

Broken Trust: Greed, Mismanagement & Political Manipulation at America's Largest Charitable Trust

OVERVIEW

Bishop Estate trustees of the 1990s controlled a multi-billion organization and enjoyed close connections to key government officials. As described by the Wall Street Journal in 1995, they had “near-Olympian status in Hawaii,” and “so much clout no one stops them.”

They claimed stellar investment results but ignored a provision in the governing trust document instructing them to publish a full accounting each year. A court-appointed master said trying to get financial information from them was like trying to investigate the CIA.

Although financial details were scarce, there was no denying that Bishop Estate was huge. The New York Times described it as “a feudal empire so vast that it could never be assembled in the modern world,” and the Wall Street Journal called Bishop Estate, “the nation’s wealthiest charity, [with] an endowment greater than Harvard's and Yale's combined.”

Bishop Estate had begun as the probate estate of Princess Bernice Pauahi Bishop, the last of the Kamehameha line. When she died in 1884, the Princess devised the bulk of her wealth to five trustees with instructions to build and maintain two schools, “one for boys and one for girls ... to be known as and called the Kamehameha Schools.” Trustee vacancies were to be filled by vote of the justices of the Kingdom’s Supreme Court, who could do so officially because they had primary jurisdiction over trust matters in those days. Jurisdiction over such matters shifted to the probate judge when Hawaii became a Territory of the United States, but Supreme Court justices at that time decided that they and their successors justices could continue to select Bishop Estate trustees, though only while acting unofficially.

This unprecedented arrangement created conflicts of interest every time a case involving Bishop Estate reached the Supreme Court. Worse yet, by the 1980s and 1990s the justices’ self-appointed power to select Bishop Estate trustees appeared linked to judicial appointments, particularly to the Supreme Court. For example, (1) in order to become a Supreme Court justice in Hawaii a person had to be approved by the Judicial Selection Commission, (2) appointees to the Judicial Selection Commission were personally selected by the chief justice, house speaker, senate president, and governor, and (3) Bishop Estate trustees during the 1990s included a chief justice, house speaker, senate president, and governor’s confidant who also chaired the Judicial Selection Commission.

Local media mostly ignored rumors of mutual backscratching, even when the Wall Street Journal reported that Bishop Estate trustees had pressured Goldman Sachs to steer legal work to the person who while governor had appointed all five of Hawaii’s sitting Supreme Court justices. Because this and other examples of influence-peddling involved so many current and

former officials in all three branches of Hawaii's state government, the Journal described Bishop Estate as "kind of a deluxe rest home for current and former public servants."

Perhaps because Bishop Estate was so intertwined with the state's judicial, legislative, and executive branches of government, the people whose job it is to police charitable trusts— the probate judge and state attorney general—never seemed to find time to scrutinize Bishop Estate trustees ... even as the trustees were paying themselves millions annually and additional millions to other politically powerful individuals for "consulting fees" without indicating how these fees benefited the charitable trust.

There were rumors—later confirmed—that the trustees had also been enjoying numerous off-the-books perquisites, such as private-jet trips to the Super Bowl and the Olympics. Some of these raised shocking conflicts of interest, such as (1) trustees accepting free membership at an exclusive golf course located on Bishop Estate land while renegotiating the terms of the club's lease; (2) the trustee in charge of negotiating the sale of Bishop Estate land under the prestigious Robert Trent Jones golf course near Washington D.C. "recusing" himself from that duty just long enough to negotiate on behalf of the buyers; and (3) trustees investing their own money along with trust funds in a risky oil exploration venture and then inserting an additional \$80 million of Bishop Estate funds (but none of their own) when the deal started to go bad.

While the trustees and their associates focused on their personal interests, Kamehameha Schools was rejecting 11 of every 12 new applicants—all native Hawaiians.

The trustees' negative impact on Hawaiian children troubled one of the trustees so much he asked the attorney general and court-appointed master to investigate what he described as a rigged trustee-selection process and ongoing corruption by not just the other four trustees but several of the sitting Supreme Court justices. When the attorney general and court master declined to act, this same trustee decided to sue the other trustees and several of the justices. He quickly changed his mind, however, when his attorney told him a lawsuit against the other trustees would cost him at least \$2 million and was unlikely to prevail in any Hawaii court because of judicial involvement in the corruption.

That trustee then encouraged a group of Kamehameha Schools students, teachers, and alumni to sue the trustees, and the group agreed to do so, but they had a hard time finding a lawyer willing to take on the seemingly all-powerful trustees. The group eventually found such a brave soul, but a Hawaii court quickly tossed out the lawsuit. According to the court, such a lawsuit must be brought by Hawaii's attorney general. That was the general rule in Hawaii and elsewhere, but Hawaii's Supreme Court had previously allowed an intended class of beneficiaries to sue a charity's trustees when the state attorney general declined to pursue the matter. The court that tossed out the lawsuit against the Bishop Estate trustees did explain why that precedent did not apply to Bishop Estate trustees.

Things started to change on August 9, 1997 when the Honolulu Star-Bulletin published a 6,400-word, scathing criticism of Bishop Estate trustees and the justices who had selected them,

under the headline “Broken Trust.” According to the essay’s five co-authors, “underqualified and overpaid trustees had engaged in loose and self-serving financial management, and distinguished themselves mostly by conflicts of interest, disdain for accountability, greed, and arrogance.” The co-authors gave specific examples, and placed much of the blame on the justices who had selected those trustees:

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. This is a distinction without meaning. To be blunt, it's a dodge.

The reality is that Bishop Estate trustees are selected by five individuals who through no coincidence are also justices of the state Supreme Court. The 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.

Can we be blamed for questioning the justices' collective judgment in other areas? After all, if the justices exercise questionable judgment in their individual capacity when selecting trustees, why shouldn't we expect equally questionable decisions in their official capacity? Worse, if selection of trustees is influenced by politics (as we believe it is), why shouldn't the public assume judicial decisions are equally political?

The Princess intended a sacred trust, not a political plum.

Eight days after the Honolulu Star-Bulletin published the Broken Trust essay, the Honolulu Advertiser published an unusually long analysis and editorial, both sharply critical of the essay’s co-authors, plus long responses from several Bishop Estate trustees and all five sitting Supreme Court justices.

The trustees denied any wrongdoing and questioned the co-authors’ motives, calling their allegations “baseless and unprovable charges ... mud thrown from the gutter.”

The justices’ response was even more sharply worded. According to them, the Broken Trust essay was “a factually inaccurate, distorted, irresponsible opinion piece, that had expressly and 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. Any statement of purported fact, innuendo or suggestion that they were otherwise motivated was unfounded, reckless speculation on the part of the self-sanctified coauthors of Broken Trust, whose motivations should be seriously questioned.”

Because three of the Broken Trust co-authors were lawyers, the justices might have been thinking about referring the matter to the Office of Disciplinary Counsel. Rule 8.2 of the Hawaii Rules of Professional Conduct says lawyers “shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.”

The justices never got around to lodging a complaint. Within a week of their angry and indignant response in the Advertiser, the first of what would soon be five separate investigations had begun, and this one was to include not just Bishop Estate trustees but Supreme Court justices as well.

The justices evidently did not like that their interactions with Bishop Estate trustees were about to be placed under a microscope. Consider, for example, their reaction to the Attorney General’s declared intention to interview them one at a time:

[The justices] said they would agree to be interviewed only as a group. Otherwise, said the justices, lawyers from the attorney general’s office might try to “trick us” into telling different stories.

[The AG] said she was prepared to subpoena the justices, if necessary, to hear their individual accounts. [One of the justices] took particular offense at this. He argued ardently that although the justices had acted unofficially in selecting trustees, they were still justices; it would not be proper to force them to cooperate in an investigation; the integrity of the judiciary was at stake—case law said so. By the time he finished, he had gone red in the face.

According to [the AG], the justices’ message to her was clear: “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.”

After weighing all the pros and cons, including the possible impact this fight would have on other important cases her office had pending before the Supreme Court, [the AG] decided not to subpoena the justices. The justices had won the standoff. It left them above the fray, which was where they wanted to be. But in the process of getting their way, the justices had engaged in a private, *ex parte* (without the other side present) discussion with the attorney general about her subpoena power in the Bishop Estate investigation. Judicial ethics are very clear in this situation: any justice who participates in such an *ex parte* discussion has no choice but to step aside and let substitute justices decide cases related to that issue. But these five Supreme Court justices appeared to have every intention of continuing to preside over Bishop Estate cases, including the many appeals that were already stacking up from [the AG’s] investigation. [The AG] described the situation delicately, from her point of view:

I thought perhaps they would realize that they didn't want to rule on something related to a discussion they had already had with one of the participants, so I wrote them a letter suggesting that they might want to recuse themselves from hearing that particular issue. They answered, "You want us to recuse ourselves, you make a motion." They probably thought I'd wise up and go away, but I did make that motion. They sat on it for a couple of months, and finally they sent it off to the judicial conduct commission with a suggestion that the "appearance of impropriety" justified or necessitated recusal. The commission agreed; but nobody seemed to mention the fact that these conversations had occurred.

Sure enough, when the justices announced that they would not personally decide cases arising out of the Bishop Estate investigation, they said nothing about the *ex parte* communication that had forced them to step aside. Instead, they cited "overheated circumstances." The justices also said nothing about their refusal to cooperate with the state's top law enforcement officer in an official investigation of a matter in which they had participated—as they had earlier insisted, over and over, they had done—as private citizens.

The justices also withdrew from any future involvement in selecting Bishop Estate trustees. They did so in a statement nearly opposite to the defiant one they had issued immediately after publication of the Broken Trust essay. But now, only a few months later, the justices were acknowledging that their continued involvement in trustee selection would "promote a climate of distrust and cynicism ... and undermine the trust that people must have in the judiciary."

By comparison, the trustees fought much longer and harder to maintain the status quo. Refusing to give an inch on any front, they used trust funds to pay themselves large raises and millions more to lawyers who pushed back hard against all five of the on-going investigations. Trustees and lawyers were refusing to cooperate with anything unless forced to do so by Supreme Court decision:

The Attorney General marveled at how they acted as if Bishop Estate's very existence depended on the maintenance of absolute secrecy. The trust's chief in-house lawyer unwittingly and hilariously embodied this mentality when he showed up in court one day with the minutes of completely routine board meetings in a briefcase that he had handcuffed to his wrist.

Most of the lawyering was later determined to have been focused on protecting the interests of individual trustees, rather than the trust's intended beneficiaries. Some of the legal expenditures were jaw-dropping, such as a \$300,000 fee paid to the firm of a former governor for help in attempting to relocate the trust's administrative situs to a Sioux tribal reservation in South Dakota.

The investigations also revealed exceptionally poor investment performance and an almost unbelievably large number of serious breaches of trust, but the probate judge kept finding reasons not to issue a final ruling. Things only started to move when the Internal Revenue Service announced that it stood ready to revoke the charity's tax exemption retroactively—a move that would cost Bishop Estate nearly one billion dollars immediately with untold additional costs down the road. Echoing the Broken Trust Essay, the IRS said the trustees had apparently violated every condition of tax exempt status: *private inurement* (by paying themselves excessive compensation and inappropriate side benefits); *private benefit* (by overpaying friends, relatives, and political cronies); *commerciality* (by overemphasizing the trust's business operations); *failure to pursue the charitable mission* (by spending an inappropriately small portion of the trust's resources on Kamehameha Schools each year—less than 1% of trust value); *involvement in political campaigns* (by paying campaign debts of favored candidates); and *excessive and improper lobbying activities* (by spending millions to prevent legislation that would limit trustee compensation to reasonable amounts).

The IRS said it would allow the charity to keep its tax exemption only if the probate judge removed all five trustees immediately. The trustees called this extortion, and it clearly was both unprecedented and heavy-handed, but with the trust's tax exemption in the balance and the public watching closely, the probate judge had no viable option other than to remove the trustees.

Given the number of lawyers involved and the trustees' strategy of never giving an inch, it was hardly a surprise that the legal process had slowed to a crawl. Four different courtrooms were being kept busy dealing with motions and cross-motions, and the assigned judges appeared reluctant to render final decisions. One of the trustees, who happened to be a lawyer, sought a postponement in an action seeking his temporary removal as a trustee. By refusing to step aside temporarily as a trustee, he was effectively arguing that he was perfectly capable of protecting the interests of the trust's intended beneficiaries. Yet his argument for seeking a postponement of his temporary removal trial was that he needed time to recover from a suicide attempt. By granting a postponement, the court seemed to suggest this trustee was currently able to protect others' interests, but not his own. Several of the other trustees also sought postponements of their temporary removal trials. They wanted their removal trials put on hold until criminal indictments against them could be resolved.

In short, a great deal of lawyering and trust money went into preventing a court decision just on the Attorney General's motion for *temporary* removal—that is, removal until those trustees could be vindicated or removed permanently, which at the current pace was projected to take many years.

The trustees and their lawyers also tried to slow the IRS but failed on that front, to the surprise of many. Normally the IRS would discuss audit findings with the trustees of the audited trust, but this time was different. The IRS viewed the level of abuse at Bishop Estate as unprecedented and doubted that Hawaii's judiciary would clean things up on its own.

The IRS pointed out that the trustees had ongoing irreconcilable conflicts of interest and were obviously putting their own interests ahead of their fiduciary duties to others ... that these trustees simply could not be trusted to adhere to any agreement that might be reached. Regarding the latter, the IRS wrote that Bishop Estate trustees had “a history of ignoring probate court orders, master report recommendations, probate court stipulations, and the advice of independent experts.”

With the tax exemption of Princess Pauahi’s educational trust now in the balance and the public watching closely, the probate judge really had no real choice other than to do what the IRS demanded. The initial removal was temporary, but by then it was clear that permanent removal was inevitable. Plus, the trustees would now (finally) be paying their own legal expenses.

Within months all five trustees had resigned and several had started the process of suing their former lawyers, on whose advice they claimed to have relied. Some observers speculated that the justices and other government officials would be implicated in the lawsuits. But such speculation came to a sudden halt when the probate judge announced a confidential settlement that had just ended any such lawsuits before they could even be filed. The settlement agreement and key documents were sealed. The stated reason for this near-total lack of transparency was the public’s desire for closure and healing.

There also next-to-no accountability in Hawaii: (1) The Attorney General who had initiated the investigation of Bishop Estate trustees was essentially voted out of office by the now-ousted trustees’ friends in the state legislature; (2) Substitute justices handpicked by the chief justice cited a technicality as reason enough to permanently reject criminal indictments that had been pending against two of the now-ousted trustees; (3) A third now-ousted never had to address legal questions related to the suicide of his attorney.

There was some accountability, but only because of federal agencies and federal courts: (1) One of the ousted trustees was eventually convicted of a federal crime and sentenced to federal prison (but for something totally unrelated to Bishop Estate or her trusteeship); (2) Two legislators with close connections to Bishop Estate were also convicted of crimes and sentenced to federal prisons (but that, too, was for misconduct unrelated to Bishop Estate); (3) The Internal Revenue Service sued all five trustees individually for tens of millions in penalties (but eventually settled for shockingly small amounts of money).

Despite the near absence of meaningful accountability, there was reason for hope: The IRS successfully demanded that the replacement trustees agree to wide-ranging reforms, including a rule against employing, reimbursing, or otherwise compensating any member of the legislative, judicial, or executive branch of government, and a rule that excluded all politicians from the trustee-selection process. The IRS had never taken such extreme actions against the trustees of a charitable trust; nor had it demanded that a charitable trust be completely de-politicized.

Postscript on judicial accountability in Hawaii:

When a state judge's term in office is about to end in Hawaii, the Judicial Selection Commission decides whether to grant another term. The first retention decision for a justice following the Bishop Estate controversy occurred in early 2002. Broken Trust co-authors, believing that the justices had impaired public confidence by turning the appointment of trustees into a political patronage system, asked to testify against the granting of another term. They were not alone in this belief. For example, the *Honolulu Star-Bulletin* editorialized, "trustee selections made by the justices have been lamentable because political motivation was evident," and the *Honolulu Advertiser* described the justices' control over the selection of Bishop Estate trustees as part of a long-time political plan to control "all the state's key institutions."

The Broken Trust co-authors' request to provide oral testimony was denied, but they were invited to submit their thoughts in writing, and they did so in a ten-page, single-spaced memo detailing the many ways in which the justices' actions had weakened the public's trust in the justice system. They provided nine copies to the Commission's office, as instructed, and then waited. The Commission eventually announced that the justice in question had been given another ten-year term.

Months later, one of the Broken Trust co-authors found himself seated next to a member of the Judicial Selection Commission and commented that the co-authors had been greatly disappointed with the Commission's decision to give that justice another ten years. The Commission member responded that it had been a very difficult decision and that the outcome had been decided by a single vote.

The co-author responded, "If you think you're going to make me feel better by telling me that the vote was close, you just don't get it. I don't see how any intelligent, well-intentioned person could read our memo and vote to give that justice another 10 years." The Commission member looked surprised and said, "What memo?" "You know, the memo that the Broken Trust authors submitted," responded the co-author. The Commission member's eyes widened as he said, "I never saw that; nobody ever said anything about a memo like that."

So much for accountability from the Judicial Selection Commission.

Fortunately, there are other organizations in Hawaii with missions that include judicial accountability, including the Judicial Conduct Commission (an appointed, governmental body that is supposed to take action when a judge in Hawaii acts unethically), American Judicature Society (a nongovernmental organization whose mission includes building public confidence in the system of justice) and Hawaii State Bar Association (the state's licensed lawyers). But for whatever reason, none of these watchdog organizations said or did anything about the many allegations of judicial misconduct despite much prodding. For example, when the American Judicature Society formed a committee on judicial accountability, one of the Broken Trust co-authors appeared before them and said:

Something is wrong with the system of judicial 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.

When this group subsequently asked one of the justices about allegations made in the Broken Trust book, he said the justices would not be responding to questions about the allegations in that book. Nobody on the committee objected, and nothing of this was reported to the public.

The Judicial Conduct Commission and Hawaii State Bar Association also chose not to investigate any of the alleged wrongdoing.

Questions asked at the Hawaii State Bar Association's 2019 leadership institute:

1. Did it strike you as odd that there could be what IRS officials, mainland law professors, and Roth have called "a world record for beaches of fiduciary duty," with so little consequences to the wrongdoers? Was that predictable? If so, why?

2. Did you notice that the authors of the Broken Trust essay criticized the Hawaii Supreme Court Justices at least as harshly as they did the Bishop Estate Trustees?

3. Did you notice the following statement Roth made to members of the American Judicature Society's Committee on Judicial Independence and Accountability, after Judge Walter Heen, Judge Sam King, and Roth publicly raised serious questions of misconduct by the state's entire Supreme Court:

"Something is wrong with the system of judicial 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."

4. Did it strike you as odd that the Judicial Conduct Commission and State Bar Association remained silent despite compelling evidence of misconduct by Supreme Court justices; or that the Broken Trust authors' written testimony was apparently never distributed to members of the Judicial Selection Commission?

5. Do you think it would be easy for any lawyer in an island community like Hawaii, even those who sincerely aspire to be genuine leaders, to speak critically about the conduct of powerful people associated with a dominant political party, regardless of which party that might be?

Broken Trust book available now Open Access:

Thanks to a grant from Kamehameha Schools, the public now has free access to the bestselling book *Broken Trust: Greed, Mismanagement & Political Manipulation at America's Largest Charitable Trust*. *Broken Trust* chronicles scandal at Kamehameha Schools/Bishop Estate during the late 1990s, which involved all three branches of Hawaii's government and attracted front-page coverage in the New York Times and Wall Street Journal. CBS's 60 Minutes called it, "the biggest story in Hawaii since Pearl Harbor." Local and national publications praised *Broken Trust*; Hawaii Book Publishers Association named it Book of the Year; and numerous high schools, colleges, and law schools have made *Broken Trust* required reading. The book's surviving co-author, Randall Roth, explains in the open-access introduction that he and Judge Samuel P. King wrote *Broken Trust* to help protect the legacy of Princess Bernice Pauahi Bishop. They assigned all royalties to local charities and donated thousands of copies to libraries and high schools. Source documents, legal issues, discussion questions, and lesson plans are available at www.BrokenTrustBook.com. In *Broken Trust*'s open-access introduction, the Kamehameha Schools trustees express a desire to recognize and honor members of the Kamehameha Schools *ohana* who courageously stood up for the trust during the years of controversy. They also express pleasure that *Broken Trust* will be "openly available to students, today and in the future, so that the lessons learned might continue to make us healthier as an organization and as a community."

Open Access Edition of Broken Trust:

<https://uhpress.wordpress.com/2017/10/02/broken-trust-is-now-available-as-open-access/?fbclid=IwAR3xKNc4Jiz-HNWJVVPoXhumsiyC8sUFUBGAku fCjISZ2ya WyGIMyDtec>