (2008).

Hirt, Paul, Annie Gustafson, and Kelli L. Larson. "The Mirage in the Valley of the Sun," *Environmental History* 13 (July 2008).

Jensen, Kelly. "'Back in My Day, Son': Dialogical Constructions of the Cowboy Code of Justice," *Journal of Popular Culture* 42 (February 2009).

Katanski, Amelia V. "Writing the Living Law: American Indian Literature as Legal Narrative," *American Indian Law Review* 33:1 (2008–2009).

Kanake, Renee Newman. "Resolving Ethical Dilemmas in James Welch's *The Indian Lawyer*," *American Indian Law Review* 33:1 (2008–2009).

Mander, Meredith K. "The Battle to Save the Verde: How Arizona's Water Law Could Destroy One of Its Last Free-Flowing Rivers," *Arizona Law Review* 51:1 (2009).

Mirpuri, Anoop, Keith P. Feldman, and Georgia M. Roberts. "Antiracism and Environmental Justice in an Age of Neoliberalism: An Interview with Van Jones," *Antipode* 41 (May 2009).

Rifkin, Mark. "'For the Wrongs of Our Poor Bleeding Country': Sensation, Class, and Empire in Ridge's *Joaquin Murrieta*," *Arizona Quarterly* 65 (Summer 2009).

Shermer, Elizabeth Tandy. "Counter-Organizing the Sunbelt: Right-to-Work Campaign and Anti-Union Conservatism, 1943–1958," *Pacific Historical Review* 78 (February 2009).

Smith, Michael M. "General Rafael Benavides and the Texas-Mexico Border Crisis of 1877," *Southwestern Historical Quarterly* 112 (January 2009).

Turner, James Morton. "'The Specter of Environmentalism': Wilderness, Environmental Politics, and the Evolution of the New Right," *Journal of American History* 96 (June 2009).

Valerio-Jiménez, Omar S. "New Avenues for Domestic Dispute and Divorce Lawsuits along the U.S.-Mexico Border, 1832–1893," *Journal of Women's History* 21 (Spring 2009).

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