



## *THE JUDICIARY, STATE OF HAWAII*

### **Testimony to the House Committee on Judiciary**

The Honorable S.C. Keith-Agaran, Chair

The Honorable Karl Rhoads, Vice Chair

Tuesday, February 22, 2011, 2:00 p.m.

State Capitol, Conference Room 325

by

Judge Glenn Kim, Chair

Hawaii Supreme Court Standing Committee on the Rules of Evidence

### **WRITTEN TESTIMONY ONLY**

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**Bill No. and Title:** House Bill No. 1376 (H.B. No. 1376), Relating to Evidence

**Purpose:** Makes permanent the limited news media privilege against the compelled disclosure of sources and unpublished information.

### **Judiciary's Position:**

H.B. No. 1376 makes permanent the qualified journalists' privilege against compelled disclosure of sources and unpublished information that was established by Act 210 (2008). H.B. No. 1376 accomplishes this by eliminating Act 210's sunset clause which, if left standing, will automatically repeal this privilege measure on June 30, 2011.

The Standing Committee on Rules of Evidence was established by the Chief Justice on 15 July 1993 "to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence." Whether or not to retain a journalists' privilege is a question that should be addressed, in the first instance, to the Supreme Court's Standing Committee on Rules of Evidence. Accordingly, the committee requests that the Legislature, recognizing the principle of shared governance of the Hawaii Rules of Evidence, defer action on this measure and refer it to the evidence rules committee for interim study and a full report in advance of the convening of the 2012 Legislature.



House Bill No. 1376, Relating to Evidence  
House Committee on Judiciary  
February 22, 2011  
Page 2

The committee observes that the drafters of evidence rules did not recommend a journalists' privilege, and the 1980 Legislature did not adopt one. Nor do the Uniform Rules of Evidence contain such a privilege. The committee has no present information regarding the status of journalists in the other 49 states, but would undertake this kind of research if the matter were referred to it.

Thank you for the opportunity to provide comments on H.B. No. 1376.



Committee: Committee on Judiciary  
Hearing Date/Time: Tuesday, February 22, 2011, 2:00 p.m.  
Place: Room 016  
Re: Testimony of the ACLU of Hawaii In Support of and to Offer Comments to H.B. 1376, Relating to Evidence

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of and to offer comments to H.B. 1376.

Freedom of the press promotes speech and self-governance for all Americans. Journalists provide information needed for voters to evaluate candidates. They uncover unlawful acts by elected representatives and expose government abuses of power. Investigative reporting helps ensure that our government is open to public scrutiny. Liberty is lost without a free and independent press.

Journalists cannot maintain their independence without access to information from confidential sources. The Watergate scandal and the Pentagon Papers became public only after informants were assured anonymity. More recently, confidential sources broke stories about illegal government programs including torture, warrantless wiretapping, kidnapping, and illegal detention. In retaliation, the government has used subpoenas to intimidate journalists into revealing sources and jailed them if they declined to name names.

The government's efforts to silence dissent are facilitated by the lack of a journalist's privilege from identifying confidential sources. Forty-nine states and D.C. recognize some form of reporters' privilege. A vibrant and meaningful state reporters' shield will ensure that journalists continue to have the tools they need to hold the government accountable to the people. It also will allow the press to continue to inform the public about substantial risks to our health and safety without fear of government persecution.

We urge this Committee to make the state media shield law permanent with the following recommendations:

- **Adopt a qualified privilege** that generally protects against forced disclosure of sources, with narrow exceptions for protecting other competing rights and interests.

American Civil Liberties Union of Hawaii  
P.O. Box 3410  
Honolulu, Hawaii 96801  
T: 808.522-5900  
F: 808.522-5909  
E: [office@acluhawaii.org](mailto:office@acluhawaii.org)  
[www.acluhawaii.org](http://www.acluhawaii.org)

Hon. Rep. Keith-Agaran, Chair, JUD Committee  
and Members Thereof  
February 22, 2011  
Page 2 of 2

- **Balance a reporters' privilege with the constitutional rights of criminal defendants** to have access to sources and information that may be exculpatory or might mitigate their sentences.
- **Use a functional definition of "journalist"** focusing on acts of journalism and whether information from confidential sources is secured for dissemination to the public.

The experience of the states, most federal courts, and our closest allies around the world demonstrates that we can have freedom of the press without harming our collective security. A state media shield law that safeguards free speech and other important interests strikes the right balance.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple  
Staff Attorney  
ACLU of Hawaii

American Civil Liberties Union of Hawai'i  
P.O. Box 3410  
Honolulu, Hawai'i 96801  
T: 808.522-5900  
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Feb. 21, 2011

Chairman Gilbert Keith-Agaran  
House Judiciary Committee  
[repkeithagaran@capitol.hawaii.gov](mailto:repkeithagaran@capitol.hawaii.gov)

Chairman Keith-Agaran:

The Society of Professional Journalists, Hawaii Chapter, and various media organizations are in strong support of HB 1376 and HB 194, making permanent the state shield law that is due to sunset June 30, 2011.

This limited news media privilege against the compelled disclosure of sources and unpublished information has successfully protected a journalist and a documentary film producer in Hawaii since it was enacted two years ago. More importantly, it has stood as a model for other states and a beacon to a free press, preventing untold subpoenas and threats to the exercise of journalistic endeavors.

It is difficult to quantify the negative, so it is not known how many journalists were not compelled to turn over their notes and sources because of the shield law. In short, however, there has been no documented harm to the state because of the shield law, and at least two cases where the law served its purpose in furthering a free press.

We appreciate your positive recommendation on these bills.

Sincerely,

Stirling Morita  
President, SPJ-Hawaii

Steven Petranik  
Editor, Hawaii Business  
Treasurer, SPJ-Hawaii

Nancy Cook Lauer  
Vice President, SPJ-Hawaii

Malia Zimmerman  
Hawaii Reporter

## JUDtestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, February 21, 2011 7:41 PM  
**To:** JUDtestimony  
**Cc:** nclauer@earthlink.net  
**Subject:** Testimony for HB1376 on 2/22/2011 2:00:00 PM

Testimony for JUD 2/22/2011 2:00:00 PM HB1376

Conference room: 325  
Testifier position: support  
Testifier will be present: No  
Submitted by: Nancy Cook Lauer  
Organization: Society of Professional Journalists Hawaii Chapter  
Address:  
Phone:  
E-mail: [nclauer@earthlink.net](mailto:nclauer@earthlink.net)  
Submitted on: 2/21/2011

Comments:

Feb. 21, 2011

Chairman Gilbert Keith-Agaran  
House Judiciary Committee  
[repkeithagaran@capitol.hawaii.gov](mailto:repkeithagaran@capitol.hawaii.gov)

Chairman Agaran:

The Society of Professional Journalists, Hawaii Chapter, and various media organizations are in strong support of HB 1376 and HB 194, making permanent the state shield law that is due to sunset June 30, 2011.

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Vice President, SPJ-Hawaii

Steven Petranik  
Editor, Hawaii Business

Malia Zimmerman  
Hawaii Reporter

Treasurer, SPJ-Hawaii

John Temple  
Editor, Civil Beat

## **Testimony in support of HB 1376**

February 21, 2011

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Chairman Keith-Agaran and members of the Judiciary Committee:

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In 2008 the Big Island Press Club applauded the Governor and the Legislature upon approval of the so-called journalism shield law by awarding the club's Torch of Light to both. This award is given annually to highlight the best example of government openness in the state.

In announcing this award, the press club noted that this law was "not perfect." In particular, concerns were raised about the sunset provision of June 30, 2011. The Big Island Press Club supports HB 1376, which would remove the sunset provision and make the shield law permanent. We are also submitting testimony in favor of HB 194, which accomplishes the same purpose.

The sunset provision was intended to create a trial period to work out some of the concerns over this law. Since it was enacted it was invoked only once, on Kauai, regarding a documentary about native Hawaiian burial practices. This suggests that journalists are not overusing and abusing their new protection.

Reporters believe their work serves a higher purpose than themselves -- the accurate dissemination of information in the public's interest. Sometimes this information is hard to reach, or the people who hold the relevant information are unwilling to come forward without a guarantee that the reporters will not identify them.



When a reporter promises confidentiality to a source, the reporter is morally compelled to honor that promise -- again, in the public's interest. The bills before you help journalists, but in a wider sense they help the citizens who rely on a free and independent press to keep them informed.

Journalism shield laws work. Forty-nine states and the District of Columbia offer some form of protection to sources. In 1974, with support from the Big Island Press Club, Hawaii County voters approved a charter amendment, still in force, protecting the newsgatherers from disclosing their sources.

In my day job I am a reporter for the Hawaii Tribune-Herald. On occasion people approach me with useful information on the condition that I do not identify them. Sometimes the information pans out and sometimes it doesn't. Regardless, I feel that the trust ensured by a journalism shield law is an important reason why they have come forward.

The Big Island Press Club was founded in 1967 and it is the oldest professional media organization in the state. On a personal note, I would like to acknowledge one of our founding members, Representative Clift Tsuji, who sits on this committee.

Please approve House Bill 1376.

☐

Sincerely,

☐

Peter Sur

President, Big Island Press Club, and writing on its behalf.

## JUDtestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Tuesday, February 22, 2011 3:29 AM  
**To:** JUDtestimony  
**Cc:** paigeemail@yahoo.com  
**Subject:** Testimony for HB1376 on 2/22/2011 2:00:00 PM

Testimony for JUD 2/22/2011 2:00:00 PM HB1376

Conference room: 325  
Testifier position: support  
Testifier will be present: No  
Submitted by: Paige Calahan  
Organization: Individual  
Address:  
Phone:  
E-mail: [paigeemail@yahoo.com](mailto:paigeemail@yahoo.com)  
Submitted on: 2/22/2011

Comments:  
I am from Maui and I am in support.

## **JUDtestimony**

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**From:** kato.gerald@gmail.com on behalf of Gerald Kato [kato\_gerald@yahoo.com]  
**Sent:** Monday, February 21, 2011 2:54 PM  
**To:** JUDtestimony  
**Subject:** Testimony in Support of HB1376 and HB194

**Follow Up Flag:**  
**Flag Status:**

**Gerald Y. Kato**

**2389 Beckwith Street**

**Honolulu, HI 96822**

**House Committee on Judiciary**

**Hearing: Tuesday, February 22, 2011**

**2 p.m., Conference Room 325**

**TESTIMONY IN SUPPORT OF HB 1376 RELATING TO EVIDENCE AND HB 194 RELATING TO EVIDENCE.**

**Chair Keith-Agaran and Members of the Judiciary Committee:**

I offer my strong support of these bills making permanent the limited news media privilege created by Act 210 in 2008. Thirty-six states and the District of Columbia offer what is known as “shield law” protections for journalists seeking confidentiality of unnamed sources or unpublished information. Hawaii’s law, which passed both houses unanimously three years ago, is a model for a federal shield law. The law protects access to significant information from confidential sources while ensuring that the legitimate needs of law enforcement and public safety are not compromised.

In its wisdom, the Legislature chose a three-year period to determine how the law would work. The test case proved to be that of Keoni Alvarez, a filmmaker, who has been producing together a documentary about Native Hawaiian burial rights. He was subpoenaed in a dispute over construction of a home on Kauai's Naue Point. Lawyers in the case wanted Alvarez to turn over all his raw footage and testify under oath about confidential interviews he conducted. Kauai Judge Kathleen Watanabe ruled that Alvarez did not have to turn over the raw footage or testify because "the public policy of the State of Hawaii to protect journalists." The law worked to protect important sources of information on important public policy issues.

The shield law reflects this state's commitment to protecting the free flow of information embedded in the First Amendment. I urge you to it a permanent part of the laws of Hawaii.

Ian Lind  
PO Box 600  
Kaaawa, Hawaii  
email (public): [ian@ilind.net](mailto:ian@ilind.net)

**Testimony in favor of HB 1376 and HB 194, "Relating to Evidence"**

House Judiciary Committee  
Rep. Gil Keith-Agaran, Chair  
February 22, 2011 • 2 p.m. • Room 325

I strongly support these identical measures, which would delete the sunset provision for the news media privilege.

Hawaii has been a leader in providing protections to journalists, carefully extending those protections to non-traditional media, and in the process upholding the First Amendment's Freedom of the Press.

The privilege has functioned as intended over the 2-1/2 years since its passage, and it is time to make it permanent.

I urge the Judiciary Committee to pass either of these bills without delay.