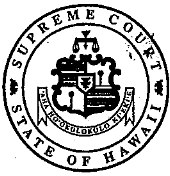

Supreme Court — Commission on Judicial Conduct — THE JUDICIARY • STATE OF HAWAI'I
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FORMAL ADVISORY OPINION #02-98
MARCH 11, 1998

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QUESTION PRESENTED

In Bronster v. Wong, et. al., Consolidated Appeal No. 21150, the Trustees of the Bishop Estate are appealing from First Circuit Court orders compelling compliance with Attorney General subpoenas. The Justices of the Hawaii Supreme Court seek an advisory opinion from this Commission on whether or not they "must recuse from Consolidated Appeal No. 21150."

CONCLUSION

For reasons discussed below, it is this Commission's opinion that no legal or ethical requirements disqualify the Justices from hearing the issues presented in the appeal. However, it is the considered advice from this Commission to the Justices that, given the entirely unique circumstances under which the appeal comes before the Supreme Court, they should recuse themselves from the case.

DISCUSSION

In Consolidated Appeal No. 21150, the Attorney General (AG) has moved to recuse the Justices from hearing the issues presented in the appeal. The Appellants, Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate, oppose the motion of the AG for recusal. Much of the information relied upon by this Commission in formulating this advisory opinion comes from the Memoranda filed in the Supreme Court by the parties to the appeal.

Earlier, this Commission issued Formal Advisory Opinion #14-93 (April 7, 1994), in which this Commission advised the Justices of a need to avoid a perception that the Trustee selection process might influence or otherwise affect the judicial process in cases involving Bishop Estate. The Commission notes that all of the present Justices, acting as individuals, have been involved in the

selection process of one or more of the current Trustees. The question presented to us in this matter, however, arises from an appeal related to litigation involving an investigation into the management of the Estate by the Trustees.

The AG describes the investigation as one primarily involving alleged breaches of fiduciary duty and mismanagement by each of the five Trustees and as one which may also involve the process of selecting and appointing the Trustees. The AG states that the Justices may have a specific and personal interest in the dispute concerning the extent of the AG's investigatory powers and that the Justices were informed that they may be asked, by subpoena or otherwise, for information in connection with the investigation. Consequently, the AG asserts that, if the present Justices hear the appeal, there would be an appearance of impropriety in violation of the Revised Code of Judicial Conduct.

A central issue in Appeal No. 21150 relates to the claim by the Trustees that the breadth of the AG's subpoenas invalidates them in the absence of the AG providing a more definite statement describing the investigation for which the subpoenas have been issued. The Trustees point out that the subpoenas, which are the subject of the appeal, have no relationship whatsoever to the Trustee selection process and that, at this point in the case, anticipating that the investigation might expand into the selection process is but a mere possibility and not a basis for disqualification. In any event, the Trustees argue, the AG's subpoena powers do not permit the AG to subpoena the Justices and inquire into the Trustee selection process.

"[W]here disqualification of a judge has been urged solely on the grounds that [the judge] should not sit in review on the acts of [the judge's] own appointees, most authorit[ies] hold that a judge is not disqualified from reviewing the acts of his appointees, unless some indication of the judge's 'direct, certain, or immediate' interest is shown, beyond whatever speculative interest, if any, inheres in having originally made the appointment of the litigant whose action is being challenged."

See Kekoa v. Supreme Court of Hawaii, 55 Haw. 104, 115, 516 P.2d 1239, 1241 (1973); cert. den. 417 U.S. 390, 94 S.Ct. 2641, 41 L.Ed.2d 233 (1974). This Commission concludes that the present Justices do not have a direct, certain, or immediate interest in anything related to the scope of the subpoenas now in issue. This would normally mean that recusal is unwarranted:

> In considering motions to disqualify, the . . . judge must exercise care to insure that disqualification is objectively required and not to permit litigants to select another judge for inappropriate motives. In that regard, a judge must not permit the mere allegation of impartiality to result in the automatic reassignment of a case. 'In deciding whether to recuse himself, the . . . judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case. Litigants are entitled to an unbiased judge; not to a judge of their choosing. A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.' . . . [Emphasis added]. In re Richard Thomas Cooke, 160 B.R. 701, 703 (Bkrptcy. D. Conn. 1993).

On questions presented to this Commission, where the issue of partiality or an appearance of partiality is involved, this Commission usually gives considerable weight to the judgment of the judge, and recusal is discouraged without clear justification or compelling reasons supporting it. We say this, knowing that in every case where recusal is sought and denied, there will always be some perception by someone that the court thereafter lacks impartiality.

In this case, since no direct, immediate, or clear-cut self-interest is involved in any way with the subpoenas that are the subject of the appeal, a feasible alternative might seem to be for the Justices to hear this appeal now and then recuse themselves at some later stage in the case should a basis for disqualification or recusal materialize. This Commission generally gives little weight to threats by litigants of future action which might later lead to a valid basis for disqualification which does not presently exist. The AG's mention of the potential involvement of the present Justices in the investigation is not viewed by this Commission as a threat to expand the investigation or direction of

the subpoenas. The AG has merely pointed out that the involvement of the Justices may occur or be sought in the future. Even if such event never materializes, it is appropriate that the AG call attention to all circumstances the State believes may impact upon the present issue.

Canon 3E of the Revised Code of Judicial Conduct ("RCJC") addresses disqualification. Subparagraph (1) provides:

> A judge shall disqualify himself or herself in a proceeding in which the Judge's impartiality might reasonably be questioned.

RCJC Canon 2 admonishes Judges to "avoid impropriety and the appearance of impropriety in all of the Judge's activities." A Judge does so by "respect[ing] and comply[ing] with the law and . . . acting at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Id.

Canon 2A provides:

> The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

The law relating to the criteria utilized in determining whether there is a reasonable basis for an appearance of impropriety is easier to state than it is to apply in this case. The test is "an objective one which assumes that a reasonable person knows and understands all the relevant facts. . . . [J]udges determine appearance of impropriety--not by considering what a straw poll of the only partly informed man-in-the-street would show--but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge. . . ." In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988). The standard is whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal is sought would entertain a significant doubt that justice would be done in the case. Verone v. Taconic Telephone Corp., 826 F.Supp. 632, 634 (N.D.N.Y. 1993). The fact that

a party can postulate a series of future events which, if they occurred, might tend to affect a judge's impartiality does not usually satisfy the objective test. In re B & W Management, Inc., 71 B.R. 987, 992 (Bkrptcy. D.Dist. Col. 1987); United States v. Marianne, 688 F.2d 980 (5th Cir. 1982), cert. den., 459 U.S. 1009, 103 S.Ct. 736 (1983).

These generally accepted principles, when applied in determining whether or not a reasonable appearance of impropriety exists in connection with the Justices hearing Appeal No. 21150, leads this Commission to conclude that disqualification of the Justices is not required. And, under usual circumstances, our advice to the Justices would be to not recuse themselves.

The present circumstances, however, are extremely exceptional, and we cannot ignore the current atmosphere nor the intensity of the discussions surrounding recent events that are, in part, the subject of Appeal No. 21150. The reasonable person standard set forth above presupposes objective, disinterested observers who can be fully informed of the facts. See, e.g., In re Drexel Burnham Lambert Inc., supra; In re Richard Thomas Cooke, supra; Verone v. Taconic Telephone Corp., supra. Although we conclude that reasonable, disinterested persons knowledgeable of all the facts would agree that there are no grounds for disqualification under the Revised Code of Judicial Conduct, we are nevertheless concerned, that public confidence in the judiciary will be harmed if the Justices remain on the case in the current, overheated circumstances. In balancing our concern of "promoting public confidence in the judiciary against the possibility that those questioning [the Justices'] impartiality might be seeking to avoid adverse consequences of [the Justices] presiding over" the appeal (see In re Drexel Burnham Lambert, Inc., supra), the scales tip heavily towards promoting public confidence in the judiciary. To that end, we are aware that a majority of the present Justices have concluded they will not, henceforth, participate in the selection of trustees.

As stated in our earlier advisory opinion relating to the selection of trustees by the Justices, public perception and opinion are extremely difficult to measure. See Formal Advisory

Opinion #14-93. The Commission will not allow critical or adverse media coverage to compel recusal, but intense media coverage may provide some insight into public opinion and perception. Our own observations reflect the importance of the investigation of the management of Bishop Estate to the citizens of Hawaii and misperceptions that may have arisen about the Supreme Court.

The neutrality of the Supreme Court's rulings over the long history of its handling of the estate's and the State's cases demonstrates the impartiality of the Supreme Court. The reality, however, is that few citizens are familiar with that history and the recent, unprecedented media coverage may have created mistaken impressions about the Supreme Court's impartiality. Because these Justices or their predecessors appointed the Trustees, some may believe that the Justices would be inclined to rule in the Trustees' favor to affirm confidence in them. On the other hand, because the Justices are represented by the AG in other litigation, some may believe that the Justices would be inclined to rule in favor of the AG to get better representation or to otherwise curry favor. Therefore, the main focus of our concern in addressing the question presented to us is the potential effect on the public's confidence in the judiciary if the Justices were to remain on the case.

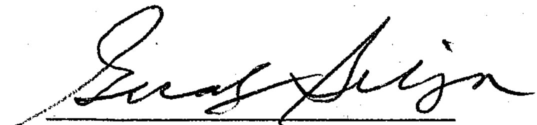
The circumstances surrounding the AG's investigation and the Trustees' position in the case from which the appeal is taken are entirely unique and are not present in other cases in which Bishop Estate is a litigant. Recognizing the uniqueness of this situation, we advise the justices to voluntarily recuse themselves, even though there is no legal or ethical requirement that disqualifies them.

This advisory opinion should not be interpreted as saying that recusal is preferred whenever someone, somewhere, claims public confidence will be eroded if a judge or justice remains

on a case. To the contrary, this Commission is mindful, as it must be, of the caveat described by the United States Court of Appeals in cautioning against a:

> ...rule holding that when someone claims to see smoke, we must find that there is a fire. That which is seen is sometimes merely a smokescreen. Judicial inquiry may not therefore be defined by what appears in the press. If that were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal. Instead, the sensitive issue of whether a judge should be disqualified requires a careful examination of those relevant facts and circumstances to determine whether the charges reasonably bring into question a judge's impartiality.
> In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1309 (2d Cir. 1988).

Given the entirely unique circumstances under which Appeal No. 21150 comes before the Supreme Court, and in spite of our conclusion that disqualification is not legally or ethically required, the Commission believes that the Justices' voluntary recusal from the case will undoubtedly enhance the public's trust and confidence in the judiciary as a neutral and fair arbiter of disputes. On balance, we conclude that the risk of the Justices remaining on the appeal is greatly outweighed by the detrimental impact it could have on the public's confidence in Hawaii's judicial process. Taking such a risk is too great. We therefore recommend to the Justices that they voluntarily recuse themselves from Appeal No. 21150.



Gerald Y. Sekiya, Chair
For THE COMMISSION ON JUDICIAL CONDUCT

Sharon S. Narimatsu
Judith T. Fong
Shigeo Iwamoto

(Members Anton C. Krucky, Darolyn H. Lendio and Benjamin M. Matsubara recused from participation in this advisory opinion)