



Committee: Committee on Judiciary and Labor
Hearing Date/Time: Thursday, March 28, 2013, 10:30 a.m.
Place: Conference Room 016
Re: Testimony of the ACLU of Hawaii in Support of, and With Comments to, H.B. 622 H.D.1, Relating to Evidence

Dear Chair Hee and Members of the Committee on Judiciary and Labor:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of H.B. 622 H.D.1, which seeks to make permanent the limited news media privilege against the compelled disclosure of sources and unpublished sources. The ACLU of Hawaii has, in previous testimony on this measure, discussed the importance of the media shield bill generally. However, the ACLU of Hawaii respectfully suggests that the Committee re-insert the words "for defamation" into subsection (c)(3) of the bill.

The proposed amendment (deleting the words "for defamation") in H.D.1 weaken the proposed protections for journalists. Rather than having secure protection for their unpublished work except in felony cases and cases of defamation, *all* journalists will be subject to a balancing test by a judge in *all* civil cases. The main reason to have a media shield law is not simply to protect those journalists who face a subpoena, but to strengthen the exchange of information between journalists and their sources in the first place (so as to promote communication of ideas and information to the general public). If journalists and informants *know* that they will be covered by the media shield law, the public benefits by receiving high-level, high-quality reporting. If journalists and informants know only that they *might* be covered if a judge happens to agree with them, then this exchange of information will not happen. As such, the ACLU of Hawaii respectfully requests that this Committee re-insert the words "for defamation" and pass this measure.

Thank you for this opportunity to testify.

Sincerely,

Daniel M. Gluck
Senior Staff Attorney
ACLU of Hawaii

The American Civil Liberties Union ("ACLU") is our nation's guardian of liberty working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country.

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hee2 - Kathleen

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 27, 2013 7:58 PM
To: JDLTestimony
Cc: marybarter@me.com
Subject: *Submitted testimony for HB622 on Mar 28, 2013 10:30AM*

HB622

Submitted on: 3/27/2013

Testimony for JDL on Mar 28, 2013 10:30AM in Conference Room 016

| Submitted By | Organization | Testifier Position | Present at Hearing |
|----------------|--------------|--------------------|--------------------|
| Mary M. Barter | Individual | Support | No |

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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hee2 - Kathleen

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 28, 2013 6:01 AM
To: JDLTestimony
Cc: mattbinder@earthlink.net
Subject: Submitted testimony for HB622 on Mar 28, 2013 10:30AM

LATE TESTIMONY

HB622

Submitted on: 3/28/2013

Testimony for JDL on Mar 28, 2013 10:30AM in Conference Room 016

| Submitted By | Organization | Testifier Position | Present at Hearing |
|----------------|--------------|--------------------|--------------------|
| Matthew Binder | Individual | Support | No |

Comments: Chairman Hee and members of the Senate Judiciary Committee: Please make the Shield Law Permanent. Journalism is one of the cornerstones of our democracy and it would be seriously undermined if journalists could not protect their sources. I'm sure you understand this so I will not bother you with the arguments for a shield law. The argument against a shield law is basically selfish and unworthy. If you are a person in power you do not want journalists exposing your secrets. If you vote against HB 622 you are saying to the public that you do not want them finding out the truth. Good luck with that! Sincerely, Matt Binder Kealakekua

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LATE TESTIMONY

hee2 - Kathleen

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 28, 2013 6:46 AM
To: JDLTestimony
Cc: matt_lopresti@yahoo.com
Subject: *Submitted testimony for HB622 on Mar 28, 2013 10:30AM*

HB622

Submitted on: 3/28/2013

Testimony for JDL on Mar 28, 2013 10:30AM in Conference Room 016

| Submitted By | Organization | Testifier Position | Present at Hearing |
|------------------|--------------|--------------------|--------------------|
| Matthew LoPresti | Individual | Support | No |

Comments:

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**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

LATE TESTIMONY

ON THE FOLLOWING MEASURE:
H.B. NO. 622, H.D. 1, RELATING TO EVIDENCE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Thursday, March 28, 2013 **TIME:** 10:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Deirdre Marie-Iha, Deputy Attorney General

Chair Hee and Members of the Committee:

This bill would make the journalists' shield law permanent. The journalists' shield was originally enacted by Act 210 in 2008, with a sunset date of 2011. The sunset date was later extended to 2013. The journalists' shield allows professional journalists to keep their sources confidential, and thus promotes public access to more information. To the extent the journalists' shield applies to professional journalists and their sources, the Department of the Attorney General does not object to making the law permanent. Beyond that, however, the Department has some significant concerns about the existing wording in Act 210, Session Laws of Hawaii 2008, including provisions that make the shield law unduly expansive. The Department therefore urges this Committee to incorporate the proposed amendments if this bill is to be passed.

We therefore respectfully urge the Committee to use this bill to amend Act 210, Session Laws of Hawaii 2008. We suggest four specific amendments: (1) omit the provision that extends the protections beyond professional journalists to non-traditional journalists and bloggers, (2) add an exception for defendants in criminal cases who have a constitutional right to the information, (3) omit the provision extending the shield to unpublished information that is not reasonably likely to lead to the identification of the source and (4) add definitions of some the critical terms describing the reach of the statute, including "news agency" and "press association." H.B. No. 622, H.D. 1, lines 2-3. These amendments would remove potentially problematic aspects of the journalists' shield law, and better tie the provision to the protection of confidential *sources*, which is the primary aim of journalists' shield laws.

First, the protection for “bloggers” or non-traditional journalists is far too broad, untested, and well beyond any statutory journalists’ shield enacted in any State. Our research indicates that no states statutory journalists’ shield law has gone this far. The interests in bringing information to the public eye would be just as well served by offering statutory protection for professional journalists only, because a source desiring anonymity could simply go to a professional journalist. The bloggers provision should be therefore removed. Making this amendment will not decrease the protection for professional journalists who publish on the digital version of traditional news sources (for example, a newspaper’s website), because that is explicitly protected under subsection (a). Because the bloggers’ provision is overbroad and not necessary to accomplish the shield law’s central goals, all of subsection (b) should be omitted.¹ If this amendment is made as we suggest, internet activity would be protected under the shield law **only** if connected to existing, professional news organizations.

Second, the existing language fails to guarantee the protection of constitutional rights of criminal defendants, who may be entitled to the information as part of their entitlement to a fair trial, or to call or confront witnesses in their defense. In the absence of an exception tailored to address this concern, when this circumstance arises, the statute may be struck down as unconstitutional, or otherwise valid prosecutions may be dismissed because the defendant is unable to present evidence in his or her defense. Neither result is in the public interest. To address this concern, a new paragraph (6) should be added to the exceptions presently found in subsection (c). Such an exception could read, for example: “a defendant in a criminal case has a constitutional right to the information sought to be disclosed.”

Third, the statute’s extension to all unpublished information in a journalists’ possession (or in the possession of a blogger who stands in a similar position, if the blogger provision is left intact) is unnecessary, because it goes beyond unpublished information that is likely to reveal the identity of the source. The protection of confidential sources is the major justification for the enactment of a journalists’ shield. Because subsection (a)(1) explicitly protects information that “could reasonably be expected” to lead to the identity of the source, further protection for unpublished information not reasonably likely to lead to the identity of the source is unnecessary to serve the central aim of the journalists’ shield law. Furthermore, because there is no

¹ The following subsections would have to be re-designated.

requirement that the protected unpublished information be given to the journalist by the source with an express demand for confidentiality, there is no reason to believe that the source would not come forward unless the unpublished information were protected. The protection of all unpublished information is therefore overbroad, and subsection (a)(2) should be omitted.

Fourth, definitions should be added to better describe the intended reach of the statute. The terms “news agency” and “press association” may be considered vague. Defining these terms would give the statute more precision, and avoid unnecessary confusion when the statute is applied in our courts.

We respectfully urge this Committee to incorporate the proposed amendments if this bill is to be passed.