

COMMON CAUSE HAWAII

1109 Bethel Street, Suite 419 • Honolulu, Hawaii 96813 • Ph. (808) 533-6996



September 20, 1993

Lawrence S. Okinaga
Chair
Commission on Judicial Conduct
P. O. Box 2560
Honolulu Hawaii 96804

Dear Mr. Okinaga:

We are bringing a complaint to the Commission that under the state of Hawaii Revised Code of Judicial Conduct (adopted September, 1992), justices of the supreme court, in an unofficial capacity, should not be appointing trustees of non-profit organizations in general and the Bishop Estate in particular. We believe that this appointment function compromises the independence and integrity of the Judiciary.

A Background - Bishop Estate

We have the following understanding of the background:

- 1 The relevant portion of the fourteenth article of the will of Bernice Pauahi Bishop, under which the justices act, is as follows:

"I further direct that the number of my said trustees shall be kept at five; and that the vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion"

2. From the death of Bishop until the present time, the justices of the supreme court have been performing this appointment task in a voluntary unpaid, and unofficial capacity. The public has been assured, from time to time that absolutely no resources of the judiciary are used in this selection and appointment process. We would stress "voluntary", as no individual justice or justices collectively, are obligated to carry out the wishes or instructions of the will of a private citizen, however important or prestigious that citizen may be and however worthy the charity.

3. The Estate at June 30, 1992 had, according to its audited financial statements, a net worth or equity of \$1,198,519,192. However its land, buildings and equipment are valued at \$342,515,492 which includes land valued as of January 1, 1965 as assessed by the State of Hawaii for real property tax purposes . Present valuation of this land is estimated in the range of \$6-8 billion. For the year ended June 30, 1992 each of the five trustees received \$860,652, which we understand is at least ten times the highest compensation of any trustees of a charitable trust in the United States.

4. The Estate is not only the largest private land owner in Hawaii, but also the largest charitable trust being an exempt organization under 501(C)(3) of the internal revenue code and operates one of the largest private schools in Hawaii.

5. The Estate is, in reviewing relevant court cases and clipping files, by its nature and circumstances one of the most litigious institutions in Hawaii, continually affected by existing, proposed and new laws that are in turn often contested in Hawaii's courts.

6. Besides the Bishop Estate, the only other estate that we are aware of where justices appoint trustees is the Lunalilo Estate.

B. Complaint

It is our contention that by voluntarily agreeing to perform this selection task, the justices of the supreme court are violating the following Canons of the Code of Judicial Conduct:

1. Canon 1 which states 'A Judge shall uphold the integrity and independence of the Judiciary'

An independent Judiciary should not have its justices performing a function like appointing trustees of a private organization, especially one of the largest private land owners in the state, which is often involved in litigation including the challenging of laws in the circuit courts and then often appealing those cases to the Hawaii supreme court. Judges are neither selected for, nor are they expected to be appointors of trustees for private institutions.

The appointment function is not part of a justices job description. However there could be in the background, largely unarticulated, a recognition of this unofficial function of the justices and there may be the appearance that this function is factored into the selection, appointment and confirmation process of justices. For example Sen Milton Holt is not only the chair of the Senate executive appointments committee which confirms all justices and judges but also a Bishop Estate employee.

This whole matter comes up again after ten years when a justice goes through the reappointment process. A justice's track record on the appointment of trustees could be an unarticulated criteria which is factored into the reappointment process and even into the decision whether a justice chooses to apply for reappointment.

Also we contend that this appointment function may put a particular justice, who either may not wish to participate in this selection process, or is for or against a particular candidate, in a difficult situation which may cause serious disagreement with his or her colleagues and that this disagreement could spill over into the judicial function.

A further conflict arises from the fact that besides justices deciding cases involving the Estate, a judge of the circuit court probate division appoints a master to review the Estate's annual report and then makes an order based on the master's completed report. This judge is "supervised" by the Chief Justice in his capacity as head of the Judiciary.

In the will of Bishop, it states that "the selection to be made from persons of the Protestant religion". Any person is at liberty to make a religious requirement in a will, but we contend that it is totally inappropriate for justices to participate in a process that implicitly condones what many consider an out of date and discriminatory requirement.

Although the justices do not set the maximum compensation (by law) or the actual compensation of trustees, many in Hawaii consider the compensation of the trustees, which is probably the highest in the nation, excessive by Hawaii and national standards. The justices by appointing persons to be trustees, who have rarely earned one eighth of a trustee's compensation, are implicitly condoning the payment of excessive compensation for the job itself or the person who occupies the position.

It is our contention that the appointment function of trustees does not enhance, but diminishes confidence in the Judiciary.

2. Canon 4, which states 'a Judge shall so conduct the Judges extra-judicial activities as to minimize the risk of conflict with judicial obligations.'

We contend that the task of selecting trustees is an extra-judicial activity and that it sets up a very definite and substantial risk of conflict with judicial obligations.

A justice often arrives on the supreme court, with a substantial history of possible conflicts, because of his or her previous career with private law firms and government agencies and other situations. This is inevitable. However, justices should not deliberately create new, foreseeable and substantial possibilities of conflicts with their judicial function by performing the extra-curricular activity of appointing trustees of a private organization. Recusals are not the answer. This kind of conflict should not be created in the first place.

3. Canon 5 A judge or judicial candidate shall refrain from inappropriate political activity.

The justices have, we understand, no written criteria for the selection of Bishop Estate trustees and therefore there is a perception of arbitrariness and lack of professionalism in the search process, especially compared with a search for a new president of the University of Hawaii, who is paid less than one fifth of a Bishop Estate trustee. The appointment of trustees is perceived, rightly or wrongly, as highly political, and even as the ultimate reward or plum of the current dominant political party. This perception should not in any way taint the Judiciary or the justices. It is our contention that judges should remove themselves from any situation that has even the least appearance of politics.

4. Summary

We do not pretend to have been exhaustive in our arguments that the appointment process of trustees is inappropriate for justices of the supreme court and the Commission itself might well see other violations of the canons quoted above and the other canons of the code of judicial conduct. The basic question is whether the appointment function of

trustees of a private organization is compatible with and appropriate to the role of a supreme court justice.

C. Other matters.

1. We are not clear whether justices who have participated in the appointment of one or more of the trustees of the Bishop Estate disqualify themselves from some or all cases involving the Estate and if so in what cases.

2. We do not believe that the Supreme Court decisions:

- Estate of Bishop, 23 Haw. 575, decided on February 1 1917
- Kekoa vs Supreme Court, 55 Haw. 104. decided on November 28, 1973

are relevant to the issues raised by this complaint.

3. We would emphasise that it is totally irrelevant whether or not there is a satisfactory alternative to the appointment of trustees. The only issue before the commission is whether or not the justices should be performing the appointment function of trustees, because it compromises the independence and integrity of the supreme court. Although the Bishop Estate and it's mission are extremely important to Hawaii, there is absolutely no comparison with the infinitely more important mission of the state judiciary.

4. There is a certain amount of urgency to this complaint in that the justices will be requested to appoint a Bishop Estate trustee to replace Myron Thompson who retires, we understand, February 28, 1994.

5. We do not wish the proceedings of the Commission to be kept confidential, as this complaint does not allege impropriety or disability of a justice.

6. If the Commission requires further information please call the undersigned at tel. 733-2058 or fax 733-2011 or write to P. O. Box 10447, Honolulu HI 96816 in order to expedite matters.

7. By copy of this letter, we would request justices of the supreme court not to make any further appointments of trustees until the Commission on Judicial Conduct has issued a decision.

8. Please acknowledge receipt of this complaint in writing.

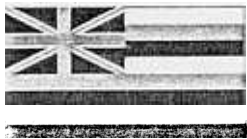
We look forward to your decision.

Yours sincerely,

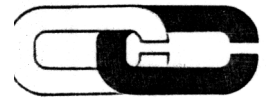
A handwritten signature in black ink, appearing to read "Des", followed by a horizontal line.A handwritten signature in black ink, appearing to read "Byrne", followed by a horizontal line.

Desmond J. Byrne
Chair

cc Chief Justice Ronald Moon and Justices of the Supreme Court of
Hawaii.



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Common Cause is a nonpartisan, non-profit citizen's lobby with approximately 1,500 members in Hawaii and 270,000 nationwide and is dedicated to open, honest and accountable government at the national, state and local levels.

Common Cause Hawaii is vitally concerned with the basic processes of state and local government. We are particularly concerned:

- that the state legislature works properly
- that government conducts its business in open meetings
- that government documents which are not covered by personal privacy considerations are made available as public documents
- that there are strong ethics laws and that they are enforced
- that campaign spending laws are sufficiently strong to avoid undue influence by special interests.
- that democratic checks and balances and government watchdogs are effective

Contacts:

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Honolulu Star-Bulletin

Political dinosaur

THE Bishop Estate, a vestige of Hawaii's monarchy and missionary period, may be thrust into the modern age because of a court ruling earlier this year and an upcoming legal challenge.

A federal appeals court in March struck down the estate's requirement that teachers at Kamehameha Schools be Protestants. A new complaint now threatens the very power structure of this historic and rich institution.

Common Cause of Hawaii filed a complaint with the state Commission on Judicial Conduct charging that having Hawaii Supreme Court justices appoint trustees for the Bishop Estate violates their code of ethics. According to the complaint, the violation occurs because of potential conflicts and inappropriate political activities. Bishop Estate trusteeships, which pay more than \$850,000 annually, are coveted positions in Hawaii politics.

State Rep. and former House Speaker Henry Peters reached that pinnacle several years ago. The most recent appointment was former Senate President Richard "Dickie" Wong. William Richardson resigned as chief justice so he could be named trustee by his former colleagues on Hawaii's highest court. Gov. John Waihee, who named all of the current Supreme Court justices, is a prime candidate for a Bishop Estate post — or it could be offered to U.S. Sen. Daniel Akaka, so a lame-duck Waihee could politely become a senator.

Whatever the scenario, any talk of high politics in Hawaii includes the Bishop Estate contingency. No other state feeds such a political dinosaur and in no other state are the governor and the Supreme Court so beholden to each other.

Supporters of having the Supreme Court continue to appoint the five trustees maintain that they perform this role as individuals, not as justices, as the will of Princess Bernice Pauahi Bishop specifies. Moreover, trustees of the estates of lesser mortals are appointed by judges of the Circuit Court.

While that's an adequate explanation of how the system came about, it doesn't justify the continued existence of this high-stakes political anachronism.

Change may come at the hands of the Commission on Judicial Conduct, or from the state Legislature. Sen. Andrew Levine hopes to reintroduce a bill removing the Supreme Court justices from the process of selecting trustees.

Wherever it happens, modification is needed. The courts have said, where modern laws demand otherwise, the will of the princess can no longer be binding. Ethical standards, like ancient reptiles, evolve. *Bishop-Estata-saurus Rex* is a creature out of time, out of place. If it violates current ethical standards, the trustee appointment process should change.

Common Cause: Justices violate ethics code

□ The group complains over the appointing of Bishop Estate trustees

Star-Bulletin staff
9/21/93

Common Cause of Hawaii has filed a complaint against the Hawaii Supreme Court justices, saying they are violating their code of ethics by appointing trustees for the influential Bishop Estate.

The complaint filed yesterday by the

community group claims the five justices are endangering the independence of the Judiciary by taking a role in the selection of trustees to the private trust created by Princess Bernice Pauahi Bishop.

The complaint was sent to the Commission on Judicial Conduct, which reviews complaints that are filed against judges.

Under the princess' will, the five justices of the Supreme Court — acting as individuals — choose people to serve as trustees. The justices are not obligated to participate in the appointments,

and no judiciary funds are expended on the selection.

But Common Cause says the perception created by the role of the justices violates the judiciary's ethics code, particularly its rules against extrajudicial activities that may create conflicts and inappropriate political activities.

Common Cause asked that a decision be made on its complaint soon because the justices are expected to appoint a replacement for Bishop Estate Trustee Myron Thompson.

Thompson retires in February.