

Politics in Hawaii: Is Something Broken?

From the Bishop Estate scandal of the 1990s to today's Act 221 and Department of Education governance, politics in Hawai'i is plagued by a lack of transparency and accountability.

By Randall W. Roth



In the early '90s, University of Hawaii law professor Randy Roth edited and co-authored The Price of Paradise, two volumes that explored the hottest political and economic issues facing Hawaii. In 1997, he co-authored the "Broken Trust" essay, published by the Honolulu Star-Bulletin, that exposed the mismanagement of the Bishop Estate, as it was then known, prompting an investigation that led to the removal of the board of trustees. He worked for a year as policy advisor to Gov. Linda Lingle, grappling mainly with reforms for Hawaii's state-run public schools. Roth has seen how things are run in Hawaii. Or, more to the point, how they aren't run as well as they should be. In this essay, he identifies the two biggest problems, as he sees them, in state governance—there is a lack of transparency and accountability. As he describes, these two traits affect everything from schools to courtrooms, keeping citizens in the dark and protecting public servants, even when they don't actually serve the public.

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Does it trouble anyone that we will be paying more money to the new football coach than we pay the fire chief, police chief, prosecutor, school superintendent, director of health, attorney general and chief justice, combined?

It may surprise you that this is not on my list of things about Hawaii governance that are "broken."

You see, we know who made the decision, what it will cost and the source of the funds. We'll be able to see how the team performs and then play Monday-morning quarterback on the question of whether the decision was a good one. From the standpoint of transparency and accountability, this is about as good as it gets. So, while I think we are paying football coaches way too much, the politics of this decision strikes me as "not broken."

From my experience co-authoring the Broken Trust essay in 1997, advising the Lingle administration, and observing local politics as a law professor since I arrived here in 1982, I've become convinced that what is broken in local politics is the lack of transparency and accountability. At so many levels, in so many of its doings, Island politics are opaque, and those who operate in its protective murkiness face no consequences, whether they literally do wrong or merely fail to do right.

I've also come to realize that this pervasive problem is, to some degree, self-inflicted. In a democracy, all government power derives from the people. We, the people, have a right to transparency and accountability, and a responsibility to insist upon it.

Yet the people of Hawaii often do not question even dubious politics, at least not publicly. I'll do my best to explain this phenomenon in these pages.

How could I have been so naïve?

I began to grasp the full extent of our political problem during the 1990s, when Supreme Court justices were selecting Bishop Estate trustees as political patronage, and decided cases involving those same trustees.

When it became clear from numerous investigations that those trustees were committing serious breaches of trust, as even IRS reviews showed, and that the public would no longer tolerate such madness, the justices announced that they would stop selecting trustees. Then, on May 7, 1999, Judge Kevin Chang removed four of the five trustees from office, accepted Oz Stender's resignation and began the usual process of accountability.

Flushed with the excitement of the time, I gave a speech predicting what would follow.

I forecast that the former trustees would be held accountable for having abused Princess Pauahi's trust, and that those trustees would then seek accountability from lawyers on whose advice they would claim to have relied.

I predicted that those lawyers would be called upon to explain why they seemingly failed to report serious nonfeasance by their trustee clients, as was required of them by Probate Rule 42.

That wasn't all: I said that the justices who handpicked those trustees and decided their cases could be sued for any harm done to the trust; and that those justices would be called before the Judicial Conduct Commission, and probably several other oversight bodies as well.

Because I taught such subjects to law students, I knew how Probate Rule 42 works; I knew the fiduciary duties of trustees and of people who voluntarily accept the power to appoint trustees of a charitable trust; and I knew the Code of Judicial Conduct.

Further, the allegations of wrongdoing had been thoroughly documented by then-Attorney General Margery Bronster's civil and criminal investigations, the reports of court masters Colbert Matsumoto and Robert Richards, the findings of court fact-finder Patrick Yim, and audits by the accounting firm Arthur Andersen and the IRS.

In case anyone has forgotten the severity of the mismanagement, the IRS threatened, in 1998, to revoke the estate's tax-exempt status and refused to have any further dealings with the trustees as they had a "history of ignoring probate court orders, [and] master report recommendations." The IRS said that Bishop Estate functioned less like a charity than as "a personal investment club," one that, as I've described elsewhere in discussing the IRS report, "paid grossly excessive fees, gave preferential treatment to insiders, engaged in excessive lobbying, and involved itself, illegally, in state and federal political campaigns," and much more.

It was this threat to revoke the estate's tax-exempt status that prompted the probate judge to finally remove the trustees. But I believed the investigations would continue, to root out the conditions that made such mismanagement possible. I knew that in a democracy, even powerful people are held accountable when they violate the ethical rules of their profession, or the laws of the land, as seem to have happened in the Bishop Estate scandal.

I look back now and wonder, "How could I have been so naïve?" None of my predictions came true. Efforts were already under way to make everything just "go away." And, lo and behold, it did.

Federal Judge Samuel King and I provided the details of how this was accomplished in our book, *Broken Trust: Greed, Management & Political Manipulation at America's Largest Charitable Trust*. One of the nation's top trust lawyers wrote in a review that the subtitle struck him as "audacious" when he first saw it—but that after reading *Broken Trust*, he concluded that the subtitle was "understated." He wrote, "The reader's first reaction is amazement, then disgust."

Yet, despite their record for serious breaches of trust detailed in court and government reports—breaches that left trust experts dilled with amazement and disgust—the former trustees did not have to pay a penny of their own money in surcharges, damages or reimbursements. They did not even have to admit to having done anything wrong. Lawyers, legislators and hangers-on, who had feasted for years at the Bishop Estate trough, also escaped any form of meaningful accountability.

On Public Education

After witnessing the lack of accountability in the Bishop Estate controversy, you'd think that I would catch on. Then, I got involved in Gov. Lingle's efforts to reform the public-education governance structure. On an almost daily basis in 2003 and early 2004, she described the system as too centralized, too rigid, too far-removed from the schools and

too focused on the wants of the adults in the system rather than the needs of the children. The education establishment portrayed all this as criticism of public-school students, and as attacks on the teachers and principals.

The political reality was that the education establishment—Hawaii State Teachers Assoc., Hawaii Government Employee Assoc., Department of Education and Board of Education—had the political clout to get any legislation it wanted passed, which it did, and to override the governor’s veto, which it also did.

The establishment’s boldly named Reinventing Education Act of 2004 paled in comparison to the governor’s proposals, but there was a glimmer of light: Principals would be put on performance contracts, they would be given control over at least 70 percent of their budgeted funds, and each school’s funding would be determined objectively using a transparent formula.

Following their enactment, I gave a speech in which I expressed guarded optimism that these three changes were at least steps in the direction of transparency and accountability.

Today, four years later, no principal is on a performance contract. No principal controls even half of his or her own budget. And the DOE has found ways to neutralize the student funding formula.

These decisions have been made behind closed doors, with no written guidelines and no systematic follow-up.

I raise the topic of public education now, not to re-debate the issues, but simply to marvel at how a system could be “reinvented,” yet hardly change at all. This is what happens without transparency and accountability.

On Mysterious State Grants

Earlier this year *The Honolulu Advertiser* published an investigative report by Rob Perez about the way a handful of legislators have been deciding which charities will get grants-in-aid from the state. The amounts involved are substantial—\$200 million over the past five years. These decisions have been made behind closed doors, with no written guidelines and no systematic follow up. Headlines referred to the decision-making process as “unique,” “puzzling,” and even “mysterious.”

Legislators directly connected with this mysterious process insisted that they have always been even-handed and unbiased. The problem, of course, is not that they're necessarily wrong, but that the public has no way of judging that for themselves. When Perez went to the Capitol looking for reactions to his story, a few legislators said they had been shocked, shocked to read about such a poorly designed process. They promised to give the matter their immediate attention.

Even House Speaker Calvin Say expressed a willingness to look into the matter. He said, "if there's a way to make the process more open . . . I'm open to that."

I think I've learned my lesson, though. This time I'm going to wait and see what happens before I tell anyone that transparency and accountability are just around the corner.

On Act 221's Anonymous Beneficiaries

There is seemingly no aspect of local politics that is immune to our habitual lack of transparency and accountability. Consider the practical impact of Hawaii's high-tech tax credit, Act 221. It gives a 100 percent credit to anonymous investors, even when the high-tech business in which they invest fails to create a single job, or fails to generate a penny in revenue. Up to 49 percent of the investment doesn't even have to be spent on high-tech in Hawaii! Act 221 also applies to investors in movies that are made in Hawaii, such as *Blue Crush* and *The Big Bounce*. Hawaii taxpayers reportedly chipped in \$28 million to finance those two, as reported in *The Honolulu Advertiser*.

Nobody knows what the total tab for Act 221 will be—it could exceed a billion dollars. We do know that other taxpayers will have to pick up that share of the cost of government in Hawaii.

I'm not against using a reasonable amount of our state's resources to help build a high-tech or movie industry. But the way we currently do it reflects politics at its absolute worst. A small group of anonymous beneficiaries is feasting while everyone else engages in open competition for the scraps that are left.

This anonymity is absolute. Because it is confidential taxpayer information, officials could go to jail for divulging key details. (We found out about *Blue Crush* and *The Big Bounce* only because the producers of those movies volunteered the information.)

A small group of anonymous beneficiaries is feasting while everyone else engages in open competition for the scraps that are left. The lack of transparency has kept the public in the dark about Act 221, making any form of accountability impossible.

This might be less upsetting if the act had worked as advertised. However, despite an accumulated cost approaching a half billion dollars (so far), the high-tech industry in Hawaii has seemingly gone backward, whether compared to growth in high-tech outside Hawaii or to other sectors within our local economy, according to independent economists hired by the 2007 Tax Review Commission.

This is exactly what Hawaii's most experienced venture capitalists predicted when Act 221 was first being considered in 2001. According to them, Act 221 would make it more difficult—almost impossible—for high-tech companies in Hawaii to secure later-round financing. They predicted that serious venture-capital investors would not want to get involved in businesses that had been structured and marketed as tax shelters.

They said it wouldn't help high-tech in Hawaii, and it hasn't. I question whether Hawaii's taxpayers have gotten anything of lasting value, either, for the \$150 million they have already handed over to well-heeled investors in movie deals—whose names we will never know.

The Habit of Secrecy

Too often, the proposed solution to a perceived problem in government involves a Byzantine, opaque process, as if we could solve political challenges by pushing our political processes deeper underground. For example, when Lingle made her first round of appointments to the University of Hawaii Board of Regents, critics charged that those selections were overly “political,” meaning that the governor had made those appointments to reward political supporters rather than on merit.

This prompted the Legislature to change the selection process. As of this year, governors may select UH regents only from a very short list of names developed by an independent panel.

But this change didn't eliminate the politics. All it did was move the politics behind a closed door. Before, if the public perceived a governor's appointments are being overly political, they knew who to hold accountable: the governor. Now, if the public thinks a new regent is unqualified, or is doing a lousy job, who can be held accountable? Surely not the governor, whose choice was limited to someone else's short list. Surely not the panel, since it operates behind a closed door and most of us couldn't name its members. Deliberately or not, what the Legislature did away with is not politics, but—you guessed it—transparency and accountability.

Some people defend the new regent-selection panel by pointing out that it is similar to Hawaii's Judicial Selection Commission. Well, it is. That's the problem.

Here's an excerpt from something that Judge Samuel King wrote years ago: "The Judicial Selection Committee is not removed from politics. Members are selected by a political procedure and play they own brand of politics. Whether good politics or bad politics we cannot tell, because they operate in carefully guarded secrecy."

On Judges and Justice

What I'm about to share disturbs me deeply, both as a lawyer who works within the system of justice, and as a citizen. There is an absence of transparency and accountability, for sure, but there are additional elements that also cannot be tolerated in any democracy.

In Hawaii, when a judge's term in office is about to end, the Judicial Selection Committee decides whether to grant another term to that judge. In the case of a State Supreme Court justice, each term is 10 years.

The first retention decision after the Bishop Estate controversy occurred in early 2002. It involved only Associate Justice Steven Levinson, but would soon be followed by positive retention decisions for the other two justices who had appointed Bishop Estate trustees, Chief Justice Ronald Moon and Associate Justice Paula Nakayama—justices Robert Klein and Mario Ramil had since resigned from the court.

Three of the authors of the original Broken Trust essay wanted to provide input into the retention-decision process. We believed that those justices had impaired public confidence by turning the appointment of trustees into a political patronage system. Compounding the problem, they had decided legal disputes involving their handpicked trustees—an egregious conflict of interest. As the *Star-Bulletin* editorialized in 1997, "Trustee selections made by the justices have been lamentable because political motivation was evident." At the same time, *The Honolulu Advertiser* asserted that this political motivation was, in fact, the intent of the state's dominant Democratic party, writing, "The late Gov. John Burns and his army of loyalists. . .made no secret of their agenda. . .in order to pursue their goals. . .they needed to exert control over the key institutions. Influence over Bishop Estate was part of that plan."

To the Broken Trust essay authors, it was inconceivable that the Judicial Selection Committee would give any of those justices another 10-year term in office. We were told by the Commission that oral testimony would not be permitted, but that we could submit our thoughts in writing. We did so, preparing a 10-page, single-spaced memo that detailed

the many ways in which the justices' actions had weakened the public's trust in the justice system. We submitted nine copies to the Commission's office. Then we waited.

Eventually the Commission announced that the justice in question had been given another 10-year term.

Sometime later, I happened to bump into a member of the Judicial Selection Committee at the airport. I tried to be pleasant, but made it clear that the Broken Trust essay authors could not have been more disappointed with the decision to give that justice another 10 years. The Commission member was apologetic, saying that it had been a very difficult decision, and that the outcome had been decided by a single vote. I said, "Look, 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."

He looked at me kind of funny, and said, "What memo?"

I said, "You know, the memo that the Broken Trust authors submitted."

His eyes widened as he said, "I never saw that; nobody said anything about a memo like that."

If he was telling me the truth, and, based on the spontaneity of his response I think he was, it suggests that Commission members made their decision without even considering the very troubling information that can now be found in the Broken Trust book.

How is it that a system of justice is able to operate this way? A key part of the problem is that Chief Justice Moon's control over the judiciary's resources, calendar and staffing is virtually absolute. For example, when the long-time staff person at the Judicial Selection Committee decided to retire, Moon insisted on naming her replacement. Commission members objected, but Moon refused to back down: the new staff person would be of his choosing, or there would be no new staff person.

You may recall that, following publication of the Broken Trust essay, the justices agreed to step aside and let substitute justices decide Bishop Estate matters. Yet, Moon insisted on handpicking the substitutes. I wish someone would explain to me how a person can be too personally involved to decide the matter himself, yet not too personally involved to handpick those who will decide it. I know of no other state where the chief justice maintains so much control over so many aspects of the judiciary as in Hawaii.

Where were the consequences?

I've described the lack of accountability for the Bishop Estate trustees, their lawyers and the many legislators and hangers-on who abused Princess Pauahi's trust, and the way the Judicial Selection Committee managed to extend three of the justices' terms in office without apparently discussing the Broken Trust authors' memo. One might wonder if those justices were ever held accountable by other oversight organizations such as the Judicial Conduct Committee (an appointed, governmental body that is supposed to take action when a judge in Hawaii behaves unethically), American Judicature Society (a nonpartisan, nongovernmental organization whose mission includes building public confidence in the system of justice) and Hawaii State Bar Association (the state's license lawyers).

So far, none of these "watchdog" organizations has said anything about the many allegations of serious judicial misconduct. For example, investigators with the attorney general's office found numerous instances in which justices kept in touch with trustees through private conversations—even in the days when Kamehameha Schools alumni were marching to protest the trustees' leadership. Or consider also the Bishop Estate internal memo, discovered by law enforcement personnel in a secret wall safe at Kawaiahao Plaza, that detailed how "CJ Moon" ought to handle the trustee-selection process, at a time when insiders were angling for a way to get former Gov. John Waihee named as a trustee. However, it was as if, once the trustees who brought so much attention to the estate were removed in 1999, any thought of holding the justices accountable for their role ended.

Last year, when I learned that the Hawaii chapter of the American Judicature Society had formed a committee on judicial accountability, I asked to appear before them and made the following statement:

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.

I suppose it was predictable that the Judicial Conduct Commission would do nothing; after all, Moon selected its members. And he did not just select them; he held them over when their terms expired.

Maybe you're wondering why more people don't know about such cozy relationships. Perhaps it's because the workings of the Judicial Conduct Commission, like those of the Judicial Selection Commission and, now, the Regent Selection Panel are cloaked in secrecy.

During my appearance before the American Judicature Society committee on judicial accountability, I invited its members to ask me anything about what Judge King and I had written in *Broken Trust*.

“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. . .”

I mention this because when that committee later met with Moon, one of its members asked him a question about something from the book. The chief justice's response was that he would not be answering any questions about anything contained in *Broken Trust*. Nobody objected, and nothing of this was reported to the public. The Hawaii State Bar Association also chose not to press for answers.

Another thing I've come to understand better is why it is we have such a hard time insisting on something better. It hasn't been an easy lesson to learn.

On the Importance of Speaking Out—and the Cost

I come from a rural community in Western Kansas, called Ellinwood. My dad never attended college. Mom earned a scholarship to Fort Hays State, but had to withdraw after her first year to help take care of her younger siblings.

In those days, Kansas was a one-party state, dominated by the Republicans. My parents, however were Democrats, capital-D Democrats. They were involved in many causes, and for quite a few years Mom chaired the county Democratic Party.

While I was in college, I became increasingly disappointed with our system of government. Politicians seemed primarily interested in political power and special interests, and didn't seem to care much about the little guys of the world.

I started reading about communism, and I liked what I read. I liked the idea of people contributing according to their ability and consuming according to their need. I also liked the thought of selfless leaders working for the greater good.

After college, I entered the Society of Jesus (also known as the Jesuits), having a few months earlier gotten what some people refer to as a “calling.” But after a year living under vows of poverty, chastity and obedience, my Jesuit superiors and I agreed that my calling had been a wrong number. Poverty and chastity had been easy for me, but obedience was impossible.

Two years later, I met an attractive young woman on a city bus, Susie Worm. We got married a few months later—and although it was the best thing that ever happened to me, it didn’t change the way I looked at myself and my world. That happened when our first child was born. Everything changed. It was if I had been blind and then, suddenly, I could see.

Many people can probably tell a similar story. One of my favorites comes from the indomitable Gladys Brandt, who, before co-authoring the Broken Trust essay had served as principal of Kamehameha Schools and chairperson of the UH Board of Regents. Gladys told me that all the way through school, she had been a “brat,” appreciating nothing and feeling responsibility to no one. But then a day came when she was a student teacher and the regular teacher failed to show up. Gladys stepped to the front of the room. As she turned around and looked at the students, she said she almost fell to her knees when she saw all those innocent little eyes looking squarely at her, trusting her totally. Gladys resolved then and there never again to be so unworthy.

My brush with communism, a year in the Jesuits, and just watching what was going on elsewhere in the world made me appreciate Winston Churchill’s observation that democracy is the worst form of government. . .except for all the others.

I became a reborn, small-d democrat—someone who feels a personal responsibility to help make our government work well enough that the word we pass on to the next generation will be at least as good as the one we inherited. For me, this means paying close attention to politics and doing my best to ensure an active marketplace of ideas. Small-d democrats are thankful for, and value, the individuals who are willing to hold elected and appointed governmental positions, but we recognize that they, like the rest of us, are subject to the laws of human nature.

Lord Acton said, “Power tends to corrupt; absolute power corrupts absolutely.” I would add that power without transparency and accountability is absolute power, and absolute power is anathema to small-d democrats.

Some people hear a story about government officials abusing power and say, “Shame on them.” Small-d democrats hear the same story and say, “Shame on us.”

But it isn't easy to speak out. Politics will always reflect the local culture. In Hawaii, because everyone lives, works and plays in close proximity, and because many of our interlocking social networks, the local culture feels super-local.

You don't have to live in Hawaii long enough before realizing that you can't discuss any controversial issue critically without it being personal to someone. This creates a natural tendency to "go along," "not make waves," and not "talk stink."

I love Hawaii. I'm proud to call it home. I love that there are so many different cultures here. I wouldn't want to change that. I see value, however, in talking about the forces that encourage or discourage civil dialogue.

It's relatively easy for someone with my upbringing to tell others to stand up and speak out. My parents modeled that as I was growing up. Plus, I have one of the few jobs here where I'm not just allowed, but encouraged, to speak out when I see something within my area of expertise that I think is broken.

Even so, it is difficult to talk critically about issues that directly involve people I admire. For example, my outspokenness about Bishop Estate has strained my relationship with two of the most decent men I've ever met, Kamehameha Schools President Mike Chun and former Bishop Estate trustee Oz Stender. I regret deeply any hurt that I may have caused them.

The point is a simple one: after living in Hawaii for a while, even someone from the mainland finds it increasingly difficult to talk critically about issues that affect people he respects.

And although I don't admire the way justices ignored their own conflicts of interest in looking after Princess Pauahi's trust, I still don't like being the one to point out the damage they had done. My knees nearly buckled when then-UH President Ken Mortimer told me that a group of influential individuals—he wouldn't tell me who—had demanded that he fire me. I'm still at UH, but this was a very unpleasant experience.

I can only imagine how much more difficult my kind of civic engagement must be for people who aren't protected by tenure and whose cultures don't value speaking out. Despite the difficulty, however, there are shining examples of people doing and encouraging others to do exactly that.

The late Nona Beamer, a cultural icon in the Hawaiian community whose short-but-powerful letter to the editor helped push the Bishop Estate controversy to the tipping point, wrote the following in a letter to me:

In Hawaii we tend not to speak up, even when we know that something is wrong. Especially in the Hawaiian community, the common practice has long been to avoid confrontation at almost any cost. This approach does not serve us well in today's world. We must learn to be good stewards of all that we have been given, and this sometimes require that we take a stand.

For me, life is a journey. I expect that there will always be problems—political and otherwise, no matter where I am or what I'm doing. I hope whatever is broken gets fixed, but what really matters for me is that I try. Not trying would be shameful in my parents' eyes. They're gone now, but my children are here. And for reasons that I don't completely understand, I am determined always to be worthy in their eyes. The thought of disappointing them is unbearable.

Karen Keawehawaii Farias expressed something similar during the Bishop Estate controversy. After encouraging her daughters to get involved, she said to herself, "If I tell them to do something, and then I do nothing, what does that make me?"

I only hope that a culture as diverse as Hawaii's can find room for and maybe even appreciate a few civic commandos.

Now, like any true academic, I will end with a series of questions rather than answers: When the people to whom we entrust the awesome power of government fail to provide a reasonable degree of transparency, or flatly refuse to be accountable for their actions, whose responsibility is it to stand up?

If not us, who? If not now, when?