

# The Burger Court Opinion Writing Database

## *Kaiser Aetna v. United States*

444 U.S. 164 (1979)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

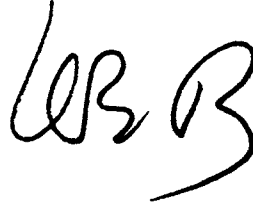
November 20, 1979

Re: 78-738 - Kaiser Aetna v. United States

Dear Bill:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'WB B', likely representing William Brennan.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

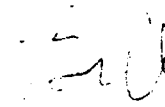
November 8, 1979

RE: No. 78-738 Kaiser Aetna v. United States

Dear Bill:

I shall await the dissent in the above.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

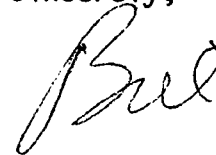
November 27, 1979

RE: No. 78-738 Kaiser Aetna v. United States

Dear Harry:

Please join me in the dissenting opinion you  
have prepared in the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brennan", is written below the word "Sincerely,".

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

November 7, 1979

Re: 78-738 - Kaiser Aetna v. United States

Dear Bill:

I am glad to join your opinion for the  
Court.

Sincerely yours,

P.S.  
/

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

November 20, 1979

Re: No. 78-738, Kaiser Aetna v. United States

Dear Bill,

The changes contained in your recirculation of November 15 are satisfactory to me, and I continue to join your opinion for the Court.

Sincerely yours,

P.S.  
/

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 27, 1979

Re: No. 78-738 - Kaiser Aetna v. U. S.

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Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference

cmc

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 8, 1979

Re: No. 78-738 - Kaiser Aetna v. United States  
No. 77-1819 - Vaughn v. Vermillion Corp.

Dear Bill:

I will wait for the dissent.

Sincerely,

*T.M.*

T.M.

Mr. Justice Rehnquist

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 29, 1979

Re: No. 78-738 - Kaiser Aetna v. United States

Dear Harry:

Please join me in your dissenting opinion.

Sincerely,

*J.M.*

T.M.

Mr. Justice Blackmun

cc: The Conference

October 9, 1979

Re: No. 78-738 - Kaiser Aetna v. United States  
No. 77-1819 - Vaughn v. Vermillion Corporation

Dear Bill:

I shall be glad to try my hand at a dissent in these cases.

Sincerely,

HAB

Mr. Justice Brennan

3, 4, 6, 10

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 23 NOV 1979

Recirculated: \_\_\_\_\_

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 78-738

Kaiser Aetna et al., Petitioners, } On Writ of Certiorari to the  
v. } United States Court of  
United States. } Appeals for the Ninth  
Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN, dissenting.

The Court holds today that, absent compensation, the public may be denied a right of access to "navigable waters of the United States" that have been created or enhanced by private means. I find that conclusion neither supported in precedent nor wise in judicial policy, and I dissent.

My disagreement with the Court lies in four areas. First, I believe the Court errs by implicitly rejecting the old and long established "ebb and flow" test of navigability as a source for the navigational servitude the Government claims. Second, I cannot accept the notion, which I believe to be without foundation in precedent, that the federal "navigational servitude" does not extend to all "navigable water of the United States." Third, I reach a different balance of interests on the question whether the exercise of the servitude in favor of public access requires compensation to private interests where private efforts are responsible for creating "navigability in fact." And finally, I differ on the bearing that state property law has on the questions before us today.

I

The first issue, in my view, is whether Kuapa Pond is "navigable water of the United States," and if so, why. The Court begins by asking "whether . . . petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal naviga-

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STYLISTIC CHANGES

and p. 1

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

2nd DRAFT

Circulated: \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

Recirculated: 29 NOV 1979

No. 78-738

Kaiser Aetna et al., Petitioners, } On Writ of Certiorari to the  
v. } United States Court of  
United States. } Appeals for the Ninth  
Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court holds today that, absent compensation, the public may be denied a right of access to "navigable waters of the United States" that have been created or enhanced by private means. I find that conclusion neither supported in precedent nor wise in judicial policy, and I dissent.

My disagreement with the Court lies in four areas. First, I believe the Court errs by implicitly rejecting the old and long established "ebb and flow" test of navigability as a source for the navigational servitude the Government claims. Second, I cannot accept the notion, which I believe to be without foundation in precedent, that the federal "navigational servitude" does not extend to all "navigable waters of the United States." Third, I reach a different balance of interests on the question whether the exercise of the servitude in favor of public access requires compensation to private interests where private efforts are responsible for creating "navigability in fact." And finally, I differ on the bearing that state property law has on the questions before us today.

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The first issue, in my view, is whether Kuapa Pond is "navigable water of the United States," and if so, why. The Court begins by asking "whether . . . petitioners' improvements to Kuapa Pond caused its original character to be so

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 6, 1979

78-738 Kaiser Aetna v. United States

Dear Bill:

I would appreciate your considering one suggestion for a change in your otherwise fine opinion.

On page 14 you rest the decision on three grounds: (i) that Kuapa Pond in its natural state was not capable of sustaining interstate navigation, (ii) that the pond has always been considered private property under state law, and (iii) that the actions of government agents gave rise to expectancies entitled to protection. The troublesome point for me is that you state "no one [of these factors is] by itself . . . dispositive." (p. 14)

I had thought we had voted in favor of a general principle that private, naturally non-navigable waterways are not subject to a public right of access even after they have been improved. I would prefer establishing this principle.

At least it seems to me, we should say that we need not decide whether any one or two of the factors alone would be dispositive. For example, if the pond in this case had been ten feet deep, but separated from all interstate waterways by a natural barrier, and was private property under state law, I would think our decision would be the same. Also, I can imagine situations - possibly it could be said of this case - where the government was estopped by virtue of action that allowed, if not specifically encouraged, the owner of a pond or stream to develop it into an attractive lake as a centerpiece of a major real estate development. People who had purchased homes, as well as the developer, could have relied on the good faith of the government.

Sincerely,

Mr. Justice Rehnquist  
Copies to the Conference

*Lewis*

November 14, 1979

78-738 Kaiser Aetna v. United States

Dear Bill:

I think the changes in your first draft, as circulated to Potter, John and me, are a reasonable accommodation of the difference in our views.

Accordingly, if these are acceptable to Potter and John, I will be glad to join your opinion.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: Mr. Justice Stewart  
Mr. Justice Stevens

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 15, 1979

78-738-Kaiser v. U.S.

Dear Bill:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

pp 8, 12

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 5 NOV 1979

Uncirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-738

Kaiser Aetna et al., Petitioners,	} On Writ of Certiorari to the	
v.		United States Court of
United States.		Appeals for the Ninth Circuit.

[November —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Hawaii Kai Marina was developed by the dredging and filling of Kuapa Pond, which was a shallow lagoon separated from Maunalua Bay and the Pacific Ocean by a barrier beach. Although under Hawaii law Kuapa Pond was private property, the Court of Appeals for the Ninth Circuit held that when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government. Thus, the public acquired a right of access to what was once petitioners' private pond. We granted certiorari because of the importance of the issue and a conflict concerning the scope and nature of the servitude.<sup>1</sup>

### I

Kuapa Pond was apparently created in the late Pleistocene Period, near the end of the ice age, when the rising sea level caused the shoreline to retreat, and partial erosion of the headlands adjacent to the bay formed sediment that accreted to form a barrier beach at the mouth of the pond, creating a

<sup>1</sup> In companion to this case, *Vaughn v. Vermilion Corp.*, — U. S. — (1979), the Louisiana Court of Appeal held that privately constructed canals, connected to navigable waters of the United States, navigable in fact, and used for commerce, are not subject to the federal navigational servitude. 356 So. 2d 551, writ denied, 357 So. 2d 558.

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Kaiser-Aetna 78-738

Supreme Court of the United States

Memorandum

11/6, 1979

Levin -

Re your comments in  
Kaiser-Aetna - Depending  
on Patten's & CIA going  
I think I can at least  
go along w/ second part  
of your tin - Beyer was  
in before could this AM &  
intimated general agreement  
w/ my draft, but expressed a  
(wer)

Then is Bill Reelquist's  
response to my letter  
suggesting change in  
his opinion.

822  
with the changes which I  
took to point in a decided  
opposite from yours. Give  
me a couple of days to try  
to accommodate you without  
losing any other votes  
in

Powell, D

There is Bill Reelquist's  
response to my letter  
suggesting changes in  
his opinion.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 13, 1979

Re: No. 78-738 - Kaiser Aetna v. United States

Dear Potter, Lewis and John:

In response primarily to the suggestions contained in Lewis' letter of November 6th, I propose to make the following changes in the presently circulating first draft of Kaiser Aetna.

Sincerely,

Mr. Justice Stewart  
Mr. Justice Powell  
Mr. Justice Stevens

*William H. Rehnquist*

Changes

BP 3, 8, 11, 12, 14, 15

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: 15 NOV 1979

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-738

Kaiser Aetna et al., Petitioners,	} On Writ of Certiorari to the	
v.		United States Court of
United States.		Appeals for the Ninth Circuit.

[November —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Hawaii Kai Marina was developed by the dredging and filling of Kuapa Pond, which was a shallow lagoon separated from Maunalua Bay and the Pacific Ocean by a barrier beach. Although under Hawaii law Kuapa Pond was private property, the Court of Appeals for the Ninth Circuit held that when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government. Thus, the public acquired a right of access to what was once petitioners' private pond. We granted certiorari because of the importance of the issue and a conflict concerning the scope and nature of the servitude.<sup>1</sup>

### I

Kuapa Pond was apparently created in the late Pleistocene Period, near the end of the ice age, when the rising sea level caused the shoreline to retreat, and partial erosion of the headlands adjacent to the bay formed sediment that accreted to form a barrier beach at the mouth of the pond, creating a

<sup>1</sup> In companion to this case, *Vaughn v. Vermilion Corp.*, — U. S. — (1979), the Louisiana Court of Appeal held that privately constructed canals, connected to navigable waters of the United States, navigable in fact, and used for commerce, are not subject to the federal navigational servitude. 356 So. 2d 551, writ denied, 357 So. 2d 558.

*Tally - We've joined - have it  
we?*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 16, 1979

Re: No. 78-738 Kaiser Aetna v. United States

Dear Lewis and John:

In accordance with our conversations, I assume the changes made in the presently circulating second draft of Kaiser Aetna are agreeable to you. I will therefore not expect join letters unless you feel it would be better to circulate them.

Sincerely,

*WHR/JRA*

Mr. Justice Powell  
Mr. Justice Stevens

stylistic  
changes  
SP 8/14/15

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: 21 NOV 1979

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-738

Kaiser Aetna et al., Petitioners,	} On Writ of Certiorari to the	
v.		United States Court of
United States,		Appeals for the Ninth Circuit.

[November —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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20. The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: 28 NOV 1979

Ep 9, 10, 14, 15

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-738

Kaiser Aetna et al., Petitioners,	} On Writ of Certiorari to the	
v.		United States Court of
United States.		Appeals for the Ninth Circuit.

[November —, 1979]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 6, 1979

Re: 78-738 - Kaiser Aetna v. United States

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Rehnquist

Copies to the Conference