



ACLU Legislative Wrap-Up May 27, 2004

This was not an easy year to be lobbying for civil liberties issues. I admit that I don't have the personal experience of having done this work in prior years, and so don't have a long perspective by which to judge difficulties one encounters in the Statehouse. But I have to say it was a lonely experience opposing the sex offender online registry bill, or advocating for the importance of free speech rights within the school harassment bill. A climate of residual fear spawned by the international political scene permeated so many issues, especially those dealing with records and security.

Nonetheless, I take comfort in knowing that a number of bills that would have made very serious inroads into our liberties were substantially altered or thwarted. Those bills may, of course, return next year -- which means we need to exercise continued vigilance in our efforts to protect civil liberties. But at least now we don't have to spend time second-guessing who might try to attach a particularly egregious section to an otherwise benign piece of legislation.

At the end of a session, it's always interesting to go back and look at the bills we identified for close monitoring, and to see how they fared. I'll take them one by one and try to keep to one paragraph in describing each bill's fate.

H.113: School Harassment bill. This was an important bill for us, for two very different reasons. From one perspective, we have been strong advocates for holding schools to higher standards in dealing with harassment, particularly racial harassment. We have, indeed, involved ourselves in several harassment cases; one is on appeal to the Vermont Supreme Court. From another perspective, we strive to protect students' free speech rights. As H.113 wound its way through committees and floor discussion, we grew more and more worried that the bill hadn't found the proper balance between protecting students from harassment, and protecting students' free speech rights. H.113 is now law, supported in both chambers by overwhelming majorities and signed by the governor last month. I suspect schools will have a difficult time implementing the provisions of the new law, and that we will become involved in litigation over its application. On balance, however, I think we should feel proud that this issue was addressed this session, and that schools must be more careful in dealing with harassment complaints.

H.629: School Bullying bill. While H.113 was making its way through the Legislature, attention also was drawn to the problem of bullying in Vermont schools. Bullying is related to harassment in that its effect is intimidation and hostility; however, whereas harassment usually applies to members of protected classes (racial and ethnic minorities, for example), bullying applies to everyone. Support for H.629 was spearheaded by an Essex family whose adolescent son was bullied in school and subsequently committed suicide. The emotion surrounding the issue propelled the bill to passage, although few felt the bill did a good job of defining the exact nature of the problem and creating a solution. The bill is not rigid and prescriptive in the way H.113 is. Instead, it directs the state Education Department to draw up a model bullying policy that local schools can use to adopt their own policies. This, too, will be a difficult area for school officials to navigate, I feel.

H.318 and S.112: Death with Dignity bills. These bills were declared nonstarters early in the session, yet both chambers' Health and Welfare committees felt pressured to take testimony and hold hearings on them. Physician-assisted suicide is a deeply emotional issue, and it's not surprising the Legislature sidestepped it. (Had the Legislature chosen to deal with the issue and a bill had actually passed, many think the governor would have had a better claim at calling the session "historic.") We submitted testimony in favor of the bills, provided certain conditions were met. I'm sure this issue will return next year.

S.227: Sex Offender Online Registry bill. As you know from my previous updates, I spent a lot of time following this bill. This was particularly true at the end of the session, as S.227 got loaded up with pieces of other bills. At several times I felt we had an outside chance of defeating the bill, but, again, the emotion around the issue led lawmakers to suspend reasoned arguments and bow to politics. The measure was approved on the last day of the session, held back not because its passage was in jeopardy but because everyone *knew* the bill would pass and therefore wanted to use it as a bargaining chip to get something else. Cynically, the supporters of the bill wanted to make sure the registry went live on the Web before the fall elections – and indeed implementation is set for Oct. 1. The online registry will contain only about 10 percent of sex offenders – and it was the way this 10 percent will be determined that occupied legislators in their final discussions on the bill. Legislators know the law is likely to be challenged on constitutional grounds; the ACLU has tried to stop registries, online or otherwise, in numerous other states. We haven't been successful. So legislators worked hard to make the law "challenge-proof." I'm not sure they succeeded. The guidelines for inclusion on the list are both fish and fowl – categorical and subjective. It's these differences in how "dangerousness" is determined (and therefore inclusion on the online registry) that I think will form the basis of any constitutional challenge that might be brought.

H.561: Criminal Records and Fingerprinting bill. Bits and pieces of this bill got attached to the sex offender bill at various times, but by the end most of the pieces had been peeled off – which from our standpoint, was good. The original H.561 would have provided the general public with access to anyone's criminal history record for any purpose, would have required the fingerprinting of defendants charged even with misdemeanors, and would have allowed the state to retain all fingerprints – even of

persons whose charges did not end in convictions. Needless to say, we thought this was extreme. However, in some respects the most frightening aspect of this bill was that all of the provisions could be argued as logical, defensible extensions of current laws or policies. I tried in my testimony to show that these incremental, “logical” steps, were leading to an insidious whole. Lawmakers persisted in trying to retain particular sections they favored or adapted, such as granting all employers the right to run criminal background checks on job candidates. But in the end none of the provisions of H.561 were adopted. Indeed, language was included in S.227 that subjected law enforcement agencies and the courts to greater legislative scrutiny of criminal records.

H.547: Confidentiality and Noncommercial Distribution of Certain Tax Records and Data. We favored the portion of this bill that would keep Social Security numbers confidential. But we opposed the placing of restrictions on commercial companies’ access to public records. We won on both counts, fortunately. I tried in my testimony to focus attention on what I felt was the salient issue at the core of this legislation: What is a public record? Once something is declared a public record, laws generally support open access except when health, safety, or some overriding public or governmental interest is at stake. Legislators in both chambers recognized this was a huge issue and know they will have to grapple with it in future sessions. Electronic record-keeping and data transmission have changed the very nature of records, making them something they never could be when the record existed only on paper.

H.199: Driver’s License Photo ID bill. The issue of confidentiality and the storing of data cropped up numerous times during the session. The battle over forcing drivers to obtain licenses with their photos has come up before, and been defeated. But this year, with security concerns pervading many legislative discussions, and with Vermont standing out as the only state in the nation not requiring photos on driver’s licenses, lawmakers worked to forge a compromise that would allow current holders of non-photo licenses to keep them if they chose, while forcing all new applicants for licenses to have photos on their licenses. In a number of states, exemptions are granted if applicants object on religious grounds to their photo being taken. We tried to get a similar provision written into this bill, but lawmakers weren’t interested. We will undoubtedly go to court over this issue one day; the issue has been litigated in many other states. Despite overwhelming legislative support for this bill, interesting discussions did take place during the floor debates over whether restrictions should be placed on the federal government’s access to the Motor Vehicle records that include the photos. Legislators were told they probably couldn’t refuse a request from the federal government for the records, but lawmakers did write into the law that the Legislature must be informed when a request for such records is made. So there was the consolation that lawmakers had some sense that they were giving up a tiny slice of our freedoms (although in fairness it should be noted that 80 percent of Vermont drivers have already chosen to have a photo-ID driver’s license).

H.327: Identity Theft bill. The perils inherent in the electronic transmission of records were highlighted during discussions around the issue of identity theft. With the sex offender online registry bill, legislators embraced the use of electronic data. With the

identity theft bill, legislators were made to see that this same technology could be put to nefarious purposes. Questions of who owns what data, how data can be purloined, and what to do when data are misused all surfaced during discussions on this bill. Although portions of the bill were vigorously opposed by the financial services industry, the bill finally passed. Consumers were given the right to have security “alerts” or “freezes” placed on their credit reports if they are the victims of identity theft.

H.538: Jury System bill. This was a bill that grew out of a judicial panel study. Changes were proposed in areas such as peremptory challenges and unanimous jury verdicts, but in the end these were rejected. Also rejected was an effort pushed by states’ attorneys, sheriffs, and some other local officials to eliminate the right to jury trials in cases that come before the state’s “judicial bureau.” The main feature of the bill that passed is to broaden jury pools by using records other than just voter checklists.

S.202: E-voting. This bill, which passed, ensures a voter-verified paper trail for all voting in Vermont elections, even votes tabulated by machines (such as scanners). E-voting has become a big issue in many states, where touch-screen and other forms of non-paper-verifiable voting is taking place. There is growing concern about electronic manipulation of votes. S.202 ensures that any such attempted manipulation in Vermont can be traced and corrected.

H.381: Unlawful Employment Practices bill. This was a workers’ “whistleblower” protection bill, and we were asked last year as an organization to support it. The board referred the matter to our Legislative Committee, which voted to support it if asked our position. As the session went on, interest in protection for whistleblowers came to focus mainly on protection for hospital workers (and mainly workers at Fletcher Allen Hospital in Burlington). Some workers’ groups fear health care workers can be retaliated against if they criticize hospital procedures or practices. Whistleblower protection at first looked like it was going nowhere, but as the focus narrowed to the medical care industry, legislators pushed for a resolution. They crafted a bill that seems to go a long way in providing the protections workers sought. I followed this bill, but I should point out that usually we don’t involve ourselves closely in labor issues since those issues usually aren’t grounded on civil liberties protections.

Prison issues. No specific bill was considered to address the tide of concerns about abuses and mismanagement in the state’s prison system. However, additional appropriations were made, and some specific directives included, in the budget and capital construction bills as an effort to address some of the more concrete concerns. The Legislative Oversight Committee on Prisons seemed to lose steam as the session wore on, and I don’t know how active it will be during the recess period. As you know, the ACLU has been working with other advocacy organizations to have an outside, independent monitor appointed to oversee problems at the prisons, including the out-of-state prisons where many inmates are now sent. A gubernatorial Corrections Overcrowding Committee is due to present its report this summer. But I’m not convinced that reducing overcrowding will do much to solve the significant problems that have been uncovered. The problems are systemic, and I don’t believe the system is capable of self-correction.

What issues might be on the table for the 2005 session? Certainly prison issues will be discussed, if for no other reason than to try to tie up the activities started in this past session. But beyond prisons, I see the following things coming up again:

- Death with dignity
- School choice
- Electronic records storage, availability, and transmission – particularly criminal records, court records, and tax records

Thanks for your interest in legislative issues over the past four months. And thanks to our Legislative Committee, chaired by John Freidin, for its guidance and support during the session. The lobbying firm with which we contracted for legislative services, Sirotkin and Necrason, assisted us in our efforts. Associate Director Andrea Warnke also helped track new bills as they were introduced.

-- Allen Gilbert, executive director, ACLU-VT