



2009 ACLU of Hawaii Legal Program Year End Report

Each year, nearly one thousand individuals contact the American Civil Liberties Union of Hawaii seeking assistance. Although we can only take a small handful of cases, we review and respond to every inquiry. Many civil liberties problems are resolved informally by telephone calls, letters, and negotiations with government officials. For non-civil liberties matters, we make appropriate referrals.

Where violations of civil liberties and/or civil rights occurred, the ACLU's policy is to use litigation sparingly and as a last resort when informal resolution is not possible. The cases accepted for litigation are staffed internally by Legal Director Lois Perrin and staff attorneys Laurie Temple and Daniel Gluck, along with cooperating attorneys from the community who generously donate their time and expertise. The following summary describes a few of the recent and current ACLU of Hawaii cases, including a few of the many cases resolved without litigation.

2009 Litigation and Non-Litigation Victories

• Kauai/Hawaii Island: ACLU Successfully Protects Documentary Filmmaker in First Use of "Media Shield" Law

The ACLU and Honolulu attorney James J. Bickerton (of Bickerton Lee Dang & Sullivan) represented Keoni Alvarez, a Big Island independent filmmaker who has spent the last four years preparing a documentary about Native Hawaiian burial practices and who was unwittingly drawn into a legal battle over the construction of a home on Kauai. The homeowner, in a search for evidence in support of his case, issued several sweeping subpoenas demanding nearly all of Alvarez's unpublished interviews and raw video footage and insisting that he answer questions about his observations and activities in a deposition under oath.

Hawaii's new "media shield" law restricts attorneys from using the subpoena power of the court to compel protected information from journalists. Just as we expect and protect doctor-patient confidentiality because it fosters trust and healthy outcomes, journalists have, under the law, the same right to protect the confidentiality of their sources and unpublished materials. This trust allows for a diverse, robust and independent media.

Bickerton and the ACLU filed a motion for a protective order, asking the court to block the deposition and to prohibit the homeowner from issuing more subpoenas to Alvarez. Kauai Judge Kathleen Watanabe granted both requests, resulting in complete protection for Alvarez and his work.

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2009 Litigation and Non-Litigation Victories, Continued

• State-wide: ACLU Assists in Persuading Federal Judge to Allow Inmate Overdetention Case to Proceed to Trial

The ACLU and Honolulu attorney Colin Yost (of Cruise & Yost) submitted two *amicus curiae* (“friend of the court”) briefs in a lawsuit challenging the unconstitutional practice of the Department of Public Safety (“DPS”) of keeping inmates in prison after the inmates have served their sentences. After reviewing all the briefs, United States District Court Senior Judge Samuel P. King rejected the State’s arguments that the case should be dismissed and is allowing the case to proceed to trial. In a 49-page written opinion, the Judge recognized that this case involves freedom from incarceration, a “paradigmatic liberty interest,” and that “[t]here is ample evidence of such a deprivation of liberty” in this case.

• State-wide: ACLU Assists in Overturning Court Order That Violated Homeowner’s Constitutional Right to Privacy

In March 2007, the ACLU submitted an *amicus curiae* brief in *Cummings v. Roth*, a case in which the circuit court had ordered a homeowner – in response to complaints that she was running an illegal boarding house – to disclose the names, gender, ages, and other personal information about all overnight guests. In December 2009, the Hawaii Intermediate Court of Appeals referred to the ACLU’s *amicus* brief and ruled that the compelled disclosure of personal information about overnight guests violated the Hawaii Constitution’s privacy clause.

• Oahu: ACLU Successfully Persuades the City and County of Honolulu to Cease Harassment and Threats of Anti-War Protesters Distributing Leaflets in Public Parks

An anti-war protester was distributing leaflets at Haleiwa Beach Park on Oahu when she was approached by police officers and told to leave the park or be arrested for trespassing. This has occurred before at other parks on Oahu, and the ACLU contacted the City and County of Honolulu’s attorneys to put an end to these First Amendment violations.

The City’s attorneys agreed that our client has a right under the First Amendment to distribute leaflets; they agreed to provide better training to Honolulu Police Department officers so that this will not happen again. Our client will receive a copy of the memo to police officers so that, if she is ever stopped by police in the future, she can educate them about her rights and continue with her protests.

• Oahu: Street Performers

After receiving numerous reports that the Honolulu Police Department (“HPD”) was arresting large numbers of Waikiki’s street performers for a variety of offenses, including peddling, we contacted the City and County of Honolulu’s attorneys to ensure that HPD officers were not arresting or otherwise harassing individuals engaged in protected First Amendment activities. The City’s attorneys provided guidance as to their interpretation of legal activities on the Waikiki sidewalks, which the ACLU has, in turn, provided to the street performers.

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Ongoing Litigation and Non-Litigation Projects

• State-Wide: LGBT Rights

The ACLU, in collaboration with Lambda Legal and the law firm of Alston Hunt Floyd & Ing, is planning legal action against the state of Hawaii following the failure by the Hawaii Legislature to enact a law providing broad legal rights and duties to the state's lesbian and gay couples. The Hawaii Senate had approved H.B. 444 – a bill to create “civil unions” (applicable to same and different sex couples) – by a veto-proof 18 to 7 majority, sending the bill back to the House for a conforming vote. Although the House had passed H.B. 444 by an emphatic 33 to 17 margin last year, House members used an anonymous voice vote to kill the bill earlier this year.

Hawaii's Constitution was amended in 1998 to allow the Legislature to restrict marriage to heterosexual couples, which it has done. The constitutional amendment forecloses a lawsuit seeking marriage equality. Although civil unions are a lesser status, they would provide a full range of state law protections and duties to gay and lesbian couples, such as relief from unfair taxation of job-provided health insurance for family members, clear duties to pay child support and alimony as spouses must, protection of the family home against nursing home costs as spouses receive, and other vital protections. The current “reciprocal beneficiaries” system not only fails to provide many basic rights but also sends a harmful message that the state views same-sex couples as less worthy of rights and protections.

• State-Wide: Marital Status Discrimination

The ACLU represents two couples (an unmarried opposite-sex couple and an unmarried same-sex couple) who have been unable to live together on their boats at the Ala Wai Boat Harbor because of the following rule: “Only the vessel owner, co-owner, the spouse of each, and their legal dependents may be issued a harbor resident permit.” Through a series of demand letters to (and negotiations with) the Director of the Department of Land and Natural Resources (“DLNR”), DLNR agreed to begin the rulemaking process to amend its rules so that unmarried couples have the same habitation rights as married couples. To date, however, DLNR has not taken steps to abate the discriminatory impact while those rule changes are pending, and the ACLU assisted its clients in filing a complaint with the Hawaii Civil Rights Commission.

• State-Wide: Random Drug Testing of Teachers

For two and a half years, the ACLU has successfully blocked implementation of Governor Lingle's plan to randomly drug test teachers. Drug testing is still in play in the new contract, and the ACLU remains committed to fighting these unconstitutional searches. With Governor Lingle claiming that schools must close seventeen days a year because the budget is in such dire straits, this is clearly not the time to waste time and money trying to impose an ineffective and unconstitutional drug-testing program on Hawaii's teachers. The ACLU of Hawaii continues to work with national experts from the ACLU Drug Law Reform Project on this issue.

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Ongoing Litigation and Non-Litigation Projects, Continued

• Big Island/Maui/Kauai: Unconstitutional Warrantless Aerial Searches

The ACLU has received complaints from private property owners on the neighbor islands about government helicopters flying as low as 40-50 feet above their homes and circling their properties for hours at a time, many times a month, while engaged in “Green Harvest” (cannabis eradication) missions. These property owners are not growing cannabis on their properties and are distressed at the invasion of privacy, noise, and disruption caused by these government helicopters. The ACLU is meeting with prospective plaintiffs and contemplating legal action. Please contact us at office@acluhawaii.org if you have experienced low-flying government helicopters at your home.

• Maui/State-wide: Immigration Enforcement

The ACLU is investigating numerous reports that Maui Police Department (“MPD”) and federal Immigration and Customs Enforcement (“ICE”) officials have violated Maui residents’ constitutional rights in enforcing federal immigration law. We have submitted several requests for documents pursuant to the Freedom of Information Act and Hawaii’s Uniform Information Practices Act and are contemplating litigation. In the meantime, we encourage all Hawaii residents to know their rights when encountering law enforcement by visiting http://www.aclu.org/files/kyr/kyr_english.pdf or http://www.aclu.org/files/kyr/kyr_spanish.pdf (Spanish). Pamphlets are also available in Arabic, Urdu, Hindi, Punjabi, Farsi, and Somali at www.aclu.org.

• State-Wide: Conditions of For-Profit Prisons on the Mainland

Approximately 1,900 male inmates from Hawaii are housed at a for-profit prison in Arizona. The State of Hawaii just removed over 150 female inmates from a private prison in Kentucky (operated by the same company, the Corrections Corporation of America) because of widespread allegations of sexual abuse of inmates by guards. The ACLU has been investigating numerous claims of constitutional violations at the men’s facility in Arizona and has been coordinating its efforts with local and national advocacy organizations.

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