



# KA NU HOU



*"The News"*

July 1998

## FROM THE CHAIR

The Board of Directors continues to be active by planning and presenting seminars for its members. A special thank you to both Nancy Grekin and Bruce Graham who presented seminars on "Basic Conveyancing" and "Sovereignty and Related Land Issues", respectively. Both of these seminars were well-attended. The "Annual Legislative Update" seminar, held on July 16, 1998, was chaired again by past Chair, Deb Chun. This seminar continues to be a popular and much anticipated event. Thank you Deb.

Please review the Calendar of Events contained in this issue, to obtain more information about up-coming seminars.

Each year our Section recognizes, with scholarships, two outstanding students at the William S. Richardson School of Law. It is my pleasure to announce that this year's scholarship recipients are Elijah Yip and Mark Murakami, both of whom were Professor David Callies' students in his real property, land use and local government seminar class. Both have completed their second year at the William S. Richardson School of Law. Congratulations to Elijah and Mark!

Elijah's article, "When Reason Offends Common Sense," appears in this issue. Mark Murakami's article, "The 'New' Development Plans," will appear in the October 1998 issue of the newsletter, along with biographical information about him.

Elijah is currently a summer associate at Cades Schutte Fleming & Wright and also clerked at Torkildson Katz Fonseca Jaffe Moore & Hetherington during the summer of

1997. In 1997, he placed first in the Susan B. McKay Moot Court Competition and also received the American Jurisprudence Award for the highest grade in Civil Procedure I. He is Co-Editor in Chief of the University of Hawaii Law Review and has also received awards for the best oralist with the Environmental Law Moot Court Team. He is active in the Advocates for Public Interest Law, Student Bar Association and Domestic Violence Clearinghouse organizations.

The Board has several matters pending before it. It has not yet made a decision whether or not to proceed with producing a real property and financial services supplement to the June 1999 issue of the Pacific Business News. We are discussing whether or not there is enough Section participation to undertake this tremendous commitment. We are still receiving feedback from our members. Secondly, the HSBA has asked the Board for their input on the Legislature's resolution requiring the Judiciary to create and implement a procedure for the certification of legal specialists. A committee, appointed by Chief Justice Moon, proposes to implement voluntary specialization by Supreme Court Rule. According to the HSBA, a Board of Legal Specialization would supervise the certification of specialists and approve of private certifiers of specialists that have been accredited by the American Bar Association. Only those attorneys that are designated specialists in a particular area (by examination), could use the designation of a specialist. The Board is opposed to the move to certify real property attorneys due to the diversity of the practice area and the impossibility of establishing standards for speciality recognition in real property.

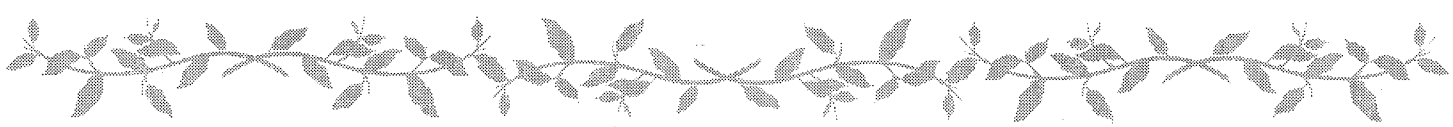
Finally, HICLE has informed us that, with the exception of our Section and a couple of others, the number of attendees at CLE seminars has declined dramatically over the past year. Several seminars have had to be cancelled. As a result, HICLE is not able to function in its current format. Recently, HICLE sought financial assistance from the HSBA and the sections. The HSBA Board, instead, proposed that HICLE be absorbed into the HSBA. Currently, HICLE receives no money from HSBA and is supposed to be self-supporting. If HSBA absorbs HICLE, the sections may be asked to take over some of HICLE's duties as they relate to the planning and marketing of seminars and the production and updating of future and current manuals. This will be a difficult task for the Board to undertake considering that the directors are all volunteers, practice law full-time and are currently involved with producing a quarterly newsletter and presenting 4 to 6 seminars a year. No decision has been made and we will keep you posted regarding our discussions with the HSBA and HICLE.

Our next Board meeting is scheduled for Friday, September 18, 1998. There will be no meeting in August. I hope to see you at our September meeting.

Sincerely,

*Sheila L.Y. Sakashita*

Sheila L.Y. Sakashita,  
Chair, Real Property and  
Financial Services Section



## WHEN REASON OFFENDS COMMON SENSE

by *Elijah Yip*

### INTRODUCTION

"Shall there be a convention to propose a revision of or amendments to the Constitution?" Voters in the 1996 Hawai'i general elections faced this question, one that would determine whether citizens would have an opportunity to directly amend or revise the Hawai'i State Constitution.<sup>1</sup> If a majority of the ballots cast on the question were in the affirmative, then the State of Hawai'i would hold a constitutional convention ("con-con"). A "majority," as the Office of Elections informed voters, consisted of the number of "yes" votes relative to the number of "no" votes, irrespective of the number of blank or spoiled ballots submitted.<sup>2</sup> Nothing was peculiar about excluding blank and spoiled ballots on a con-con question from the count, as that had always been the practice. Moreover,

<sup>1</sup> The Hawai'i State Constitution may be revised or amended only by the legislature or a constitutional convention. See Stand. Comm. Rep. No. 48, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 1950, at 187 [hereinafter 1 PROCEEDINGS 1950].

<sup>2</sup> See *Bennett v. Yoshina*, Civ. No. 97-00322 DAE, at 2 (1997). The Office of Elections issued a memorandum to the public on November 1, 1996, stating that "to determine whether the constitutional convention will be held, more than 50% of the voters must vote YES. Spoiled, blank, and invalid ballots are not included in the calculation of a majority for this question." Op. Att'y Gen. 95-6 at 12 (1996) (quoting Office of Election's Fact Sheet: Calculating a Majority on the Question on a Constitutional Convention (November 1, 1996)).

the practice accorded with a statutory provision governing elections<sup>3</sup> and an opinion issued by the State Attorney General.<sup>4</sup> The question passed under this method of calculation, as voters returned 163,869 ballots marked "yes," 160,153 marked "no," 90 marked both "yes" and "no," and 45,245 blank ballots.

The method was wrong, at least according to the Hawai'i Supreme Court. Every ballot must be counted, even blank and spoiled ones, the court ruled in a suit challenging the traditional method of counting votes.<sup>5</sup> As could be expected, the court's ruling sparked controversy.<sup>6</sup> The practical result of the decision was to invalidate the Election Officer's certification that the con-con question had

<sup>3</sup> HAW. REV. STAT. § 11-151 (1993). The statute provides in pertinent part:

If a contest or question requires a majority of the votes for passage, any blank, spoiled, or invalid ballot shall not be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in ratification of a constitutional amendment.

*Id.*

<sup>4</sup> See Op. Att'y Gen. No. 96-5 (1996).

<sup>5</sup> See *Hawai'i State AFL-CIO v. Yoshina*, 84 Hawai'i 374, 935 P.2d 89 (1997). A state union organization brought the suit.

<sup>6</sup> The Yoshina opinion initiated a public debate over whether the Court acted judiciously, much of it engaged via the local press. See, e.g., *Canceled Con Con Serves Public Interest*, HONOLULU STAR-BULLETIN, March 26, 1997, at A-20; *Convention Ruling: Political Confidence at Stake*, HONOLULU ADVERTISER, March 26, 1997, at A-10; *Constitutional Convention Vote: 4 Viewpoints*, HONOLULU ADVERTISER, March 30, 1997, at B-3.

passed. The ballots cast upon the con-con question were to be counted again using the method endorsed by the court, one that voters did not expect would be used. Under this method, the question failed.

The crux of the controversy may be summarized in the question: did the court act legitimately? The question is a valid one, given that a federal district court later found the court's ruling constitutionally infirm.<sup>7</sup> The district court held that the court's decision to retroactively apply its method of counting ballots violated the right to fundamental fairness in elections protected by the United States Constitution. Voters were not on notice that blank and over-voted ballots would be counted.<sup>8</sup>

Institutional legitimacy is the sine qua non of public acceptance of judicial authority. The United States Supreme Court affirmed that proposition in responding to the invitation to overrule *Roe v. Wade*.<sup>9</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>10</sup> the Court stressed the importance of maintaining in-

<sup>7</sup> See *Bennett*, Civ. No. 97-00322 DAE (1997). The Ninth Circuit reversed the district court on appeal. *Bennett v. Yoshina*, Nos. 97-16408, 97-16540, 97-16543, 97-16596, 1998 WL 136411 (9th Cir. Mar. 27, 1998). See note 20 for further discussion of the Ninth Circuit opinion.

<sup>8</sup> See *id.* at 3-4. In fact, the Elections Office prohibited an organization campaigning for the con-con, *Citizens for a Constitutional Convention*, from telling voters that blank ballots would count. *Id.* at 2-3.

<sup>9</sup> 410 U.S. 113 (1973).

<sup>10</sup> 505 U.S. 833 (1992).

stitutional legitimacy when rendering a decision in the face of an "intensely divisive controversy."<sup>11</sup> A court's vulnerability as an institution with little coercive power is most exposed in such instances, so a court must exercise its authority carefully so as to retain public faith in its legitimacy in light of a decision that does not satisfy all.

This paper discusses the impact of *Yoshina* on the Hawai'i Supreme Court's institutional legitimacy, focusing not on the points of law decided in *Yoshina* per se, but on the process and reasoning by which the court reached its decision.<sup>12</sup> Part I summarizes the decision and its factual background. Part II sketches a framework for understanding the value of institutional legitimacy. Part III analyzes aspects of *Yoshina* that may affect the Hawai'i Supreme Court's institutional legitimacy, and concludes that the court's approach in that case put its legitimacy at risk.

## I. BACKGROUND

### A. The Con-Con Question

The Hawai'i Constitution provides for amendment or revision of its provisions by a con-con. Section 2 of Article XVII of the Hawai'i Constitution sets forth the procedures for convening a con-con, electing delegates, and ratifying revisions

<sup>11</sup> *Id.* at 866.

<sup>12</sup> Additionally, this paper makes no attempt to empirically assess the effect of *Yoshina* on the public's perception of the Hawai'i Supreme Court's legitimacy. The author's sole aim is to identify aspects of the *Yoshina* decision that may potentially affect the court's legitimacy.

and amendments proposed by the delegates. The legislature may submit to the electorate the question of whether to hold a con-con at any general or special election. If the electorate has not had a chance to vote on the question for nine years, the Hawai'i Constitution requires the lieutenant governor to certify the question for a vote at the first general election after the nine-year period. A con-con will be held only "[i]f a majority of the ballots cast upon such a question be in the affirmative[.]"

In 1996, Lieutenant Governor Mazie Hirono certified a con-con question for vote in that year's general election. Of the 369,357 ballots returned on the question, 163,869 were marked "yes," 160,153 "no," 45,245 left blank, and 90 marked both "yes" and "no." To clarify the correct method of determining whether the question received the requisite majority of affirmative votes, the Chief Elections Officer requested an opinion from the Hawai'i State Attorney General. The Attorney General concluded that the phrase "majority of the ballots cast upon such a question" meant a majority of the ballots marked "yes" or "no," but did not pertain to ballots that were blank or marked both "yes" and "no." Based on the opinion, the elections officer excluded the 45,335 blank and spoiled ballots and certified that the con-con question passed. In response, the Hawai'i State AFL-CIO filed a suit against the State of Hawai'i, alleging that the Attorney General's opinion was erroneous, and that certification of the election using the method the opinion prescribed would allow a con-con to convene in error.

### B. The Con-Con Litigation

Hearing the case through its original jurisdiction, the Hawai'i Supreme Court held in *Hawai'i State AFL-CIO v. Yoshina* that the question failed. According to the court, the dispositive issue in the case was the interpretation of the phrase "majority of the ballots cast upon the question" in Section 2 of Article XVII of the State Constitution. The court parsed the phrase into the terms "ballots cast" and "upon the question," and discussed the meaning of each.

The court first addressed the term "ballots cast." Finding no statutory definition of the term, the court turned first to the conventional meaning of the words. According to the Webster's New International Dictionary, a "ballot" is a "printed or written ticket or single sheet or slip of paper, used generally in secret voting," and "cast" means "[t]o deposit (a ballot) formally or officially[.]"<sup>13</sup> Accordingly, the court reasoned, "ballots cast" means "the aggregate printed or written tickets, sheets or slips of paper deposited in the appropriate receptacle."<sup>14</sup> The court then observed that pre-statehood statutes and judicial decisions relating to elections considered a ballot cast without regard to what the voter recorded on the ballot, or to whether the voter voted for the number of candidates permitted by law.

Turning to the phrase "upon such a question," the court reasoned that its function was not to "control, qualify, or

<sup>13</sup> *Yoshina*, 84 Hawai'i at 377, 935 P.2d at 92 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 417 (2d ed. 1959)) (internal quotation marks omitted) (alterations in original).

<sup>14</sup> *Id.*

enlarge<sup>15</sup> the plain meaning of "ballots cast," but to clarify the relationship between the first and second paragraphs of Article XVII, Section 2. Paragraph two governs the election of delegates to a con-con, a process that takes place only after the electorate has approved a con-con. Therefore, the "ballots cast" referred to in the second paragraph are those ballots cast on the con-con question described in the first paragraph, and not those cast for the election of delegates.

To clarify the importance of its interpretation of "ballots cast upon such a question," the court distinguished *Republican Party of Hawai'i v. Waihee*,<sup>16</sup> a case cited by the defendants. In *Waihee*, a county charter provided that "[I]f a majority of the registered electors who vote on the question at a recall election shall vote 'Yes,' the elected officer shall be deemed recalled[.]"<sup>17</sup> The Hawai'i Supreme Court in *Waihee* adopted the general rule that blank, illegal, and unintelligible ballots should not be counted in the total number of votes. However, the *Yoshina* court explained that *Waihee* was distinguishable because the provision in that case contained language different from that of Article XVII. The county charter in *Waihee* pertained to "votes" whereas Article XVII speaks of "ballots." The court found the meanings of the two words to be materially different; a vote is an elector's choice and a ballot is an instrument by which the voter expresses that choice. The court thus concluded that *Waihee*

was inapposite to its analysis.

Finally, the court looked to the legislative history of Article XVII. Of significance to the court was the inclusion of both the phrases "votes tallied upon the question" and "the total vote cast at the election" in paragraph 2 of Article XVII, Section 2. The standing committee report suggested that the distinction between the terms was purposeful, as the term "votes tallied" was used to exclude blank and spoiled ballots from the count in an election to ratify a constitutional amendment or revision. The rationale was that voters tend to dilute the vote by casting blank ballots on constitutional questions because they find it too difficult or cumbersome to make decisions regarding constitutional policy. Also persuasive to the court were deliberations of the Committee of the Whole in which delegates discussed the difference between the words "tallied" and "cast" in floor debates. Given the distinction between the terms "votes tallied" and "votes cast," the court concluded that the use of "cast" rather than "tallied" in paragraph 2 of Article XVII, Section 2, was significant and intentional, and was meant to include spoiled and blank ballots in the count. Thus, by looking at the plain language of Article XVII and the intent of the drafters, the court held that "ballots cast" included blank ballots and over-voted ballots.

Following *Yoshina*, several citizens and organizations<sup>18</sup> brought a federal class action suit challenging the decision on constitutional grounds.<sup>19</sup> The premise of the suit was that *Yoshina* vio-

lated the First and Fourteenth Amendments of the United States Constitution, which guarantee the right to a fundamentally fair election. The plaintiffs claimed that the election was fundamentally unfair because the State misinformed voters as to the meaning of their votes. The district court agreed that *Yoshina* rendered the election fundamentally unfair because the Hawai'i Supreme Court's interpretation of Article XVII was unforeseeable to the public.<sup>20</sup>

Indeed, the Hawai'i Supreme Court did not seem to pay due sensi-

<sup>20</sup> See *id.* at 30. The district court found that the state's election laws, as they were interpreted in *Yoshina*, failed the strict scrutiny analysis required whenever a law impairs First or Fourteenth Amendment rights. See *id.* at 30-31. On appeal, the Ninth Circuit reversed. *Bennett v. Yoshina*, Nos. 97-16408, 97-16540, 97-16543, 97-16596, 1998 WL 136411 (9th Cir. Mar. 27, 1998). The court of appeals stressed that "garden variety" election irregularities do not violate the Due Process Clause, even if they determine the outcome of the vote or election. See *id.* at \*7. The test of whether a court should strike down an election on substantive due process grounds is whether there was "(1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Id.* at \*8. The court found both elements lacking in the *Yoshina* case. *Id.* Voters who left the convention question blank, the court ruled, could not have "relied" on the hope that their votes would not be counted. See *id.* The court also found no disenfranchisement because every ballot submitted was counted and no one was prevented from voting. See *id.* at \*9.

The Ninth Circuit opinion does not lessen the force of this paper's argument. First, the court was more concerned about the propriety of federal court intervention into state laws than with the interpretation of Article XVII. Federal courts necessarily defer to a state court's interpretation of state laws. As the court recognized, states have considerable control over their election laws. See *id.* at \*5. Federal courts should intervene only when there is a serious (as opposed to "garden variety") election irregularity. See *id.* at \*7. Second, the Ninth Circuit's argument regarding reliance interests is disputable. Imaginably, some voters would not have submitted a blank ballot had they known it would be counted. In sum, the Ninth Circuit opinion does not touch on the key areas of criticism of *Yoshina* that are the focus of this paper.

<sup>18</sup> The plaintiffs in *Bennett* included several individual class representatives and Citizens for a Constitutional Convention, a public interest group.

<sup>19</sup> *Bennett v. Yoshina*, Civ. No. 97-00322 DAE (1997).

<sup>15</sup> *Id.* at 378, 935 P.2d at 93 (quoting *Pray v. Judicial Selection Comm'n*, 75 Haw. 333, 342, 861 P.2d 723, 727 (1993)).

<sup>16</sup> 68 Haw. 258, 709 P.2d 980 (1985) (per curiam).

<sup>17</sup> See *id.* at 259, 709 P.2d at 980 (alterations in original).

tivity to the expectations that formed the basis for the public's voting behavior. Instead, *Yoshina* appeared to defy the accurate application of precedent and the rules of statutory interpretation. Thus, the district court's determination that *Yoshina* was fundamentally unfair legitimately raised the question of whether the Hawai'i Supreme Court exercised its authority appropriately. The next Part suggests a framework for answering that question.

## II. INSTITUTIONAL LEGITIMACY

Created by the Constitution as the "least dangerous branch"<sup>21</sup> of government, the judiciary is a vulnerable institution. It lacks the "standard political levers over people and institutions"<sup>22</sup>: coercive power and control over the purse-strings.<sup>23</sup> Instead, the power of the court lies in its legitimacy as the institution fit to interpret the law and to determine its dictates.<sup>24</sup> Correlatively,

<sup>21</sup> See generally, THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing in favor of establishing a judiciary that possesses only the power of judgment); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962) (explaining the relationship between the United States Supreme Court and other political institutions in American democracy).

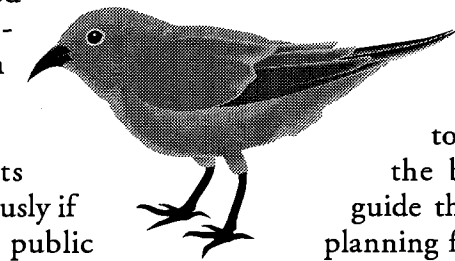
<sup>22</sup> Gregory A. Caldeira & James L. Gibson, The Etiology of Public Support for the Supreme Court, 36 AM. J. POL. SCI. 635, 635 (1992).

<sup>23</sup> See *Casey*, 505 U.S. at 865.

<sup>24</sup> See *id.*; see also Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 DUKE L.J. 703, 708 (1994). While Tyler and Mitchell speak of voluntary acceptance of the decisions of the United States Supreme Court, one could extend their proposition to mean that the decision of any court has no force unless it is accepted by the public.

acceptance by the public of institutional decisions increases or decreases as public perception of the court's institutional legitimacy changes accordingly.<sup>25</sup>

The legitimacy of a court is particularly at stake in two instances.<sup>26</sup> The first is when it deviates from judicially-crafted principles upon which people rely, such as when it overrules one of its prior holdings. The second is when a court decides a case charged with controversy. In both situations, a court must exercise its power judiciously if it wishes the public to accept its decision without questioning its legitimacy.



Principled decision-making comprises an essential component of a court's legitimacy.<sup>27</sup> The court cannot appear to surrender to social and political pressures, and to avoid such perceptions, it should offer principled justifications for its decisions. For instance, the court should rest its decisions on the familiar authority of precedent. Adherence to legal principles creates the appearance that the court is bound by objective standards that have nothing to do with personal or political preferences.<sup>28</sup> Decisions

<sup>25</sup> Tyler & Mitchell, *supra* note 24, at 712.

<sup>26</sup> See *Casey*, 505 U.S. at 866-67.

<sup>27</sup> See *id.* at 865.

<sup>28</sup> See Owen M. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 744-48 (1982).

abiding by such standards appear rationally-based, and thus bolster the rational authority upon which the court's legitimacy is derived.<sup>29</sup>

A second dimension of the judiciary's legitimacy is the appearance that the court explains its decisions candidly. Judicial candor is the "judge's self awareness in decision-making and disclosure."<sup>30</sup> The rationale behind promoting judicial candor, in broad terms, is to make the law more predictable.<sup>31</sup> The more clearly judicial opinions articulate the factors influencing a decision, the better they are able to guide the public and lawyers in planning future conduct.

In stating the reasons for its

<sup>29</sup> See David M. Trubek, Max Weber on Law and the Rise of Capitalism, 1972 WIS. L. REV. 720, 725-35. Weber conceived of the rationality of the law as related to its legitimacy. *Id.* at 727. Weber identifies three ways of legitimizing legal decisions called traditional, charismatic, and legal "domination." The first two forms of legitimization derive from tradition and the extraordinary personality of a leader, respectively. Modern law is different in that it does not depend on an extrinsic source for legitimacy. The rationality underlying the law is its very legitimization principle. *Id.* at 732.

<sup>30</sup> Shirley S. Abrahamson, Judging in the Quiet of the Storm, 24 ST. MARY'S L.J. 965, 990 (1993). The aim of judicial candor, however, would not require that a judge announce every consideration, however negligible or minute, that influenced a decision. See Robert A. Leflar, Some Observations Concerning Judicial Opinions, 61 COLUM. L. REV. 810, 818 (1961).

<sup>31</sup> See Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 GEO. L.J. 353, 401 (1989) (explaining that when a court is candid, it gives parties notice of the basis for its decision and allows them to structure their transactions around the court's stated rationale).

decisions, courts reinforce their legitimacy.<sup>32</sup> In a democracy, the public expects the opportunity to evaluate judges and their reasoning.<sup>33</sup> As Professor David Shapiro explains, "reasoned response to reasoned argument is an essential aspect of . . . [judicial] process."<sup>34</sup> When the true reasoning behind an opinion is out in the open, it can be attacked, defended, and debated by the public, and the judiciary's exercise of power is thereby limited. By contrast, courts that do not disclose their reasoning are free to distort, misstate, or conceal the true reasons for their decisions while foreclosing debate and criticism of their validity. Such lack of candor lowers the judiciary's credibility. Additionally, the public is likely to detect that a court is being disingenuous, and when it does, its reaction to the judiciary will be even more cynical.<sup>35</sup>

The relationship between judicial candor and institutional legitimacy also finds a basis in the moral stance against dishonesty. Honesty is a norm that governs nearly all forms of human relations.<sup>36</sup> Not even judges are immune, as the obligation of candor does not evaporate once a person assumes public office.<sup>37</sup> Judges that engage in deception undermine the legitimacy of the

courts, diminish public acceptance of their decisions, and convey the impression that they are unable to deal with the truth. Correlatively, when deciding a highly controversial case, a court cannot entirely ignore the social and political context of the case, or else it assumes the risk of straining its credibility in the public's estimation.<sup>38</sup> The Hawai'i Supreme Court's decision in *Yoshina* implicated issues of judicial candor, and for that reason, it put its legitimacy at stake.

### III. ANALYSIS: THE EFFECT OF YOSHINA ON THE HAWAII SUPREME COURT'S INSTITUTIONAL LEGITIMACY

*Yoshina* provides fertile ground for exploring the Hawai'i Supreme Court's legitimacy because the decision fits within the two situations that Casey described as the most compromising to the institutional legitimacy of a court. First, the con-con question in *Yoshina* carried with it much political baggage. The core purpose of a con-con is to confront the question of whether to preserve the status quo or engage in reform.<sup>39</sup> The con-con question had potentially far-reaching implications for a variety of sensitive issues, including same-sex marriage, abortion, gambling, and Native Hawai'i sovereignty. If convened, the con-con would give the citizens of Hawai'i a very direct hand at reshaping the Hawai'i Constitution. In tampering with the electorate's expression of whether to hold a con-con, the

<sup>38</sup> See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 94 (1998).

<sup>39</sup> See SEAN ALOYSIUS KELLEHER, *THE POLITICS OF CONSTITUTIONAL REVISION IN HAWAII*, 1968 2 (1973).

Hawai'i Supreme Court essentially handled a "political grenade."<sup>40</sup> As such, in deciding *Yoshina*, the court was especially prone to criticism for overstepping its allocated authority.

Secondly, the legal reasoning of *Yoshina* intruded on the reasonable expectations of the public. Technically, the Hawai'i Supreme Court did not overrule any precedent in *Yoshina*. Nevertheless, its reasoning contradicted the understanding of the public regarding how its votes would be counted. To exacerbate the problem, the court applied its new interpretation retroactively. In that way, *Yoshina* generated an effect similar to that which the public feels when a court expressly overrules one of its prior cases.

*Yoshina* diminished the judicial legitimacy of the court because it paid inadequate attention to the legitimacy concerns raised by the con-con controversy. *Yoshina* was not an instance where the court utterly failed to engage in principled decision-making. At first glance, the court appeared to make a careful effort to ground its reasoning in legal principles. The court defined the constitutional issue before it, analyzed the statutory language using principles of statutory construction and legislative history, and drew a legal conclusion based on that analysis. Nowhere in the opinion did the personal or political preferences of the members of the court become apparent.

The absence of any discussion of preferences in the opinion, ironically, touches upon why *Yoshina* may have compromised the court's integrity. The

<sup>40</sup> Convention Ruling: Political Confidence at Stake, HONOLULU ADVERTISER, March 26, 1997, at A-10.

court seemed to ignore the second dimension of institutional legitimacy, judicial candor. In substantiating its analysis with legalistic reasoning, reasoning that arguably eluded the common sense of the average voter,<sup>41</sup> the court implied it was not prepared to address issues not discussed in the opinion, such as the fairness of applying its interpretation of Article XVII retroactively. The court attempted to gather support for its decision by grounding it in legal logic, but in doing so it succumbed to the fantasy that logic permitted no conclusion other than the one reached by the court.<sup>42</sup> Underlying this approach is the pretense that no other considerations influenced the court's decision, even though a variety of factors may have had an appreciable effect on the court. The result is an erosion of judicial legitimacy.<sup>43</sup>

The following sections discuss how the court's lack of judicial candor placed its legitimacy at risk. The court framed its decision as one necessitated by principled reasoning. This approach was deceptive in two ways. First, it masked the logical fallacies in the court's reasoning. Second, it limited the universe of issues and authority that the court had to address. As a result, *Yoshina* was both logically flawed and intellectually disingenuous.

<sup>41</sup> See Mary George, 'Humpty Dumpty' Logic, HONOLULU ADVERTISER, March 30, 1997, at B-3 (arguing that the court's semantic approach offended the common sense of voters that by leaving their ballots blank, they chose not to vote on the question).

<sup>42</sup> See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 14 (1993).

<sup>43</sup> See *id.* Solan notes that the harm to legitimacy is ironic, "in that it results precisely from the effort to increase the legitimacy of the judicial process by perpetrating the fiction that the outcome of each case is fixed by independent principles." *Id.*

#### A. Statutory Interpretation

Interpretation of the language of Article XVII, Section 2 was the focus of *Yoshina*. Statutory interpretation is standard judicial fare, and rightly so, for it creates the appearance that courts can do no more than mechanically deduce the correct answers from a legislative imperative.<sup>44</sup> Judges thus purport to be bound by the "plain language" of a statute. In *Yoshina*, the Hawai'i Supreme Court recited the familiar rule that "if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written."<sup>45</sup> In representing that this rule guided its analysis, the court insinuated that what followed was the product of principled reasoning.

However, the process of interpretation employed by the court was not entirely grounded in the plain meaning of Article XVII. The court's first task was to truncate the phrase, "ballots cast upon such a question," into the sub-phrases "ballots cast" (the "ballot phrase") and "upon such a question" (the "question phrase"). In examining the word "ballot," the court emphasized its function as an instrument used in voting.<sup>46</sup> According to the court, this definition of "ballot" distinguished it from a "vote." A vote is the voter's choice between candidates or questions while a ballot is merely the instrument by which the voter expresses that choice. Similarly, a ballot is "cast" regardless of

<sup>44</sup> See Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 217 (1983).

<sup>45</sup> *Yoshina*, 84 Hawai'i at 376, 935 P.2d at 91 (quoting *Blair v. Cayetano*, 73 Haw. 536, 543, 836 P.2d 1066, 1070) (ellipses in original).

<sup>46</sup> See *id.*

whether it bears the voter's choice as long as the voter has placed the ballot into the ballot box.

Under the court's analysis, a voter could conceivably cast a ballot without voting. While that is consistent with common understanding, it does not follow that the elections officer must count blank and spoiled ballots. If a ballot is an instrument that records the voter's choice, then, at a minimum, a ballot must record a choice to be valid. The case the court cited as authority for its definition of "ballot," *State ex rel. Cashmore v. Anderson*,<sup>47</sup> supports this view. *Cashmore* explains, "the act of voting consists of marking a valid ballot that is deposited in the ballot box and counted in the election."<sup>48</sup> Under *Cashmore's* holding, submitting a blank ballot would not count as an act of voting. Thus, the court drew an empty distinction between a ballot and a vote since the very basis for the distinction would render blank ballots invalid. The product of the court's exercise in statutory interpretation was a tautological argument: ballots that are invalid should be counted because they, unlike votes, can be invalid by definition. The fallacy in the court's reasoning could not have bolstered its overall credibility.

The court's discussion of the question phrase was similarly flawed. The court established that the question phrase identified which of the "ballots cast" were relevant to the calculation of a majority on the con-con question. The relevant ballots were the ones with the con-con question printed on them, and not those used to elect a candidate

<sup>47</sup> 500 P.2d 921 (Mont.), cert. denied, 410 U.S. 931 (1973).

<sup>48</sup> *Id.* at 929 (emphasis added).

or delegate to a con-con. However, the court explained that the question phrase did not "control, qualify, or enlarge" the plain meaning of "ballots cast" (the "modification principle").

The court was correct in invoking the modification principle, but it applied the principle inconsistently. The court stated a truism in concluding that the question phrase referred only to the ballots bearing the con-con question.<sup>49</sup> The court avoided the central point of contention surrounding the question phrase, namely whether it identified the subset of ballots containing an expression of a voter's choice as to the con-con question. Here the court's strategy in truncating the phrase, "ballots cast upon such a question," becomes clear. By arguing that the plain meaning of "ballot" is not controlled by whether it contains a voter's expression, the court foreclose the possibility that the question phrase would modify that definition. Yet, its conclusion that the question phrase refers only to the subset of ballots bearing the con-con question would also seem to modify the plain meaning of "ballots cast." For instance, a ballot cast in favor of a certain candidate, rather than the con-con question, falls within the plain language definition of "ballots cast" because, according to the court, a ballot is cast regardless of whether it bears the voter's

choice.<sup>50</sup> Yet, the court acknowledged that such a ballot should not be counted, because it was not within the subset delimited by the question phrase. Essentially, the court applied the modification principle to preserve its interpretation of the ballot phrase, but overlooked the principle to recognize basic conclusions it could not ignore without losing credibility.

In applying what is essentially a double standard, the court may have injured its credibility. The public could readily infer from such judicial behavior that the court was hiding the true rationale behind its purported allegiance to a rule. The court's inconsistent application of the modification principle underscored the need to read the phrase "ballots cast upon such a question" in its entirety to discern which ballots must be counted. In the same way that the question phrase limits the subset of ballots to those bearing the con-con question, the court should have read the phrase to identify those ballots that contained an expression of a voter's choice on the con-con question. A ballot devoid of an expression is not "cast upon the question," but merely cast.

The portion of Yoshina interpreting Article XVII was, perhaps, the most tortuous part of the opinion. That the court's analysis was complex creates the impression that it culled its decision from principles of logic. A closer analysis suggests that the court was not entirely frank in applying those principles. Surely, by embarking on an elaborate journey, the court appeared to have ar-

<sup>50</sup> Amicus Citizens for a Constitutional Convention and Let the People Decide advanced this argument. See *id.* at 378 n.4, 935 P.2d at 93 n.4. Not surprisingly, the court dismissed it as "miss[ing] the point." *Id.*

rived at its destination with the guidance of settled principles. However, the appearance of complexity alone guarantees neither that the destination was correct nor that disclosed principles were the only guideposts upon which the court relied.

## B. The Court's Use of Authority

In addition to applying principles of statutory construction, the court grounded its decision in case law and legislative history. Both forms of authority are instruments of principled decision-making, as they provide guidance to a court on how to render a decision that is consistent with settled rules and expectations. As with its efforts at statutory interpretation, the court in Yoshina discussed authority favorable to its conclusion, and inadequately addressed the considerable body of contrary authority.

### 1. Case Law

A court that observes *stare decisis* creates the impression that it adheres to the rule of law. The Hawai'i Supreme Court attempted to justify its holding with precedent, but it did not embrace the full universe of authority relevant to the issue before it. What precedent the court did use provided incidental support for several premises underlying the court's holding. For instance the court cited *Lane v. Fern*,<sup>51</sup> a territorial case standing for the proposition that a ballot is "cast when the voter has exhausted all reasonable efforts to have it placed in the box."<sup>52</sup> The court also

<sup>51</sup> 20 Haw. 290 (1910).

<sup>52</sup> *Id.* at 297.

used two cases, *Davis v. Brown*<sup>53</sup> and *State ex rel. Cashmore v. Anderson*,<sup>54</sup> for support in distinguishing between a ballot and a vote.

For direct support of its holding, the court cited only one case, *People ex rel. Hewitt v. Cincinnati, L. & C. Ry. Co.*<sup>55</sup> *Hewitt* involved an election to determine whether to levy a road tax. The statute governing the election provided that a majority of the ballots cast at the election must be in favor of the tax. The number of ballots cast totaled 463, of which 222 ballots were cast in favor of the tax and 189 were against. The Supreme Court of Illinois held that the proposition levying the tax did not secure the requisite majority of ballots. *Hewitt's* holding supports the court's reasoning, but it does not justify it. The court in *Hewitt* did not explain why the calculation of the majority must be based on all the votes cast; it merely held that it must. The Hawai'i Supreme Court's reliance on *Hewitt* endowed it with only a shadow of authority.

The court did address one of its prior holdings. In *Republican Party of Hawai'i v. Waihee*,<sup>56</sup> the Hawai'i Supreme Court adopted the general rule that "blank, illegal, and unintelligible ballots should be rejected in comput-

<sup>53</sup> 34 S.E. 839 (W. Va. 1899).

<sup>54</sup> 500 P.2d 921 (Mont.), cert. denied., 410 U.S. 931 (1973).

<sup>55</sup> 100 N.E. 208 (Ill. 1912).

<sup>56</sup> 68 Haw. 258, 709 P.2d 980 (1985) (per curiam).

ing the number of votes."<sup>57</sup> The court found *Waihee* inapposite, emphasizing the qualification it made in *Waihee* that "[w]hether that general view has any application in a particular case depends on the particular wording of the charter, statute or constitutional provision in question."<sup>58</sup> It observed that the wording of the provision in *Waihee* contained the phrase "vote on the question" rather than "ballots cast upon such a question" in Article XVII, Section 2. Therefore, the court concluded, the rule in *Waihee* did not apply. Again, the court was technically correct in pointing out the difference between the wording in the county charter in *Waihee* and Article XVII. The question, as the next section explains in greater detail, is whether the court was reasonable in drawing that fine distinction.

The authority the court did not address may be more telling than the precedent it cited. As *Waihee* acknowledged, the general rule is not to count blank, unintelligible or over-voted ballots. The rule is well-settled in a number of jurisdictions.<sup>59</sup> Except for its evasive treatment of *Waihee*, the court failed to directly address the general rule or the rationale behind it.

### Illustrative of the court's approach

<sup>57</sup> *Id.* at 259-60, 709 P.2d at 981 (quoting 26 AM. JUR. 2d, Elections § 314 at 139 (1966)).

<sup>58</sup> *Id.* at 260, 702 P.2d at 981.

<sup>59</sup> See, e.g., *Stembridge v. Newton*, 99 S.E.2d 133 (Ga. 1957); *Dickinson County Memorial Hospital Corp. v. E. O. Johnson*, 80 N.W.2d (Iowa 1957); *Battle Creek Brewing Co. v. Board of Supervisors of Calhoun County*, 131 N.W. 150 (Mich. 1911); *Wooley v. W. L. Sterrett*, 387 S.W.2d 734 (Tex. Civ. App. 1965).

to contrary authority was its use of *State ex rel. Cashmore v. Anderson*.<sup>60</sup> The court cited *Cashmore* for the proposition that a ballot is different from a vote, but neglected to observe that *Cashmore* directly clashed with its reasoning. The court in *Cashmore* held that, in an election to approve a proposed state constitution, "unintelligible ballots, fouled, void, or illegal ballots are not included as 'electors voting in the election' because their ballots are not entitled to be counted in the election."<sup>61</sup> Only the total number of properly marked ballots should be counted in determining whether the constitutional question obtained the required majority of votes. *Yoshina* made no mention of the facts or holding of *Cashmore*, but merely cited the case and explained in a parenthetical how the case supported the distinction between a ballot and a vote.

As with its efforts at statutory interpretation, the Hawai'i Supreme Court was not entirely candid in applying precedent. The court attempted to bolster its legitimacy by tapping into the power of precedent, but it did so inconsistently. Most of the case law relevant to the issue of counting spoiled ballots stands contrary to the court's conclusion. Yet, the court made little effort to account for its decision in light of the contrary authority.

### 2. Legislative History

*Yoshina's* treatment of the legislative history of Article XVII, Section 2 was misguided as well. The court concentrated on floor debates of the Committee of the Whole at the 1950 con-con, which

<sup>60</sup> 500 P.2d 921 (Mont.), cert. denied., 410 U.S. 931 (1973).

<sup>61</sup> *Cashmore*, 500 P.2d at 930.

included a discussion of the distinction between the words "tallied" and "cast." The portion of the debate quoted by the court clarified that the word "tallied" referred to the actual votes that were counted and votes "cast" meant the total number of votes cast, including spoiled ballots. The court argued that legislation enacted in 1953 confirmed that distinction:

§ 243.01. Votes cast, definition of. The term 'Votes Cast' for any election purposes, shall mean:

- (1) Any ballot which is presented by any voter to the inspector of election in charge of the ballot box, to be deposited in the ballot box, regardless of whether it be a blank ballot or a ballot later rejected for any reason.
- (2) Any ballot which is returned, as having been voted under the provisions of sections 227 to 233, inclusive, as amended, and regardless of whether it be a blank ballot or a ballot later rejected for any reason.<sup>62</sup>

The provision was co-authored by the chairman of the standing committee at the 1950 con-con, who participated in the floor debate referred to in the opinion.

The court misplaced its reliance on the convention debates and the 1953 statute because it did not give due consideration to the accompanying context. The subject of the debates was the ratification provision of Article XVII, Section 2, not the provision governing the convening of a con-con. Only in the ratification provision do the terms "total vote cast" and "votes tallied" appear. Ratifi-

cation of a revision or an amendment is effective only by the approval of a majority of all the votes tallied upon the question. Additionally, the majority must constitute at least fifty per cent of the total vote cast at the election. According to the Standing Committee, the purpose of this ratification scheme was to counteract the situation where "although an overwhelming majority of the persons actually voting for or against the proposition may approve it, the total of all such persons so voting is less than one half of the total number voting for candidates."<sup>63</sup> The fifty per cent requirement was included "[t]o reassure those who feel that at least a minimum number of the total electorate ought to ratify an amend-

The majoritarian standard for ratification is different from that for convening a con-con. The Attorney General's Opinion explains that Article XVII has always been understood to establish a two-part scheme for amending the State Constitution by a con-con.<sup>65</sup> Convening a con-con requires a simple majority, while ratification of an amendment or revision requires a simple majority and a percentage of all votes cast. The requirement for holding a con-con is thus less rigorous than that for ratifying a constitutional revision or amendment. Yoshina disre-

<sup>63</sup> Stand. Comm. Rep. No. 48, in 1 PROCEEDINGS 1950, supra note 1, at 187. The reason for the low rate of ballot returns is that voters may be confused or unwilling to take the effort to decide difficult questions of constitutional policy. See id.

<sup>64</sup> Id.

<sup>65</sup> See Op. Att'y Gen. 96-5 at 12 (1996).

garded this two-part scheme.

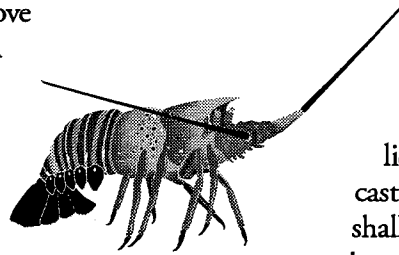
The 1953 statute also did not support the court's reasoning. First, the statutory language used the terms "ballot" and "vote" interchangeably, contrary to the distinction the court draws.<sup>66</sup> Second, as the court mentions in passing, the statute was superseded by revisions to the election statutes in 1971. The revisions yielded Hawai'i Revised Statutes § 11-151, which states that "blank, spoiled, or invalid ballots shall not be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in ratification of a constitutional amendment."<sup>67</sup> This provision is the converse of the 1953 statute. Further, the exception made in § 11-151 for ratification confirms the two-part scheme for passing constitutional revisions or amendments through a con-con. The fact that an exception was made specifically for the ratification provision suggests that the general rule applies to all other election situations not enumerated, including the question of whether to hold a con-con. Notwithstanding its footnote explaining that § 11-151 did not apply because it uses the term "votes" rather than "ballots,"<sup>68</sup> the court did not attempt to explain how its analysis was consistent with the statutory provision.

The court's treatment of case law and legislative history highlights the reason why Yoshina was injurious to the court's

<sup>66</sup> See 1953 Haw. Sess. L. Act 181, § 1, at 35. The statute defines "votes cast" in terms of "ballot[s]." Id.

<sup>67</sup> HAW. REV. STAT. § 11-151(3) (1993).

<sup>68</sup> See Yoshina, 84 Hawai'i at 380 n.5, 935 P.2d at 95 n.5.



institutional legitimacy. Citation to favorable authority may lead the public to believe that the court's decision is the necessary product of legal reasoning. Abbreviated treatment—and, in some instances, complete neglect—of contrary authority belies that conclusion. One commentator, writing about the court's cursory treatment of Waihee, aptly described the problem with the court's treatment of precedent: "Our Hawai'i Supreme Court either intentionally ignored this law or is intellectually dishonest or has an affiliation with the members of our unions too intimate to allow objectivity to reign."<sup>69</sup> The Hawai'i Supreme Court's failure to engage in a frank and full discussion of the arguments against its position prompted conjecture over whether the court succumbed to political pressure, a result contrary to its desire of bolstering its institutional legitimacy through a well-reasoned opinion.

### C. Issue Selection

Yoshina turned upon the narrow issue of the interpretation of the phrase "ballots cast upon such a question" in Article XVII, Section 2. This line of inquiry was appropriate, as the authority to convene a con-con flows from the Hawai'i Constitution. However, election officials did not rely solely on Section 2 of Article XVII in determining what information to give to the public about how their votes would be counted. The Office of Elections also relied on Hawai'i Revised Statutes § 11-151. The question, then, is whether the court acted legitimately in limiting its discussion to

<sup>69</sup> Gene Ward, High Court Reversed Itself, HONOLULU ADVERTISER, March 30, 1997, at B-3.

Article XVII and applying its interpretation of that provision retroactively.

The case law suggests that the court unconstitutionally acted against the reasonable expectations of the electorate. The Eleventh Circuit encountered a situation factually similar to Yoshina in *Roe v. Alabama*.<sup>70</sup> In *Roe*, a voter and two candidates for office in a state election sought to enjoin enforcement of the order of an Alabama state court requiring improperly completed absentee ballots to be counted. Alabama law provides that a person voting by absentee ballot must complete an affidavit form in the presence of a notary public.

In the 1994 general elections, approximately 1000 to 2000 absentee ballots were not counted because they were not accompanied by a properly completed affidavit form. A lawsuit filed after the elections successfully secured an order mandating the election officials to count the contested absentee ballots. The Eleventh Circuit held that the order would "constitute a retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues."<sup>71</sup> The court's rationale was twofold. First, the Alabama Election Code clearly stated the affidavit requirement, and second, the statewide practice in Alabama had always been to exclude absentee ballots that did not comply with the requirement. Requiring the contested absentee ballots to be counted, the court reasoned, would amount to "a post-election departure" from past practice, one upon

<sup>70</sup> See *Roe v. Alabama*, 43 F.3d 574 (11th Cir.) (per curiam), reh'g denied, 49 F.3d 734 (11th Cir. 1995).

<sup>71</sup> Id. at 581 (footnotes and citations omitted).

which voters reasonably relied.

Yoshina raised similar constitutional problems. The Office of Elections had informed the public by written memorandum and on the Internet that spoiled, blank, and invalid ballots would not be included in the calculation of a majority for the con-con question. This information reflected the long-standing practice of the elections office. According to the Chief Elections Officer, blank ballots were never counted in calculating a majority on con-con questions.

The federal district court in *Bennett v. Yoshina* found Yoshina analogous to *Roe*. The information distributed to voters, coupled with the conventional practice of not counting blank or over-voted ballots, gave no reason to voters to believe that their blank ballots would be counted. Even assuming the Hawai'i Supreme Court's interpretation of Article XVII, Section 2 was reasonable (an issue the district court did not address), the interpretation was unforeseeable to the average voter.<sup>72</sup> That Yoshina's interpretation comported with a plain language understanding of the statutory language, an argument defendants supported with the opinion of a professor of linguistics, was irrelevant. The court observed that if it took a professor of linguistics to discern the common usage of the language, then that is evidence that the average lay voter could not have been expected to understand the "plain meaning" of the provision as interpreted by the Hawai'i Supreme Court. Accordingly, the

<sup>72</sup> See *Bennett v. Yoshina*, Civ. No. 97-00322 DAE, at x. The court found defendants' argument that Yoshina was foreseeable because it was reasonable to "beg[] the question." Id. n.13. "The real issue," the court wrote, "is whether Hawai'i voters could have anticipated the Hawai'i Supreme Court's decision in light of contrary direct information provided by elections officials." Id.

court held that Yoshina rendered the election on the con-con question fundamentally unfair in violation of the First and Fourteenth Amendments.

Bennett strongly suggests that the Hawai'i Supreme Court ignored an issue of fundamental importance. Regardless of the correctness of its interpretation of the language of Article XVII, Section 2, the court's neglect of fundamental fairness concerns injured its integrity in the estimation of the public. Judicial credibility depends in part on the court's articulation of reasons for its decision so that the public may debate their validity. When the public cannot reasonably foresee the rationale behind an opinion, and yet, is expected to abide by it, it may very well regard the court with cynicism.

The Hawai'i Supreme Court's attempt at lending credibility to Yoshina backfired. Preoccupied with creating the appearance that Yoshina was a principled decision, the court neglected to assess the overall fairness of its decision. In engaging in a painstaking dissection of a legal phrase, the court appeared fixated on the meaning of the individual words in the phrase when the more important issue was the public's expectations that flowed from the meaning of the phrase as a whole. In terms of legal authority, the court cited a mosaic of precedents to support individual premises of its arguments without acknowledging that the weight of authority, in its totality, controverted its conclusion. The lay public may not have understood exactly how the court's legal reasoning went awry, but it sensed that the court was not being entirely candid, and that was enough to prompt distrust of the court.

## CONCLUSION

The United States Supreme Court

emphasized in Casey that the judiciary's power flows from its legitimacy, "a product of substance and perception" that the courts are fit to interpret and apply the law.<sup>73</sup> Although principled reasoning is a core component of institutional legitimacy, courts must not neglect to reason candidly. After all, Casey lists "perception" with "substance" in the conjunctive.

The Hawai'i Supreme Court did not heed the warning of Casey. An editorial published after the court handed down Yoshina captured the reaction likely shared by the public at large:

The debate over whether the Constitutional Convention question passed is extremely legalistic, depending on semantic interpretation and a close reading of our Constitution's framers. But the practical result is likely to be anything but theoretical. No matter how sound the high court's ruling is, it will be interpreted as further evidence that the "system" is unwilling to accept any influence or input from those not in power.<sup>74</sup>

Yoshina heightened the controversy over an already volatile issue. It did so by substituting a consideration of the reliance interests of the public with semantic and legal precision. Honesty from the court is understandably a minimum price for public acceptance of the court's legitimacy. But while the Hawai'i Supreme Court remains cloistered in its selected mode of reasoning, the public outside suspends its approval.

<sup>73</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992).

<sup>74</sup> *Convention Ruling: Political Confidence at Stake*, HONOLULU ADVERTISER, March 26, 1997, at A-10.

## WHAT HAS YOUR BOARD BEEN UP TO?

The Board of Directors of the Real Property and Financial Services Section holds its monthly meetings at the HSBA offices on the third Friday of each month. Members of the Section are welcome to attend. The following is a brief summary of the minutes of the March, April, and May meetings.

### March Meeting:

#### • Committee Reports

(1) Legislation - Rick Kiefer provided an update of the bills relating to real estate which are currently alive in the legislature. A copy of the legislative update will be provided to Nancy Grekin for inclusion in the Section website.

(2) Seminars - Nancy Grekin, Bruce Graham, Bill Deeley, and Sheila Sakashita discussed future seminars which are described in the Calendar of Events portion of the April newsletter.

(3) Newsletter - Nancy Grekin reported that she learned that advertising income generated from the newsletter may constitute taxable income to the HSBA. The Board agreed to defer action on this until Ms. Grekin could obtain additional information on the potential tax ramifications.

• Treasurer Tom Rosenberg reported that as of February 28, 1998, the Section had \$8,032.50 in its treasury.

• David Callies reported that the William S. Richardson School of Law is considering the adoption of a program which will allow students to obtain a certificate in real estate and real property. The Board discussed the value firms would place on such a certificate.

• Mark Hazlett reported that HICLE is in the final stages of updating the Hawaii Real Estate Manual update.

• Coralie Matayoshi has asked the Real

Property and Financial Services Section to coordinate a special insert section to be included in the Pacific Business News containing articles relating to real property and financing topics. Sheila Sakashita will draft something for the newsletter asking Section members if they are interested in authoring articles for the insert.

### April Meeting:

#### • Committee Reports

(1) Membership - Sheila Sakashita reported that there are 363 members currently within the Section.

(2) Legislation - Sheila Sakashita distributed copies of the most recent Legislative Reference Bureau summaries of bills which are alive in the Legislature and reported that Rick Kiefer will be submitting the summary to Nancy Grekin for inclusion in the Section website.

Randy Brooks distributed copies of a proposed City and County of Honolulu Ordinance which would authorize the City to condemn commercial leasehold property. The Board briefly discussed the proposal.

(3) Seminars - Tom Rosenberg discussed future seminars which are described in the Calendar of Events portion of this newsletter.

David Callies reported that HICLE is experiencing extreme financial difficulty. The Board discussed whether it should continue to utilize HICLE for its seminars.

Sheila Sakashita reported that Carla Poirier of HICLE has advised her that the Real Estate Manual updates will be distributed at the end of April.

(4) PBN Supplement 1999 - Sheila Sakashita reported that the Pacific Business News agreed that the real estate supplement for the Pacific Business News could be done next year. Sheila Sakashita has prepared a survey which has been sent to the Section members asking if they are

willing to participate in the production of the supplement which will include 16 articles. The authors of these articles must commit by May 1998 (deadline later extended), and the articles must be submitted by February 1999.

• Treasurer Tom Rosenberg reported that as of March 31, 1998, the Section had \$8,129.37 in its treasury.

• Sheila Sakashita distributed a memorandum from Charles Key to all HSBA section chairs advising them that the Legislature is considering a statutory procedure to certify lawyers as specialists. The Board discussed the issue and expressed serious concerns over the need and propriety of the legislation. Sheila Sakashita and Randy Brooks will attend the meeting of the HSBA section chairs to voice the Board's concerns regarding the proposed certifications.

### May Meeting

#### • Committee Reports

(1) Seminars - Tom Rosenberg informed the Board that 94 people attended Nancy Grekin's HICLE seminar and that HICLE made \$4,800 from the program. He discussed future seminars which are described in the Calendar of Events portion of this newsletter.

(2) Real Estate Manual - All missing chapters of the Real Estate Manual have gone out, and at a cost of \$8,300.00, it is now complete. HICLE promised that it would have all corrections in the second set.

(3) Nominations - Tom Rosenberg is resigning as Treasurer after eight years of service. The proposed slate of officers and directors includes Jon Pang, as Chair Elect/Vice Chair, Trudy Burns Stone, as Secretary, Stan Kuriyama, as Treasurer, and Harrilynn-Joy K. Kameenui, as Director. Tom Rosenberg and Max Graham said that they would run as Directors. Two more vacancies remain for next year. Anyone wishing to supply additional names to the nominating committee should get them to Sheila Sakashita or Randy Brooks. In particular, the Board

is looking for nominees who are in-house attorneys, members of the Young Lawyers Division, and neighbor island attorneys. Ballots will go out in the October newsletter.

(4) PBN Supplement 1999 - In response to the survey, Chair Sakashita received two responses. Mark Hazlett volunteered to send additional faxes to solicit authors and Charlie Pear agreed to edit the pieces.

• Bill Deeley reported on the Ozaki premises liability case.

• There was a brief overview of the legislative bills.

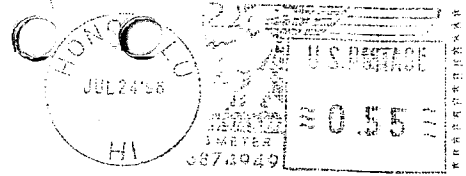
• Tom Rosenberg moved to increase the annual scholarship grant which is awarded to the two winners of the newsletter article contest from \$300.00 each to \$500.00 each. The motion was seconded and approved.

• Randy Brooks and Sheila Sakashita met with Charlie Key and Gunner Schull and other section chairs and chair-elects. The consensus was in opposition to the effort to certify attorneys; however, the Legislature appears to be advocating it. Hawaii is one of only a few states that does not have mandatory continuing legal education. The Board is still opposed to certification for real estate practitioners in Hawaii.

## MEET THE NEWEST BOARD MEMBER

Colleen Iwalani Wong is the Division Senior Counsel to Kaneohe Schools Bernice Pauahi Bishop Estate where her main areas of practice center around real property, business planning, personnel and employment law, personal injury and risk management, environmental law, and education law. She graduated from the University of Santa Clara in 1982 with a J.D. and a M.B.A.

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**REAL PROPERTY AND  
FINANCIAL SERVICES SECTION  
HAWAII STATE BAR ASSOCIATION  
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D.Scott MacKinnon  
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John Rolls, Jr.  
Alfred Wong  
William Yuen

**CALENDAR OF EVENTS**

Sept 18	Board of Directors' Meeting 1136 Union Mall, Penthouse 1 12:00 Noon	Nov 20	Board of Directors' Meeting 1136 Union Mall, Penthouse 1 12:00 Noon
Oct 16	Board of Directors' Meeting 1136 Union Mall, Penthouse 1 12:00 Noon	Nov 30 - Dec 1	HSBA Annual Convention Sheraton Waikiki
Nov 20	Litigation Update Hawaiian Electric Training Center Pacific Tower, 8th Floor 8:00 a.m. - 10:00 a.m.	Dec 9	Annual Section Meeting Plaza Club 12:00 Noon
		Dec 18	Board of Directors' Meeting 1136 Union Mall, Penthouse 1 12:00 Noon

(For further information regarding seminars, please call HICLE at 956-6551)