

The William S. Richardson School of Law
UNIVERSITY OF HAWAII AT MANOA
2515 Dole Street
Honolulu, Hawaii 96822
TEL: 808-956-8509
FAX: 808-956-6402

FAX MESSAGE

Date: Jan. 31, 1996

TO: The Honorable Ezra R. Kanohe
House of Representatives

Fax Number: 586-6271

FROM: Jon M. Van Dyke *Jon Van Dyke*
Professor of Law
(Address and Fax Number Above)

Number of Pages (including cover): 2³

MESSAGE: Thank you for inviting me to comment on the proposed constitutional amendments found in H.B. 3845 and H.B. 3846.

I appreciate your concern about the crime problem in Hawaii, but I would strongly recommend against repealing the protections found in Hawaii's Constitution as a method to deter crime.

The constitutional provisions found in Article I, sections 6 and 7 were crafted carefully by the 1950, 1968, and then 1978 Constitutional Conventions to meet the concerns of Hawaii's citizens that the government should play a very limited role in intruding into the private lives of its citizens. These are good provisions that reflect the wishes of our people. The Hawaii Supreme Court has not departed markedly from the precedents of the United States Supreme Court and those of other state courts. It is not correct to say that decisions of Hawaii's courts afford "the most liberal privacy rights to criminal suspects among the fifty states."

In addition to the Tanaka case, which requires the government to obtain a warrant before seizing a citizen's trash, very few other recent cases depart from federal precedents. One that I am familiar with is State v. Rothman, 70 Haw. 546, 779 P.2d 1 (1989), which requires the government to obtain a warrant before putting a "pen register" on a person's phone lines to record the numbers of incoming and outgoing phone calls. Neither Rothman nor Tanaka imposes any great burdens on the government, because in appropriate cases the government can obtain warrants to seize trash and put the pen register on a person's phone lines. Your amendment would

remove the obligation that law enforcement agencies present their evidence to a magistrate to obtain a warrant. That reasonable requirement has been part of the American legal tradition for centuries, and is fully justified to protect citizens from abuse.

The amendment would also affect many areas outside law enforcement. Article I, section 6 has been interpreted to protect private activities in the home, and could, as you mention, be important in protecting the right to obtain an abortion if the federal courts were ever to change their interpretation on this issue. But here again, our Supreme Court has been extremely cautious in interpreting this right, and it is not fair to view our court as overly liberal. Quite the contrary. I am enclosing excerpts from an article I recently co-authored which summarizes the decisions made during the tenure of Chief Justice Lum, which should shed some light on how the Hawaii Supreme Court has interpreted the two provisions in question. The Court has rejected most claims based on privacy, and its decisions accepting privacy claims have been reasonable and well-considered.

In summary, I would strongly urge you and your colleagues to reconsider this idea of amending Hawaii's Constitution as a way to improve law enforcement. We have a good Constitution, and its provisions do not hinder law enforcement agencies. Having our own constitutional provisions allows our judges to determine the law that best suits our conditions in our island communities. These protections are important to us.

Please let me know if I can be of any further assistance to you on this matter, or on any other matter relating to the Constitution.