



The Judiciary, State of Hawai‘i

Testimony to the Thirty-Second State Legislature, 2023 Regular Session

House Committee on Judiciary & Hawaiian Affairs

Rep. David A. Tarnas, Chair

Rep. Gregg Takayama, Vice Chair

Tuesday, February 28, 2023, 2:00 p.m.

State Capitol, Conference Room 325

by

Catherine H. Remigio, Chair

Hawai‘i Supreme Court Standing Committee On the Hawai‘i Rules of Evidence

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 1502, Relating to Evidence.

Purpose: Limits compelled disclosure of sources or unpublished information for journalists, newscasters, and persons participating in collection or dissemination of news or information of substantial public interest. Establishes exceptions.

Judiciary's Position: The Hawai‘i Supreme Court Standing Committee on the Rules of Evidence respectfully offers the following comments on H.B. 1502, and respectfully requests that the Legislature defer action on the measure and refer it to the Committee for an updated study and report.

1. The preamble to H.B. 1502 contains statements that require clarification.¹ In its December 2011 Report to the Legislature (2011 Report), the Committee made several recommendations regarding Act 210, Session Laws of 2008. The Committee recommended that Act 210 be retained under HRS Chapter 621, and it also suggested that the Legislature consider specific amendments to Act 210. As directed by the Legislature, the 2011 Report included relevant research and legal memorandum, to include other state’s journalists’ shield laws in

¹ The statements appear on page 2 of H.B. 1502, lines 3-10.

existence at the time. H.B. 1502 and Act 210 of Session Laws 2008 are virtually identical.² Yet H.B. 1502 contains none of the suggested amendments provided in the 2011 Report to the Legislature. What follows below is a more detailed clarification of the Committee’s position on H.B. 1502/Act 210.

2. It has been 15 years since the passage of Act 210, and 12 years since the Committee’s 2011 Report to the Legislature. More time is needed to update the research compiled in 2011 to determine whether other states are now using the same or similar provisions, how H.B. 1502 compares to the law of other states, and whether the standards expressed in H.B. 1502 have counterparts in current federal law, Hawai‘i law, or in the law of other states.

2008-2011: Standing Committee on Rules of Evidence – Comments on Act 210

Act 210

Act 210 started as House Bill 2557. HB 2557 was introduced on January 18, 2008 and proposed a new section to HRS Chapter 621 entitled “Limitation on compellable testimony from journalists and newscasters; exception.”

During the 2008 Legislative Session, the Standing Committee on Rules of Evidence submitted written testimony on H.B. 2557 to 1) the House Committee on Judiciary, 2) the Senate Committee on Judiciary and Labor, and 3) the Joint Conference Committee. The Committee’s written testimony consistently provided no position or comment on the measure, but instead requested that H.B. 2557 be deferred and referred to the Standing Committee on Rules of Evidence “for interim study and a report to the 2009 Legislature.”

H.B. 2557 was not referred to the Standing Committee on Rules of Evidence in 2008, becoming Act 210 in 2008 of the Session Laws of 2008 with a repeal date of June 30, 2011.

Act 114

In 2011, H.B. 1376 proposed elimination of Act 210’s June 30, 2011 sunset clause. The Standing Committee on Rules of Evidence submitted written testimony on H.B. 1376, again requesting that the measure be deferred and referred to the Committee for an interim study and a full report. In its written testimony, the Committee noted:

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.

² The only difference is a stylistic modification in section (c)(2).

H.B. 1376 became Act 114 of the Session Laws of 2011. It extended the repeal date of Act 210 from June 30, 2011 to June 30, 2013. Act 114 also directed the Standing Committee on Rules of Evidence to report to the Legislature the following information or recommendations:

1. Whether to:
 - A. Retain Act 210 under HRS Chapter 621,
 - B. Codify Act 210 under HRS Chapter 626 (the Hawai‘i Rules of Evidence), or
 - C. Allow Act 210 to be repealed;
2. Cite to other states that have enacted legislation similar to Act 210;
3. The effects of Act 210 on the media and prosecution of cases; and
4. Any proposed legislation to amend Act 210.

The 2011 Report to the Legislature

The Standing Committee on Rules of Evidence submitted its “Report on the Limited News Media Privilege Against the Compelled Disclosure of Sources and Unpublished Information” to the Legislature in December 2011. The Committee’s Report included the following responses:

1. Recommended Act 210 remain under HRS Chapter 621 and that the sunset provision be eliminated.
2. Attached memorandum drafted by Professor Addison Bowman, including his preliminary research of journalists’ privilege and comparative analysis of the shield laws of 18 states.
3. Suggested that the Legislature take another look at the language of Act 210 in 3 areas: subsections (a)(2), (c)(3), and (d). Reasons for the suggestion were included.
4. Attached memorandum provided by the Department of the Attorney General entitled “Proposed Amendments to Journalists’ Shield Law”.

Act 210 was not amended or enacted. It did not become law, and was effectively repealed on June 30, 2013.

H.B. 1502

H.B. 1502 is a reiteration of Act 210. It contains none of the Committee’s 2011 suggested amendments.

Conclusion

The Standing Committee on Rules of Evidence was established to study and evaluate proposed evidence law measures referred by the Hawai‘i Legislature and to consider and propose appropriate amendments to the Hawai‘i Rules of Evidence. The Committee convened on

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February 17, 2023 to consider H.B. 1502. In addition to the above comments, members noted it has been 12 years since its 2011 Report to the Legislature and 15 years since Act 210 passed.

The Committee respectfully requests that the Legislature defer action on the measure and refer it to the Committee for an updated study and report.

Thank you for the opportunity to provide comments on H.B. 1502.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee on
Judiciary & Hawaiian Affairs**

February 28, 2023

H.B. No. 1502: RELATING TO EVIDENCE

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Office of the Public Defender, as a member of the Hawai‘i Supreme Court Standing Committee on the Rules of Evidence (“Evidence Committee”), concurs with the testimony submitted by the Hawai‘i State Judiciary and its recommendation that the Legislature defer action on this measure to allow the Evidence Committee for an updated study and report.

Thank you for the opportunity to testify on H.B. No. 1502.



To: House Committee on Judiciary & Hawaiian Affairs
Hearing: 2:00PM, Tuesday, Feb. 28, 2023
Conference Room 325

TESTIMONY IN SUPPORT OF HB 1502 RELATING TO EVIDENCE

Chair Tarnas and Members of the Judiciary & Hawaiian Affairs Committee:

Media Council Hawaii supports HB 1502 Relating to Evidence, which would restore and codify Act 210, Session Laws of Hawaii 2008. Commonly known as the “Shield Law,” Act 210 provided a limited privilege to journalists, and those acting in similar capacity, against compulsory disclosure of confidential sources and unpublished information.

Media Council Hawaii believe the Shield Law as it was enacted in 2008 should become a permanent part of Hawaii law. During the five years it was in effect, there were no reported problems with the law. In 2011, the Judiciary’s Evidence Committee reviewed the law as requested by the Legislature and it recommended that “Act 210 be integrated in HRS Ch. 621.” Due to an unfortunate set of circumstances, the Shield Law fell victim to a sunset provision. HB 1502 would revive what was widely considered one of this country’s most progressive laws protecting Freedom of the Press.

Hawaii is currently one of only two states that has no statewide protection for journalists and their confidential sources. Such a privilege is needed to protect the free flow of information and the public interest in guaranteeing anonymity to whistleblowers and others who possess and provide information about government misconduct.

Media Council Hawaii supports HB 1502 as it is currently drafted. We urge that it be approved by this committee without unwarranted changes or amendments.

Media Council Hawaii is a non-partisan established in 1970 and is organization of individuals from the community and media which seeks to improve public access to information; strengthen public support for First Amendment rights and freedoms; and broaden public understanding of the role of the media.

Chris Conybeare:
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Feb. 28, 2023

David Tarnas
House Judiciary and Hawaiian Affairs Committee
State Capitol
Honolulu, HI 96813

Re: House Bill 1502

Chairman Tarnas and Committee Members:

Thank you for considering House Bill 1502, which would resurrect Hawaii's Shield Law to protect the identities of newsmen's confidential sources and reporters' unpublished notes. It was in effect for five years from 2008 to 2013 as we were not able to remove the sunset date from the law.

Hawaii went from having a foresighted Shield Law to being one of two states that does not have a Shield Law. Wyoming, the other state, is moving a bill for a Shield Law this year.

We support this bill, but ask that the committee delete the following underlined section and insert "digital news website" in "(a) A journalist or newscaster presently or previously employed by or otherwise professionally associated with any newspaper or magazine, or any digital version thereof operated by the same organization, news agency, press association, wire service, or radio or television transmission station or network, **or digital news website** shall not be required by a legislative, executive, or judicial officer or body, or any other authority ..." (The original language for this bill was drafted in 2007. Since then digital news websites, such as Honolulu Civil Beat, have proven themselves an important part of the news media landscape and serve the public.

Very often the people who provide the best information (oftentimes hidden from view) about a story don't want their names revealed for fear of losing jobs or being retaliated against, and a reporter will risk going to jail rather than give up a source never get news tips as no source will ever trust him or her.

The original Hawaii law was foresighted, envisioning that there were people doing the work of news reporters but not working for newspapers or radio or TV stations. Bloggers, such as Ian Lind, provide a service using the tools of a reporter but do not work for a traditional news outlet. (The law did not cover people who pass on information through social media because they do not check out information but pass it on.)

The law was in effect for three years and did not cause problems, and was tested in court once, in the case of a filmmaker working on documentary about Native Hawaiian burial sites, an issue clearly of public interest and concern. A committee of the state Supreme Court also has recommended that the law be made permanent.

A legislative compromise extended it for two more years.

Now, we are now hearing calls from Congress to push for provisions to force reporters to reveal their sources.

The bill would grant the source- and note-protection in all civil cases except for libel cases in which the reporter is a named party.

In criminal cases, there are some exceptions:

- If there is probable cause to believe that the journalist has committed a crime or is about to commit a crime
- If the journalist observes an alleged crime, he or she will have to testify as a witness but does not have to reveal information gathered from a source.
- In cases where there is substantial evidence that the information is important to the investigation of a felony, a three part test would apply: The information cannot be obtained through alternative sources; the information is not available elsewhere; and the information is relevant.
- If the reporter has information critical to prevent serious harm to life or public safety
- If the source consents, then journalists must turn over unpublished or other documents provided by the source.

We think this bill will reinstitute one of the best Shield Laws in the country. It protects the interest of every journalist in Hawaii whether they've been subject to a subpoena or not.

Thank you for your time and attention,

A handwritten signature in black ink, appearing to read "Stirling Morita". The signature is fluid and cursive, with a large initial "S" and "M".

Stirling Morita
President
Hawaii Chapter SPJ



Big Island Press Club

Since 1967, protecting the public's right to know

Big Island Press Club
P.O. Box 1920
Hilo, Hawaii 96721

CONTACT:
mphillips@bigislandpressclub.org

February 27, 2023

To: House Committee on Judiciary and Hawaiian Affairs

From: Michael Phillips, President, Big Island Press Club

In SUPPORT of HB 1502 Relating to Evidence

The Big Island Press Club, Hawaii's oldest press club, is in strong support of HB 1502 relating to Evidence.

Since 1967, the Big Island Press Club has been protecting the public's right to know. Serving as a watchdog for openness and credibility for Hawaii Island, we support the valuable service to society that journalists make by publishing and broadcasting information on issues of great public importance.

Sometimes to get information of public importance out, journalists will need to rely on confidential sources. Typically shield laws exist to facilitate the news gathering process by excusing journalists from disclosing confidential sources or information obtained from such sources.

In 2008, Hawaii enacted a shield statute (Act 210, HB 2557) that included a sunset provision that would repeal the statute on June 30, 2011, unless the legislature reauthorized its extension before that time. While the legislature did extend the

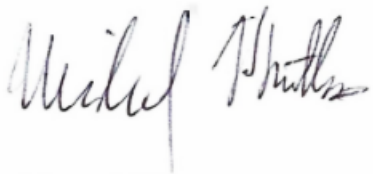
statute for two more years, it finally lapsed in 2013, leaving the state without a shield statute since. Subsequent efforts have failed, not only leaving Hawaii without a shield statute, but also leaving Hawaii as one of only two states in the entire country without one.

Currently, the other state without a shield statute, Wyoming, is working on resolving that with their own shield law this year.

We encourage you to reinstate what was one of the best shield laws in the country so that journalists, through their confidential sources, can continue to report on issues of importance to the community as they can most everywhere else in the United States.

With that said, we wholeheartedly support HB 1502. Thank you for the opportunity to testify on this important matter.

Signed,

A handwritten signature in black ink that reads "Michael Phillips". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

Michael Phillips
President, Big Island Press Club

HB-1502

Submitted on: 2/27/2023 5:24:41 PM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
ROBERT DUERR	Albatross News	Support	Written Testimony Only

Comments:

Shielding information relating to sources is important to journalism. Protecting source information is similar to attorney client privilege.

Gerald Kato
kato_gerald@yahoo.com
808-223-3844

To: House Committee on Judiciary & Hawaiian Affairs
Hearing: 2:00 PM, Tuesday, February 28, 2023
Conference Room 325

TESTIMONY IN SUPPORT OF HB 1502 RELATING TO EVIDENCE

Chair Tarnas, Vice Chair Takayama and Members of the Judiciary & Hawaiian Affairs Committee

My name is Gerald Kato. I recently retired after a long career on Journalism and Communication faculty at the University of Hawai`i at Manoa. Prior to joining the faculty, I was a newspaper and broadcast reporter who spent many years covering government and politics in Hawai`i.

I support HB1502 Relating to Evidence, which proposes to reinstate and codify Act 210, Session Laws of Hawaii 2008. The so-called “Shield Law” provides a limited privilege to journalists, and those acting in similar capacity, against compulsory disclosure of sources and unpublished information. When it was first enacted into law, Act 210 was widely hailed as one of the most progressive laws of its kind in the country protecting journalists and Freedom of the Press. Due to some unfortunate circumstances, the law as allowed to lapse and was automatically repealed in 2013. Today, Hawaii and Wyoming are the only states without a Shield Law or other legal protections for confidential sources.

First Amendment attorney Jeffrey Portnoy, Media Council Hawaii President Chris Conybeare, Society of Professional Journalists-Hawaii President Stirling Morita and I participated in lengthily and detailed negotiations in 2008 with then Attorney General Mark Bennett on the bill that ultimately became Act 210. There were frank discussions and compromises were made on both sides. Act 210 is a tribute to all parties in the negotiations recognizing the need to protect the free flow of information in a democratic society while balancing the need for information in pursuit of justice.

I am a journalist who’s taught others to do journalism. I want to see good journalism protected now and into the future. That’s why, I take this matter personally. Over time, we’ve witnessed a steady decline in the news industry that threatens the viability of a free press. Advertising money has gone from conventional media to internet platforms that don’t reinvest in publishing news and information. The news business is changing, but the need for reliable information remains essential to our community and country. As a media critic once wisely observed, now, more than ever before, we need to preserve, protect, defend, and expand the sources of independent information that our constitutional democracy requires. I believe this bill is a step in the right direction.

HB 1502 recognizes that changes occurring in journalism in today's world. It understands that that good journalism is not only done within the four walls of a newsroom. Technology has expanded our capacity to gather and disseminate information of public concern. Each of us has the ability to engage in what the pamphleteers and publishers did when the First Amendment was written into our Constitution two centuries ago. For those reasons, I believe it is imperative that we maintain protections for all forms of journalism that advances the goal of an informed citizenry.

Simply stated, a journalist is a person who gathers information for the purpose of disseminating it to the public.

Does that mean anyone who owns a computer or a video camera is a journalist? No.

It means that citizens informed about their community, their government, and their future well being can engage in civic life in a way they never could when only the owner of a printing press or a broadcast studio determined what we heard, saw or read. The instinctive reaction to only treat members of traditional news organizations as journalists while everyone else is viewed derisively as a "blogger" is wrongheaded and a denial of our First Amendment heritage. As the U.S. Ninth Circuit Court of Appeals once famously said, "what makes journalism journalism is not its form but its content."

This law is not only about protecting journalists—traditional or otherwise—some of whom we may like personally or politically, others we may not. The underlying public policy principle is to encourage sources, whistleblowers, for example, to disclose truthful information to the public so that the public will have full access to information it needs to meaningfully engage in the life of the community. I believe a strong Shield Law is a means of fighting public apathy.

I've heard concerns that the law is subject to abuse. Well, it's been proven to work in the past without any hint of abuse, and it's been subject to review by the Judiciary's Evidence Committee. The Shield Law provides a reasonable means of reviewing all claims of privilege. The courts know the relevant statutes and the legislative intent, and, as they do in other areas of law, they can distinguish between legitimate and illegitimate claims for protection.

After a lifetime of journalism in Hawaii, I am convinced that we need to give meaning to the idea of free flow of information and the public's right to know. I believe this is a law that encourages sources to reveal truthful information they have of public concern and encourages the kind of aggressive public interest journalism we need. For the reasons I have expressed here, I support restoration of Act 210 to become a permanent part of the Hawaii Rules of Evidence.

HB-1502

Submitted on: 2/25/2023 4:57:14 PM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Will Caron	Individual	Support	Written Testimony Only

Comments:

As a former journalist and editor of various publications, I strongly support this measure. Journalism shield laws are important protections that enable internal sources to provide information to reporters that is of critical public interest even and especially when it may reveal government wrongdoing or negligence. Whistleblowers need to know that reporters can protect their identities before they can share vital information with them. This is a fundamental aspect of investigative journalism, which is itself a critical component of a healthy democracy.

Journalists, when doing their true duty, are in the profession of speaking truth to power. They need legal protections from retaliation by those in power and authority positions. Please pass HB1502.

HB-1502

Submitted on: 2/24/2023 4:27:36 PM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

The Truth is the Truth no mater wear it come from!!!!

HB-1502

Submitted on: 2/28/2023 7:57:37 PM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Dana Keawe	Individual	Support	Written Testimony Only

Comments:

support