



**Testimony in Support of HB1376 the Repeal of the Sunset Provision of  
Session Laws of Hawai'i 2008 (Act 210)**

In 2008, Hawai'i became one of 37 states to enact a shield law, affording some level of protection for journalists against having to testify in a court of law as to the source of information used in articles. Section 3, contains a sunset provision, providing for the automatic expiration of the act on June 30, 2011.

The Franklin Center for Government and Public Integrity testifies to the need of journalism shield law protection, in support making the news media privilege permanent by eliminating the sunset provision in Section 3.

**The Current Legal Regime**

The freedom of the press is one of the four freedoms guaranteed by the Constitution of the United States<sup>1</sup>. While the protection of the identity of news sources, with respect to journalists, has not been recognized as a freedom of the press protection, the Supreme Court of the United States has weighed in on the issue. In *Branzburg v. Hayes*, The court, while not specifically

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<sup>1</sup> U.S. Const. amend I.cl. 4. The four freedoms guaranteed by the first amendment to the constitution are the freedom of religion, speech, press and assembly.

acknowledging a specific privilege, stated that in order to attain such testimony, the state must have a compelling state interest in the information sought<sup>2</sup>

Since then the 9<sup>th</sup> Circuit of the United States Court of Appeals, whose jurisdiction includes the State of Hawai'i, has used the legal reasoning in *Branzburg* ,to recognize a broad *reporter's privilege*. In *Shoen v. Shoen*, the court stated "When facts acquired by a journalist in the course of gathering the news become the target of discovery, a qualified privilege against compelled disclosure comes into play. In *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975), cert. denied, 427 U.S. 912, 49 L. Ed. 2d 1203, 96 S. Ct. 3200 (1976), we interpreted *Branzburg v. Hayes* as establishing such a qualified privilege for journalists. Eight of the other nine circuits that have decided the question read *Branzburg* the same way."<sup>3</sup> As a result, the 9<sup>th</sup> Circuit has perhaps the broadest protection afforded constitutionally to reporters, amongst the circuits in the United States. In addition, reporter's privilege is recognized in the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, and D.C. circuits<sup>4</sup>.

On a very basic level, the State of Hawai'i merely continue codify the existing case law. To allow the current state law to expire would bring Hawai'i law back into conflict with existing case law on the federal level. On another level, the recognition of the affording protection to reporters engaged in journalistic activity is the current trend in a majority of jurisdictions by state

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<sup>2</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972), at 700.

<sup>3</sup> *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993)

<sup>4</sup> See *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *Gonzales v. NBC*, 194 F.3d 29, 35 (2nd Cir. 1998); *In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *United States v. Smith*, 135 F.3d 963, 969 & 971-972 (5th Cir. 1998); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Hutira v. Islamic Republic of Iran*, 211 F.Supp.2d 115, 118 (D.C.C. 2002). Federal Court of Appeals which have at some level recognized Reporter's privilege at a level equal to or greater than existing Hawai'i law.



law statute. Currently, thirty-seven states and the District of Columbia have to some extent have shield laws protecting journalists from testifying to their sources. Continued recognition of this privilege by statute would keep Hawai'i in compliance with the legal trend in a vast majority of states.

### **Importance of protecting Journalists.**

Apart from the legal analysis, journalists perform an activity important to society, which needs to be protected. Generally, laws designed to protect sources are necessary to ensure accurate reporting. If a reporter cannot guarantee the protection of his notes, records, video, and other unpublished information, then persons with information are less likely to give information to a reporter. Sources are more likely to withhold vital information, if they know that the information may be subpoenaed and used against them. The information given to reporters are not only vital for a reporter to do his job, it is important to the public at large. Journalists perform a public service by supplying the public with information. With particular regards to investigative reporting, whistleblower information is always of a public interest, especially when the information has to do with a government institution. Shield laws ensure that people with information about public corruption can come forward with that information without fear of reprisal by government institutions.

### **Conclusion**

The current trend in the legal community is to protect reporters, whether it be by legislation via shield laws, or through the courts. The current regime in Hawai'i is to protect reporters.

Journalists provide an invaluable protection, and should be afforded the protection already afforded to them in Hawai'i and 36 other states. There is no logical reason that such protection should be repealed by the sunset provision. Because of this the Franklin Center for Government and Public Integrity supports the initiative in HB 1376 to remove the sunset provision from the 2008 act 210, and make the Hawai'i shield law permanent.

Jason Stverak  
President

JWS/jds

[http://www.capitol.hawaii.gov/session2011/hearingnotices/HEARING\\_JUD\\_02-22-11\\_.HTM](http://www.capitol.hawaii.gov/session2011/hearingnotices/HEARING_JUD_02-22-11_.HTM)

Feb. 21, 2011

Chairman Gilbert Keith-Agaran

House Judiciary Committee

*Sent via email to [repkeithagaran@capitol.hawaii.gov](mailto:repkeithagaran@capitol.hawaii.gov) and*

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Re: hearing on Tuesday, February 22, 2011 in House Judiciary committee

Dear Chairman Agaran and committee members:

Hawaii Reporter, a 9-year-old daily news journal based at the Hawaii state capitol, is in support of HB 1376 and HB 194, which makes permanent the state shield law scheduled to sunset on June 30, 2011.

Hawaii Reporter has benefited from this legislation after subpoenas were issued to our news organization in a civil case related to the 2006 breach of the Ka Loko Dam on Kauai. The law protected Hawaii Reporter's sources, notes and other relevant information and prevented a litigant from using his subpoenas to intimidate sources and journalists involved in documenting the cause of the breach.

The legislation encourages a free press in Hawaii. In addition, Hawaii can be proud that this legislation has served as a model for other states.

Thank you for holding this hearing. Please lift the sunset date and let the law stand.

Sincerely,

Malia Zimmerman

Editor

Hawaii Reporter

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