

HB 1008, HD2



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011**

ON THE FOLLOWING MEASURE:

H.B. NO. 1008, H.D. 2, RELATING TO THE POWER OF ARREST.

BEFORE THE:

SENATE COMMITTEE ON
PUBLIC SAFETY, GOVERNMENT OPERATIONS, AND MILITARY AFFAIRS

DATE: Tuesday, March 22, 2011 TIME: 3:00 p.m.

LOCATION: State Capitol, Room 224

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Espero and Members of the Committee:

The Department of the Attorney General strongly supports this bill, with one amendment.

The purpose of this bill is to amend section 803-16, Hawaii Revised Statutes, regarding arrest powers granted to federal customs and immigration officers, by granting arrest powers to officers of both the United States Immigration and Customs Enforcement (ICE) and the Federal Bureau of Investigation (FBI). The bill will also update and accurately reflect the titles of the heads of district offices for the federal agencies included under section 803-16. The Department supports these provisions.

The Department strongly opposes, however, the amendment made in the current version of the bill, House Draft No. 2, at page 3, lines 10-12:

...provided that no evidence obtained as a result of an arrest without a warrant pursuant to this section shall be admissible in judicial proceedings in a state court.

The Department respectfully requests that this provision be deleted from the bill.

THE GRANT OF LIMITED POWERS OF ARREST

The grant of limited arrest powers, under state law, to federal agents, like those of ICE and the FBI, will allow them to provide support to state and county law enforcement efforts, especially in certain times of need. This is particularly important for a small multi-island state like Hawaii, which cannot depend on quick and substantial law enforcement response and support from the limited state and county law enforcement agencies. The state and county must rely on federal law enforcement cooperation and support for natural disasters, joint law enforcement task force efforts, and major or national events.

The following are examples of joint task force cooperation. Federal agents participate on joint task forces that focus on Internet crimes against children, serving outstanding arrest warrants for criminal offenders, and in the investigation and apprehension of violators of the state sex offender registration laws. Federal agents also work with state and county officers on special drug enforcement task forces.

Federal cooperation and support is also important for major or national events like the Asia Pacific Economic Cooperation (APEC) Leaders Meeting, which will be held in Honolulu in November 2011. The meeting will bring thousands of people to Honolulu. To ensure the safety and security of those leaders attending the meeting and those in the community, federal, state and county law enforcement agencies must engage in a major cooperative effort. The amendments proposed in this bill could facilitate that effort.

Act 201, Session Laws of Hawaii 1980, codified as section 803-16, conferred the power to arrest under state law on

officers of the United States Custom Service and the Immigration and Naturalization Service. This law provided additional protection at state airports and harbors by authorizing customs and immigration agents to assist in maintaining law and order. These agents were often in a position to observe suspicious activities but were not authorized, under prior state law, to take action under state law.

In March 2003, the Department of Homeland Security was created by combining the law enforcement arms of the former Immigration and Naturalization Service and the former Customs Service. New agencies were created under the Department of Homeland Security, including ICE, the U.S. Customs and Border Protection Service (CBP), and the Citizenship and Immigration Services (CIS).

Act 95, Session Laws of Hawaii 2008, amended section 803-16 in an attempt to address the creation of the new federal agencies. It also created new section 803-17, Hawaii Revised Statutes, which grants arrest powers to deputies of the U.S. Marshal Service. While Act 95 granted authority to deputy marshals, and amended section 803-16 to include CBP and CIS, it failed to include ICE, the largest investigative branch of the Department of Homeland Security. Furthermore, by including CIS, it included an agency that, according to ICE legal counsel, does not have the authority to make arrests under federal law. Only ICE and CBP agents have law enforcement authority.

This bill is intended to correct these issues by amending section 803-16 to include agents of ICE, and to delete reference to the officers of the CIS. It also grants authority to FBI agents, who will then be able to provide support to state and

county law enforcement efforts. The FBI website describes its mission as follows:

As a national security organization, the mission of the FBI is to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners.

FBI agents clearly have law enforcement authority and have the ability to provide additional support to the state and county if added to the provisions of section 803-16.

Representatives of both ICE and the FBI are in support of their agencies being added to section 803-16.

THE PROVISION ON THE INADMISSIBILITY OF EVIDENCE

With this provision in the bill, law enforcement agents of specified federal agencies will have limited powers of arrest under state law to assist state and county law enforcement agencies with task force operations and critical events, but any evidence obtained as a result of such an arrest would not be admissible in a state prosecution. That being the case, it would make no sense for the federal agents to assist with an arrest and potentially jeopardize a criminal prosecution. It is not clear what would constitute "evidence obtained as a result of an arrest," but the breadth and vagueness of the provision would suggest that all evidence in the case could be inadmissible.

Although the amendment language may be intended to provide safeguards against improper searches and seizures, we believe that it is unnecessary and has many unacceptable consequences.

The following is an example of the unacceptable consequences of the provision. If a federal agent, assisting state law enforcement officers with security for the APEC conference, happens to see an individual trying to conceal an assault pistol under his coat, detains and arrests the individual under state law, and in the process of the arrest recovers Teflon coated ammunition and pipe bombs from the individual, the provision would likely prevent the state from prosecuting the individual for the possession of those dangerous weapons and ammunition.

The justification for this provision is unclear. This law has been in place since 1980, over thirty years ago, and the Department is unaware of any instances in which the law has been misused or abused.

In 2008, the Legislature enacted what is now section 803-17, Hawaii Revised Statutes, which grants similar powers of arrest to deputy United States marshals. That statute does not include any prohibition on the admissibility of evidence.

The Department respectfully requests that this bill be passed without the amendment on page 3, lines 10-12.



Committee: Committee on Public Safety, Government Operations & Military Affairs
Hearing Date/Time: Tuesday, March 22, 2011, 3:00 p.m.
Place: Room 224
Re: Testimony of the ACLU of Hawaii in Opposition to H.B. 1008, HD2,
Relating to Power of Arrest

Dear Chair Espero and Members of the Committee on Public Safety, Government Operations & Military Affairs:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 1008, HD2, which seeks to allow officers to make arrests under state law.

H.B. 1008, HD2, seeks to unnecessarily expand police power and the potential for its abuse in Hawaii by giving federal officers the right to arrest individuals under state law without a warrant. The opportunity for abuse of this right is great, given that federal officers lack the same familiarity, training and oversight as Hawaii state law enforcement officers with regard to the Hawaii Constitution and state law.

H.B. 1008, HD2, muddies the distinction between state and federal law and authorities and subsequently threatens the civil rights of Hawaii citizens. Federal officers have great powers under federal law and may attempt to use these powers to circumvent privacy rights under the Hawaii Constitution. For instance, H.B. 1008, HD2, would allow federal officers the use Hawaii law as a pretext to search someone without a warrant. The legislature should consider alternative ways of combating crime rather than allowing federal authorities to evade the mandates of the Hawaii Constitution and abuse the rights of Hawaii citizens.

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

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