

PUBLIC CORRUPTION

in the Land of Aloha

by Randall Roth

The Hawaii Legislature created a Commission to Improve Standards of Conduct in 2022, shortly after federal agents caught two legislators taking bribes. In its report to the 2023 Legislature, the Commission described corruption in Hawaii as glaring, embarrassing, deep-rooted and systemic, and public trust as lost. Former officials in prison or awaiting trial included not just legislators, but prosecutors, police officers, planning-and-permitting workers, a chief building inspector, environmental-management director, affordable-housing official, wastewater-maintenance supervisor, police chief, councilman, county managing director, county corporation counsel, and police commission chairperson.

All these crimes were investigated and prosecuted by federal agencies, with virtually no help from local law enforcement, local watchdog agencies, or whistleblowers from within the directly affected government offices. This suggests the added presence of a non-criminal form of corruption, often described as willful blindness or intentional ignorance. Rather than get personally involved and perhaps step on the wrong toes, people deliberately chose to go along to get along.

A tendency to go along to get along is not limited to Hawaii, but it is particularly strong and prevalent here. Reasons include the state's remote location, overlapping social networks, highly regulated business sector, disproportionate reliance on government jobs, bureaucratic governance

structures, union leaders with power to make or break an individual political campaign or business activity, and, perhaps most importantly, longtime dominance of a single political party.

Though seldom an indictable crime, conscious acts of willful blindness can violate civil or ethical duties—for example, when the willfully blind individual is serving on an official watchdog commission, board, or agency. Examples of these include the Police Commission, Board of Water Supply, Commission on Water Resource Management, Commission on Judicial Conduct, Ethics Commission, and Honolulu Authority for Rapid Transportation board, but there are many more.

The individuals appointed to such groups tend to be intelligent, impressively accomplished and widely respected, but they also tend to be establishment insiders, not known as boat rockers. The occasional exception does not last long. For example, a new appointee to the HART board was essentially removed soon after promoting increased transparency and accountability for the rail project.

Meanwhile, establishment insiders perceived as model team players sometimes find their oversight services in high demand. One of the individuals now awaiting trial for an alleged crime previously served on the Judicial Selection Commission, Board of Water Supply, Legislative Salary Commission, Honolulu Police Commission, Judiciary Salary Commission, and Honolulu Apportionment Commission.

Information like this helps explain why Hawaii's watchdog agencies, boards, and commissions have consistently missed seeing (or pretended not to have seen) public corruption now described as glaring, embarrassing, deep-rooted, and systemic. The following brutally honest look at the essential role of willful blindness in two of Hawaii's most notorious public corruption scandals is also instructive.



The older of these scandals implicated numerous lawyers, all three branches of state government, and every judicial watchdog group. The complete backstory appears in *Broken Trust: Greed, Mismanagement & Political Manipulation at America's Largest Charitable Trust*, University of Hawaii Press (2006) with electronic and audio versions now Open Access (i.e., free to users) thanks to grants from Kamehameha Schools.¹ The underlying news events were widely reported during the 1990s, not just locally, but by the New York Times, Washington Post, Wall Street Journal, CNN, National Public Radio, and hundreds of other national and international news organizations.

This article focuses on the conduct of Hawaii's Supreme Court justices, and apparent willful blindness of its judicial watchdog agencies and legal community. The justices had put themselves at the center of the Broken Trust scandal by selecting trustees of the charitable trust then known as Bishop Estate (now Kamehameha Schools), despite lacking the necessary jurisdiction. Acknowledging they could not select trustees while acting officially as justices, they claimed to be doing it unofficially, as private citizens. Nothing like this existed in any other territory or state, but it was law in Hawaii because justices, acting officially as justices, ruled it so.

One obvious problem was that justices acting unofficially can be subject to fiduciary duties of care and loyalty, and not protected by judicial immunity. Accordingly, Hawaii's justices could theoretically find themselves personally liable for harm done by trustees they selected negligently or for a purpose other than to benefit the trust.

By the mid-1990s, Bishop Estate trustees were openly ignoring mandatory provisions in the trust's governing instrument, paying themselves grossly excessive fees, improperly delegating authority among themselves, and paying millions to establishment insiders in the form of salaries, retainers, commissions, and fees for ill-defined services. As described years

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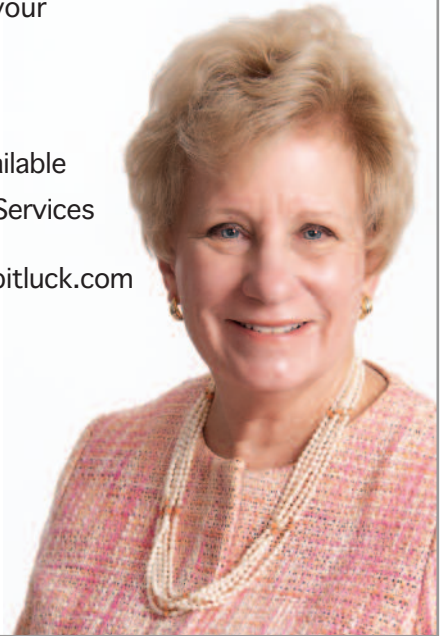
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later in a CBS News “60 Minutes” retrospective report, the justices’ handpicked trustees had turned the world’s largest charitable trust (at the time) into “a candy store for the state’s political establishment.”

The trustees appeared to be doing all this with impunity. Indeed, a 1995 Wall Street Journal front page story described the trustees as having “so much clout no one stops them.”² And, as later summarized in a book review about the *Broken Trust* book in the *Hawaii Bar Journal*, “Despite corruption, greed, lack of transparency, and serious breaches of trust by the powerful, arrogant, and often abusive trustees, no attorney general, court-appointed master, probate judge, justice of the supreme court, or trust counsel did anything about the abuse and culture of fear perpetuated by the trustees.”³

Indeed, no government official, community leader, or group of lawyers publicly addressed the apparent impropriety of the five justices selecting trustees while acting unofficially as private citizens, much less that their selection decisions appeared incompetent at best, self-serving at worst: To be appointed to the Supreme Court a person’s name first had to appear on a short list created by the Judicial Selection Commission; seven of the Commission’s nine members had been chosen by a Senate President, Chief Justice, Speaker of the House, or Governor; and Bishop Estate trustees in the 1990s included a former Senate President, Chief Justice, Speaker of the House, and Governor’s confidant who also chaired the Judicial Selection Commission.

On August 9, 1997, the *Honolulu Star-Bulletin* published a critique of Bishop Estate trustees and the justices who selected them, under the headline “Broken Trust.”⁴ Its authors provided specific examples of trustee misconduct and placed much of the blame at the feet of the justices. For example: “Acknowledging the obvious impropriety of making trustee selections in their official capacity, the justices tell us they are acting as individual citizens when they select Bishop Estate trustees. . . . The reality is that Bishop Estate trustees are selected by five individuals who through no coincidence are also justices of the state Supreme Court. A further reality is that these same five individuals are virtually certain to be called upon to decide cases involving the trustees they select. The estate has been before the Supreme Court at least 18 times in the last 13 years. Some people wonder why the justices would stretch logic and judicial ethics to the breaking point just to do something they clearly don’t have to do, and then do it poorly.”

One week later, the *Honolulu Advertiser* published the justices’ long response, in which they described the Broken Trust essay as “factually inaccurate, distorted, and irresponsible,” and claimed it had “impliedly impugned the integrity, honesty, ethics, intelligence, qualifications, competence and professionalism not only of the five members of the Hawaii Supreme Court as individuals, but also of the court as an institution.”⁵

Days after that, the Governor instructed the Attorney General to investigate the Broken Trust authors’ accusations, including

those regarding the justices’ role in trustee selection. The justices agreed to be interviewed only in each other’s presence. Informed the Attorney General was prepared to subpoena them individually, if necessary, to hear their individual responses to her questions, one of the justices responded that although he and the others had acted unofficially when selecting trustees, they were still justices; no one could force justices to cooperate in an attorney general’s investigation; the integrity of the judiciary was at stake; and case law said so, according to this justice. As described by the Attorney General years later, the justices’ position seemed to be, “We’ll just see whether your subpoena power goes so far. If we’re the ones to decide it (which we probably will be), we don’t think so.” The Attorney General filed a motion to disqualify, which the justices sat on for months. Eventually they stepped aside, citing “overheated circumstances” without mentioning their *ex parte* discussion of the issue to be decided, or their refusal to cooperate with the state’s top law enforcement official’s investigation of a matter in which they claimed to have participated as private citizens.

Meanwhile, the trustees were spending millions in trust funds resisting five on-going investigations. Four courtrooms stayed busy with a flurry of motions and cross-motions, but judges appeared reluctant to remove the trustees, even temporarily. By comparison, a federal agency, the Internal Revenue Service (“IRS”), quickly concluded that these trustees had violated every condition of tax-exempt status and were putting their personal interests ahead of their fiduciary duties. To the IRS, it made little sense to communicate with seriously conflicted trustees.

Although the IRS saw a need to replace the trustees, it lacked the power to do so itself. Nor could it simply order a local court to do so. It accomplished this outcome indirectly, however, by getting word to the probate court that it stood ready to revoke the charity’s tax exemption retroactively—a move that immediately would cost Bishop Estate nearly one billion dollars—if that court did not replace all five trustees. The trustees and their lawyers called this extortion, and they had a point. The IRS’s position was unprecedented and remarkably heavy-handed. But with the tax exemption of Princess Pauahi’s charitable trust at stake and the public watching closely, the probate judge had no real choice but to remove the trustees.

The ousted trustees started the process of suing their former lawyers, on whose advice they would claim to have relied, and justices and other government officials might be implicated. Such possibilities ended suddenly, however, when the probate court approved a global settlement that essentially wiped everyone’s slate clean. The public supposedly wanted closure and healing.

Experts outside Hawaii saw this as a dodge and harshly criticized not just the trustees, but the justices who had selected them and the lawyers who saw but said nothing about the impropriety of justices picking trustees, much less incompetent ones. For example, The American College of Trust and Estate Counsel Law



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Journal criticized “political backscratching in the Hawaii Supreme Court’s appointment of trustees.”⁶ The International Civil Society Law Journal marveled at the justices’ conflicts of interest and failure to exercise due care when selecting trustees.⁷ Trusts and Estates Review expressed amazement that a rigged selection system could continue for many years: “Unfortunately and almost unbelievably (especially for any member of the legal profession), ... the [justices] virtually never made an objective, considered selection.”⁸

In sharp contrast, Hawaii’s judicial oversight groups neither said nor did anything remotely critical of the justices. Hawaii’s Commission on Judicial Conduct, which is supposed to investigate indications of serious judicial misconduct, did nothing and never explained why. This was not as surprising as it might sound to the uninitiated. All seven members of that Commission had been appointed by the justices.

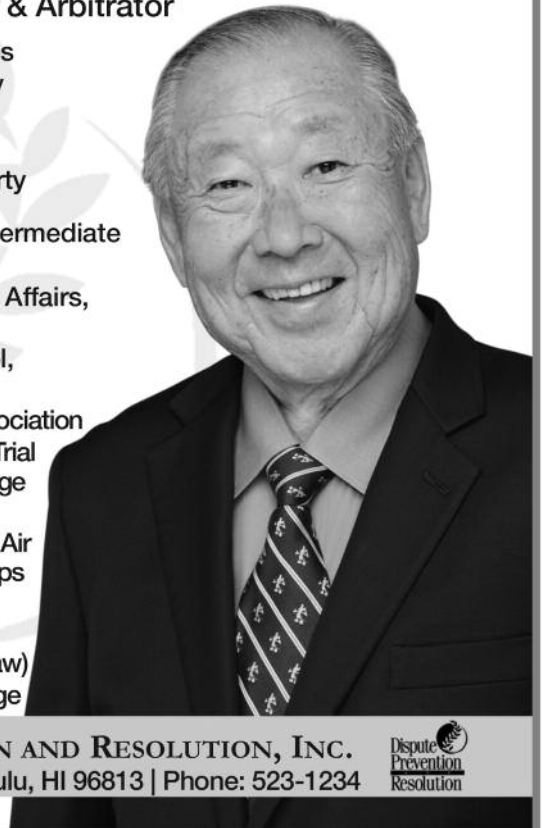
Another group, the Judicial Selection Commission, is supposed to investigate credible allegations of judicial misconduct when it performs ten-year retention reviews. To make sure that happened when the first of the Broken Trust justices came up for review, three Broken Trust authors sought an opportunity to testify. Informed that only written testimony would be considered, the three prepared a ten-page, single-spaced, footnoted document detailing how the justices had damaged the public’s trust in the justice system. As instructed, the authors submitted ten copies—one for each Commission member and one for the commission’s staff member. Eventually the Commission announced that its members had voted to give this justice another ten-year term. Later, when one of the Broken Trust authors mentioned to a Commission member the authors’ disappointment with that decision, the Commission member said it had been a particularly difficult decision and the outcome had been decided by a single vote. When the Broken Trust author responded that he did not see how any intelligent,

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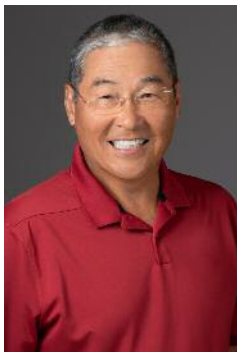
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well-intentioned person could read the Broken Trust authors' testimony and vote to give that justice another 10 years, the Commission member claimed not to have been told about or given a copy of that testimony.

Four years later, when the local chapter of the American Judicature Society formed a Committee on Judicial Independence and Accountability, one of the Broken Trust authors appeared before the assembled committee, and began his presentation by noting, "Something is wrong with the system of judicial independence and accountability when serious questions can be raised about the conduct of a state's entire Supreme Court without an official body either coming to the defense of those justices or taking steps to hold those justices accountable. Given the seriousness and specificity of the allegations in the Broken Trust essay and book, one would expect some kind of response. Thus far, the silence has been deafening."

He then answered their questions and suggested questions for them to ask the justices, such as this one: "Critics have suggested the Commission on Judicial Conduct's failure to investigate the many allegations of misconduct by the justices was connected to the fact all seven of the Commission's members had been appointed by the justices. If you do not agree with that suggestion, please explain why you think your appointees chose not to investigate any of the many allegations of misconduct."

The Committee on Judicial Independence and Accountability subsequently met with the chief justice, ostensibly to ask him questions like that, but the chief justice flatly refused to respond to questions related to the Broken Trust authors' allegations. Because that was many years ago, it would not be productive to comment now, he explained. As for the Commission on Judicial Conduct, they do a good job, according to the chief justice.

When the Committee on Judicial Independence and Accountability issued a report several years later, it included the

following comments about the Broken Trust essay but said nothing about the chief justice's refusal to address any of the Broken Trust authors' allegations: "The Hawaii Supreme Court's (discontinued) involvement in the appointment of Bishop Estate trustees was the genesis of considerable criticism in the wake of the Broken Trust essay, which was published by the Star Bulletin in 1997, and the subject of further public debate after the Broken Trust book was published in 2006. . . . The sub rosa contentions in the Broken Trust discussion, that the Supreme Court's trustee appointments were essentially political payoffs, rather than based on merit, and that the settlement of the legal actions involving the former trustees was improperly permitted by the judiciary, may have cast lingering shadows on the public's view of the judiciary. . . . This Committee is not qualified or inclined to pass judgment on anyone's conduct in the matter. The Committee does not find, however, that the system is inherently flawed."⁹

In sum, there was minimal accountability for trustees who enriched themselves and others at the expense of charitable-trust beneficiaries; no accountability for the succession of attorneys general, probate judges, court-appointed masters, and watchdog commission members who for years failed to see problems that were obvious; and no accountability for justices whose hand-picked trustees turned the state's largest and most historically and culturally significant trust into a candy store for the state's political establishment.

The absence of accountability in the Broken Trust era set the stage for future corruption scandals, including the one described in *The Mailbox Conspiracy: The Inside Story of the Greatest Corruption Case in Hawaii History* (Watermark Press 2021), a book written by former federal public defender Alexander Silvert. Its core story began with efforts by Honolulu Police Chief Louis Kealoha, and his Deputy Prosecutor spouse,

Katherine Kealoha, to frame Katherine's uncle for crimes he never committed, which was related to Katherine's attempts to defraud various family members, including that uncle. Because family dysfunction was at the core of the *Mailbox Conspiracy* story, casual observers might mistakenly assume this scandal says little about systemic criminal and non-criminal corruption in Hawaii.

Federal District Court Judge Michael Seabright did not make that mistake, as evidenced by his remarks when sentencing the Kealohas. After describing their conspiracy as "staggering in its breadth, its scope, and its audacity," Seabright suggested anyone who cares about Hawaii should be asking, "How was it this went on so long undetected?"¹⁰

Indeed, it seems unlikely that a police chief, deputy prosecutor, and other law-enforcement officers could frame a totally innocent man—and destroy extensive physical evidence of their crime—without others in the police department or prosecutors' office suspecting something was amiss. These offices are filled with professionals trained and experienced in spotting wrongdoing, and the wrongdoing in this case had been staggering in its breach, scope, and audacity. Yet there were exactly zero whistleblowers from these offices.

At times there appeared to be more than willful blindness at work. According to Silvert, various personnel within the police department resisted turning over exculpatory evidence and then improperly redacted records they turned over. But at least they eventually responded. By comparison, the Prosecutor, the city's chief law enforcement officer who was specifically empowered to uphold the law and, as an attorney, ethically required to do so, flatly refused to cooperate in any way with the federal investigation.

Various watchdog agencies also fell spectacularly short. The Honolulu Ethics Commission was one of them, according to its former Executive Di-



rector, Chuck Totto. He started investigating the Kealohas in 2014, which was before any federal investigation, but Totto's investigation ended abruptly in 2015 when he resigned under pressure and funding needed to continue the investigation was terminated. Years later, when the Commission's chairperson publicly defended the Commission's actions and described Totto's resignation as voluntary, he responded, "The ethics commission did not carry out its duty to the public to properly investigate the Kealohas. We've heard some reasons as to why that was, but I don't buy those reasons."¹¹

Another example of a possibly ineffective watchdog agency: When Chief Kealoha intentionally caused a mistrial, apparently to avoid public revelation of the criminal conspiracy, the Police Commission chairman told reporters, "I think the chief has acknowledged that he's made a mistake, he's apologized, he deeply regrets it, and we need to move on."¹² Years later, a different chairman acknowledged that the police department was still under a dark cloud because of the ongoing federal investigation, but said the police department needed to "move on."¹³ In 2020, the newly appointed Commission Chairperson said the commission needed more aloha, and added, "I don't want to dwell on the past."¹⁴ Immediately following the Kealohas' conviction in federal court, the mayor who had appointed every member of the Police Commission told reporters, it's time for the Police Department, the City, and the public to "move on."¹⁵

The framed uncle in *The Mailbox Conspiracy* had submitted a detailed complaint to the Office of Disciplinary Counsel, but, as best he could tell, that agency did not investigate his specific allegations. He first heard from that office years later after Katherine had been convicted of serious crimes and voluntarily relinquished her law license. It is not as though Katherine's corrupt behavior had been subtle. In addition to stealing from her grandmother and uncle, she had defrauded banks, stolen the life savings of orphans, talked those orphans into lying to the grand jury, created a fictitious notary, and misused her position of deputy prosecutor to protect her brother and others from criminal prosecutions. As described in court, she had been "a walking crime spree."

As Silvert has pointed out, when a bridge collapses the affected community tries to understand why. People do not simply "move on." Public trust in our government has collapsed, largely because of public corruption detailed in *Broken Trust* and *Mailbox Conspiracy*, yet oversight groups that may have engaged in willful blindness, or chosen not to seek accountability for clearcut wrongdoing, apparently expect simply to "move on."

Willful blindness is particularly troubling when done by someone with a special responsibility for the quality of justice. According to the Hawaii Rules of Professional Conduct, that includes every lawyer. If lawyers find excuses not to point out apparent corruption, or fail to call for accountability when members of official watchdogs appear to engage in willful blindness, who is left to do so?

The *Broken Trust* and *Mailbox Conspiracy* scandals are now history, but valuable lessons remain unlearned. The learning process will require more public discussion than just this article, and such discussion, if candid, will make many establishment insiders uncomfortable. But if enough lawyers express themselves candidly and forcefully, meaningful change is possible. Otherwise, history will repeat itself in one form or another, and public corruption will continue to be glaring, embarrassing, deep-rooted, and systemic in the land of aloha.

¹ Available at randallroth.com/brokentrustbook.

² Alix M. Freedman and Laurie P. Cohen, *Bishop's Gambit: Hawaiians Who Own Goldman Sachs Stake Play Clever Tax Game*, WALL ST. J., April 25, 1955, at A1.

³ David C. Farmer, *Book Review: Broken Trust: Greed, Mismanagement, and Political Manipulation at America's Largest Charitable Trust*, HAW. BAR J., July 2006, p. 85.

⁴ "Broken Trust," HONOLULU STAR-BULLETIN, p. B1, Aug. 9, 1997.

⁵ "The justices respond," HONOLULU ADVERTISER, p. B5, Aug. 17, 1997.

⁶ Ronald D. Aucutt, *Book Review: Broken Trust*, AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL JOURNAL, Summer 2007, p.1.

⁷ Leon Irish, *Book Review*, INTERNATIONAL SOCIETY OF CIVIL SOCIETY LAW JOURNAL, Vol. V, Issue III, July 2007, p. 75.

⁸ Alexander A. Bove, *Scandal in Paradise*, Trusts & Estates, July 2006, p. 60.

⁹ The entire report is available on the American Judicature Society website under "Publications." See, <https://americanjudicaturesociety.org/wp-content/uploads/2021/08/9-Report-of-the-Special-Committee-on-Judicial-Independence-and-Accountability-2008.pdf>. The section addressing Broken Trust appears on pp. 11-12.

¹⁰ "Judge Seabright: Corruption was allowed to flourish" in Kealoha case, KHON2 News, Nov. 30, 2020, available at <https://www.khon2.com/local-news/judge-corruption-was-allowed-to-flourish/>.

¹¹ Nick Grube, *Defiant Ethics Commission Defends Decisions On Kealohas*, HONOLULU CIVIL BEAT, July 17, 2019, available at <https://www.civilbeat.org/2019/07/defiant-ethics-commission-defends-decisions-on-kealohas>.

¹² Ronald Taketa as quoted in *HPD chief appears before Police Commission*, Hawaii News Now, Dec. 18, 2014, available at <https://www.hawaiinewsnow.com/story/27657456/hpd-chief-appears-before-police-commission/>.

¹³ Max Sword, as quoted in an article by Christina Jedra, *Indictment Puts Spotlight On One Of The Most Connected Men In Honolulu*, HONOLULU CIVIL BEAT, Feb. 8, 2022, available at <https://www.civilbeat.org/2022/02/indictment-puts-spotlight-on-one-of-the-most-connected-men-in-honolulu/>.

¹⁴ Shannon Alivado, as quoted in an article by Yoohyun Jung, *Sheehan Out As Honolulu Police Commission Chair*, HONOLULU CIVIL BEAT, Jan. 10, 2020, available at <https://www.civilbeat.org/2020/01/sheehan-out-as-honolulu-police-commission-chair/>.

¹⁵ Kirk Caldwell, as quoted in an article by Gordon Y.K. Pang, *Honolulu Mayor Kirk Caldwell defends his 'move on' comments following Kealoha verdicts*, HONOLULU STAR-ADVERTISER, June 29, 2019.

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