

# A Moon Court Overview: Rent for Space on Earth

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It turns out to be remarkably difficult to classify the Hawai‘i Supreme Court during the Moon Era. Chief Justice Ronald T.Y. Moon similarly defies easy classification. Yet this Symposium issue analyzes the man and the court he led for seventeen years, as well as honors him and his colleagues. Ronald Moon served Hawai‘i for over twenty-eight years while wearing a judicial robe, including three years as Associate Justice and seventeen years as Chief Justice. His judicial career thus spans nearly half of Hawai‘i’s entire history as a state, and he holds the record for length of service as chief justice since statehood.

Moon and his fellow justices hardly drew on a blank slate of law when the Moon Court era began in the early 1990s. Nonetheless, the court Moon served and led until 2010 faced considerably more uncharted legal territory than most appellate judges generally encounter as they go about their judicial business. The Hawai‘i Supreme Court justices were called upon to apply and interpret a strikingly different, innovative Hawai‘i Constitution that had recently been promulgated by the 1978 Constitutional Convention and overwhelmingly ratified by popular vote. They also faced the challenge of whether and how far to take the Richardson Court’s path-breaking decisions that considered and applied ancient Hawaiian custom and usage as well as Anglo-American common law. Finally, the very newness of statehood and of its state laws afforded great opportunities but also significant challenges for the state’s high court, not least concerning core issues about how the Hawai‘i judicial system and its jurisdiction ought to be structured.

Those of us lucky enough to know Ron Moon personally have greatly appreciated his graciousness on and off the bench, as well as his somewhat corny jokes. But we also know a man who is balanced and careful—if not downright cautious—about most things.<sup>1</sup> This probably helps to explain the appreciation as well as the surprises and the critique that permeate the articles in this Symposium issue.

It is almost a cliché, of course, that identifying high courts by the name of whoever is serving as the chief justice is imprecise and sometimes downright misleading. Still, reference to the Moon Court during the years that Ronald

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<sup>1</sup> This only added to the widespread shock that followed when Chief Justice Moon fell off a ladder while working on his house and sustained a serious back injury soon after his retirement in August 2010. Happily, he carefully followed his rehabilitation regimen with characteristic dedication and discipline and Ron Moon now is back to being very engaged in the public life of Hawai‘i.

T.Y. Moon was the chief justice is uniquely apt for several linked reasons: first, the Chief Justice of the Hawai'i Supreme Court has more administrative authority than virtually all of his or her counterparts across the United States. This is partially a function of direct power, such as the authority to appoint district court judges, and partially a result of the role the chief justice plays within a very small state in which, moreover, the Supreme Court, the Legislature, and the Governor do their work in very close proximity to one another. "The C.J." enjoys a great deal of built-in respect, and on many occasions the office serves as a bully pulpit to seek structural reform as well as to battle for judiciary budgets and to seek public goals such as enhanced access to justice. Chief Justice Moon stood out for being protective of his prerogatives and generally quite effective in obtaining funds for new courthouses and other needs of the judiciary, even during times of severe budgetary constraints.

This Hawai'i Supreme Court notably led the nation in recognizing the unconstitutionality of banning same-sex marriage,<sup>2</sup> but it did not extend privacy rights beyond the criminal law area—despite an explicit invitation to do so posed by the reference to privacy rights found in article I, section 6 of the Hawai'i Constitution.<sup>3</sup> The same court that recognized far-reaching constitutional rights for Native Hawaiians nevertheless did not sufficiently anchor its extraordinary decision<sup>4</sup> that enjoined state alienation of ceded lands within the Hawai'i Constitution and thereby missed the chance to articulate an adequate and independent state ground that could have insulated its far-reaching and courageous decision from review by the United States Supreme Court.<sup>5</sup> (In this case on remand, the justices ultimately also ducked the question of how to define a Native Hawaiian when the issue was raised and argued by Hawai'i Attorney General Mark Bennett.<sup>6</sup>)

Overall, the Moon Court proved strikingly receptive to most environmental claims, including allowing unusually broad standing for plaintiffs.<sup>7</sup> Yet, on the

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<sup>2</sup> See *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993); see also Michael D. Sant'Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705 (2011).

<sup>3</sup> See Jon M. Van Dyke & Melissa Uhl, *Hawai'i's Right to Privacy*, 33 U. HAW. L. REV. 669 (2011).

<sup>4</sup> *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw.*, 117 Haw. 174, 177 P.3d 884 (2008), *rev'd sub nom.* *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), *on remand sub nom.* *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw.*, 121 Haw. 324, 219 P.3d 1111 (2009).

<sup>5</sup> See Eric K. Yamamoto & Sara D. Ayabe, *Courts in the "Age of Reconciliation": Office of Hawaiian Affairs v. HCDCH*, 33 U. HAW. L. REV. 503, 520 nn.135-36 (2011); Melody K. MacKenzie, *Ke Ala Pono—The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447, 497-98 (2011).

<sup>6</sup> See *Office of Hawaiian Affairs*, 121 Haw. at 333, 219 P.3d at 1120.

<sup>7</sup> See Denise E. Antolini, *The Moon Court's Environmental Review Jurisprudence*:

other hand and virtually alone among state courts, it also allowed property owners to litigate whether state and local governments were using only a pretense of public use when they exercised their eminent domain power to take private property.<sup>8</sup> On the third hand, within the world of “inside baseball” that is insurance law—a realm replete with decisions with significant practical impact on everyday life, but attracting very little attention, if any, beyond a small cadre of specialists—Professor Hazel Beh notes: “In most instances, the court adopted a moderately pro-insured position, often specifically rejecting more liberal or conservative positions. . . . Regardless of whether any single case was rightly or wrongly decided, having answers proves to have its own value.”<sup>9</sup>

The future may show that Moon’s most lasting achievement was to reorder appellate jurisdiction in Hawai‘i. Utilizing an outline for reform that had lingered for twenty-five years, Moon successfully reduced the burden on the Hawai‘i Supreme Court of handling numerous direct appeals.<sup>10</sup> This new discretionary appeal system ultimately may produce shorter opinions.<sup>11</sup> It also has the potential to make the justices less fractious than they were known to have become at times during the Moon Court era. Finally, though the change initially has overburdened the Intermediate Court of Appeals, it may soon generate the increased resources that court needs and deserves.<sup>12</sup>

That an attorney who specialized in insurance defense before he ascended to the bench did so much to change the law in Hawai‘i is noteworthy. So is his distinction as the first Korean-American supreme court justice and first chief justice in the United States and surely also as the first jurist to serve as a Marshal of the Rose Bowl Parade. (During his tenure, Chief Justice Moon also spent a great deal of time serving as an always gracious host to visiting delegations of judges and other dignitaries from all over the world.) Critics and friends alike, moreover, delight in pointing out that Ronald T.Y. Moon was

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*Throwing Open the Courthouse Doors to Beneficial Public Participation*, 33 U. HAW. L. REV. 581 (2011); D. Kapua‘ala Sproat, *Where Justice Flows Like Water: The Moon Court’s Role in Illuminating Hawai‘i Water Law*, 33 U. HAW. L. REV. 537 (2011).

<sup>8</sup> See David L. Callies, Emily Klatt & Andrew Nelson, *The Moon Court, Land Use, and Property: A Survey of Hawai‘i Case Law 1993-2010*, 33 U. HAW. L. REV. 635, 651-54 (2011).

<sup>9</sup> See Hazel Beh, with Tred Eyerly, Keith Hiraoka, Peter Olson, Michael Tanoue & Alan Van Etten, *Key Issues in Hawai‘i Insurance Law Answered by the Moon Court*, 33 U. HAW. L. REV. 779, 779, 833 (2011).

<sup>10</sup> See Edmund M.Y. Leong & Peter Van Name Esser, *The Development of Hawai‘i’s Appellate Courts: An Organizational Perspective*, 33 U. HAW. L. REV. 875, 887-96 (2011).

<sup>11</sup> As Mark Twain once quipped, “if I had more time I would write a shorter letter,” though some suggest that this *bon mot* should be attributed to French philosopher Blaise Pascal from his “Lettres Provinciales”; see also Callies, Klatt & Nelson, *supra* note 8, at 637 & n.8 (noting the increase in length of Moon Court opinions as compared to previous courts).

<sup>12</sup> See Leong & Esser, *supra* note 10, at 893.

once a registered Republican. His own opinions and those of his colleagues seem to have surprised many people much of the time. Often there appeared to be a yin/yang quality of lengthy attention at times to procedural issues and technical details, and at other times a willingness to issue bold opinions and sweeping rulings.

In an analysis of the Moon Court's criminal law opinions by Kamaile Nichols and Richard Wallsgrove, for example, they note: "It is no surprise that along Hawai'i's long and tangled grapevine of law clerks and other young lawyers, C.J. Moon had a reputation as a friendly stickler for the rules."<sup>13</sup> This somewhat anomalous stance, they make clear, entailed attention to rules binding the prosecutors as well as the defendants. Their examination of decisions about evidentiary matters and about searches and seizures and related issues describes an array of decisions that were often pragmatic, sometimes hard to reconcile with other precedents, and generally open to new kinds of claims—while still seeking to remain rule-bound, albeit in a friendly way.

At points seemingly far removed along a spectrum of judicial approaches, Denise Antolini, Melody MacKenzie, and Kapua Sproat praise Chief Justice Moon and the court, while David Callies and his co-authors criticize them for engaging in innovative and often broad-brush approaches to environmental law, water rights, and Native Hawaiian claims. As Kapua Sproat summarizes: "The Moon Court had the courage to respect both the letter and spirit of the law even when that position lacked universal support."<sup>14</sup> Many others, of course, have been and remain less sanguine when they perceive judges to be following the spirit as well as the letter of law.

What probably stands out most about the court under Moon's leadership was its use—and critics would say its abuse—of the public trust doctrine, both in procedural and substantive ways. While to some this constitutes unsupportable judicial interventionism, to others it is simply following and building upon admirable precedents, particularly those from the Richardson Court, that accepted and applied ancient indigenous practices as part of Hawai'i's unique history. To a great extent, this debate appears to revolve around how far back in time and how deeply into context judges ought to look when they resolve disputes that involve individual ownership in tension with communal interests. Simultaneously, however, such judicial decisions potentially do a great deal to shape the future of the Hawaiian islands, far beyond the relatively narrow realm of clients and litigators who come before the courts.

Some sense of how to resolve substantial paradoxes that seem inherent in trying to classify Chief Justice Moon and the decisions of the court he led might

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<sup>13</sup> Kamaile Nichols & Richard Wallsgrove, *Chief Justice Moon's Criminal Past*, 33 U. HAW. L. REV. 755, 756 (2011).

<sup>14</sup> Sproat, *supra* note 7, at 577.

be gleaned from Moon's own ongoing commitment to increased access to justice, particularly for those most vulnerable. Calvin Pang's report about the Access to Justice Movement in Hawai'i is particularly enlightening: "Getting support from the head of the judiciary was important in a period of notable economic and social changes that exacerbated the grim access to justice picture in Hawai'i, which was never good to begin with."<sup>15</sup> And the connecting thread that links Moon's speeches, actions, and opinions may be his oft-repeated quotation of his father: "[P]ublic service is the rent we pay for the space we occupy on earth."<sup>16</sup>

As the fine articles that constitute this Symposium issue make clear, Chief Justice Moon's long and effective commitment to public service did much more than to pay any rent he might have owed to the community. What primarily stands out about the Moon Court era, however, is that such a duty to perform public service was often transmuted into active intervention by the court on behalf of a public trust. Chief Justice Moon and his colleagues determined that it is largely left to the judiciary to protect and foster communal claims. Such claims may be rooted in past language and traditions that constitute much of law, perhaps at least referred to within the "great outline" of the Hawai'i Constitution. Thus they continue to hold promise for the future.

Much of the difficulty when judges do something like this on behalf of the community, of course, can be linked to conflicting memories about precisely when specific rights and duties originated and what they now ought to entail, perhaps with an eye to the future as well. As Eric Yamamoto and Sara Ayabe point out, however, much of the "activism" of the Moon Court may be seen as an ongoing effort to keep various channels open for other decision makers and for possible future reconciliation of currently conflicting claims.<sup>17</sup> Not always—and surely not always effectively—Hawai'i Supreme Court decisions during the Moon era may usefully be classified as opening and/or keeping open future options. They might even prove to be important stepping stones on the rugged path to restorative justice.

Long ago it was wisely said that the search for justice is ongoing and that it is never done. It is not open to any of us to achieve lasting justice. Nonetheless, our obligation is to begin that quest.<sup>18</sup> Chief Justice Moon and his colleagues undertook this enormous challenge with care and concern and marked success. We are greatly in their debt, through surely there is more rent still to be paid.

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<sup>15</sup> Calvin Pang, *"Paying Rent": The Access to Justice Movement During the Moon Years*, 33 U. HAW. L. REV. 835, 835 (2011).

<sup>16</sup> *Id.*

<sup>17</sup> Yamamoto & Ayabe, *supra* note 5, at 508, 509, 534-35.

<sup>18</sup> Within the Jewish tradition, it is said in Pirkei Avot (Chapters of the Fathers) 2:21: "You are not obligated to complete the task, but neither are you free to desist from it."

