

ACLU Legislative Update

Session-End Review June 8, 2005

The 2005 Vermont legislative session is still “dangling” because of the governor’s promise to veto the state budget. How the budget issue will be resolved is unclear. Everyone agrees that things are a bit of a procedural mess right now. However, unless some dramatic event occurs in the next couple weeks, it’s probably safe to assume that the issues we were following during the session are “locked up” for now -- passed, defeated, or put on hold. It would be unusual for a special session to take up anything other than the specific issue for which it’s called.

So, the question at this time of year is always, How did we do? And the answer is a mixed bag. We won some, we lost some, and we’ll be fighting again over others.

For a very quick overview, here are issues I’ve written about on which action was taken:

- voyeurism
- corrections
- DNA sampling

Here are issues that received serious attention but didn’t move, or that passed one chamber but not another:

- involuntary civil commitment
- prescription drug monitoring
- attorney’s fees for prevailing parties in public records litigation cases

Here are issues that received minimal attention and didn’t move:

- death with dignity
- student free speech rights
- consent to taking of a blood test (for DUI cases)

Finally, here are issues that we were watching but received very little attention at all:

- Informed consent to test for communicable diseases
- Islamic burials

More than 700 bills were introduced during the first part of this biennium, so the issues above represent a small fraction of what the Legislature was asked to consider. We review all the bills submitted, and tag those with civil liberties implications. We try to keep you informed about the bills that appear most likely to be considered, or are of some special interest. Aiding me in this work is our Legislative Committee, chaired by ACLU Board President John Freidin.

Let me make some general remarks about the session, and then get into details about some of the bills.

The session felt as though it were bifurcated, in terms of civil liberties issues. In the first two months, all eyes were on corrections bills and health care. I spent time monitoring the corrections issues, and also the voyeurism (“Peeping Tom”) bill the Senate Judiciary Committee dug into. Then, in early April, the administration -- which was not getting its way on many issues in the Democratically-controlled House and Senate -- turned up the heat on crime issues. Suddenly, Vermont seemed under siege from sex offenders and violent predators. The House Judiciary Committee was targeted as the graveyard for crime-fighting bills, and it was blamed for not acting on numerous measures from involuntary civil commitment for sex offenders and violent offenders, to DNA testing.

It's tough for any committee or political party to be accused of being soft on crime, so the House Judiciary Committee quickly gathered together a passel of anti-crime bills and began taking testimony on about a half dozen of them. What the administration had dubbed an "omnibus crime bill" -- and which never actually existed in written form -- became a "safe communities" proposal in the House Judiciary Committee. Looking for a Senate bill to attach the proposal to, the committee seized on S. 15, the voyeurism bill.

Later in the month, another bill touted by law enforcement -- prescription drug monitoring -- that had so far gotten little traction in the House was added by a Senate committee to the big health care reform bill. (The Public Safety and Health departments contend there is widespread "doctor-shopping" by drug abusers, and possible "over-prescribing" by some physicians.) There was virtually no testimony on the prescription drug monitoring proposal before it was attached to the health care bill. Eventually, we and others were able to present testimony to the Senate Judiciary Committee on the proposal, and to convince senators there were important, unanswered questions about the bill. It was finally deleted from the health care bill, but the Senate Judiciary Committee promised to work on the prescription drug monitoring proposal during the recess and give the bill its first attention next winter.

By this time it was clear that individual anti-crime initiatives were not faring well if put under the microscope and given due deliberation. But it was also clear that the administration and others were adept at using the "fear factor" to pressure legislators to "do something." So, as the House Judiciary Committee worked on the corrections bill and the voyeurism bill, these bills began to look like the proverbial legislative "Christmas tree." To the voyeurism bill, for example, were attached stalking orders, an expanded definition of "aggravated stalking," mandatory DNA testing of all felons, sexual assault protection orders, expansion of the aggravated assault statute, broadening of special investigation units for sex crimes, strengthening of sex offender registry rules and procedures, an order to identify high-risk sex offenders, consideration of whether a permanent sentencing commission should be established, and a summer/fall study by the House Judiciary Committee of involuntary civil commitment.

The corrections bill, meanwhile, had begun to stray from its roots as a bill to reduce prison overcrowding. In fact, the House Institutions Committee even went so far as to strip from the bill the introductory "intent" section stating the bill's purpose as an effort to reduce the state's prison population. The reason was that although some measures such as furloughs could get inmates out sooner, others such as no-time-off-the-max provisions could keep certain offenders in longer. Meanwhile, the Corrections Department pushed hard to add to the bill a provision criminalizing the "assault" of corrections officers through inmates' use of bodily fluids. (The impetus was one or two specific incidents in the Springfield prison.) Very little testimony was taken on this proposal, despite the fact that this would be a crime only in prisons and despite the fact this could lead to lengthier prison time for inmates.

The conference committees on these bills nibbled at what most non-Statehouse people would view as relatively obscure or minor issues within the bills. Surprisingly, the one bill the Senate had spent considerable time in crafting -- the voyeurism bill -- resembled more the House than Senate version by the time agreements were reached. The voyeurism bill is now more a general privacy protection measure than a measure against sexual voyeurism. How the new law will be used is an open question. We hope that the positive benefits of privacy protection won't be outweighed by over-zealous prosecution of casual or unintended viewing of people in their homes (or other places where people have "a reasonable expectation" of privacy").

Let me turn to a few specific measures that bear watching -- either because they passed and have engendered controversy elsewhere, or because they didn't pass but will be further studied or reconsidered.

DNA testing (S. 5). Under the “safe communities act,” DNA samples will be taken from all felons, and the samples will be kept in a databank for future identifications. The federal government has had such a law covering federal felonies for a number of years, and Vermont has done DNA testing for offenders convicted of certain “listed” crimes (mainly “serious” felonies). The expansion to all felonies is significant, and was done with very little testimony. (S. 5 itself was very narrow; it called only for DNA testing in certain sexual assault cases.) DNA databanks have been challenged in court, sometimes successfully. Recently, the New Jersey ACLU won a state court order that DNA records be destroyed after certain offenders had done their time and are not suspects in other investigations. Vermont law enforcement used the solving of the Patricia Scoville murder as an illustration of why DNA samples should be taken from a broader felon population. In the conference committee, the only disagreement over DNA testing concerned appropriating money for taking and analyzing the samples. Money was eventually found, and the proposal passed.

Involuntary civil commitment (H. 108). Actions by the administration, by the Republican Party leadership, and by law enforcement before, during, and after the session have shown this is an issue that won't go away. A press conference in August announcing the proposal, two follow-up press conferences with victims during the session, a push by the departments of Corrections, Health, and Public Safety in the House Judiciary Committee, and two efforts on the floor of the House to add the proposal as an amendment to the “safe communities” bill grabbed press attention and threatened Democrats' ability to control the legislative agenda.

The release of murderer Kent Hanson, and his subsequent re-arrest in Maine on theft and possibly assault charges, became the *raison d'être* for the bill. However, the original bill backed by the governor -- involuntary civil commitment for certain high-risk sex offenders -- was found not to be broad enough to include someone like Hanson. His crimes were violent felonies, so the governor broadened his proposal to include sex offenders plus violent offenders. No other state in the country has tried such a broad approach. So, while the constitutionality of involuntary civil commitment for sex offenders has been tested in the courts, the constitutionality of a broader measure has never been tested. That, however, is unlikely to stop this proposal as it's studied by the House Judiciary Committee this summer and fall.

Instead, arguments about cost and effectiveness are likely to hold more sway. The cost of these programs in other states is about \$100,000 per committed person per year. Very, very, few of those committed are ever released, so the costs keep rolling along year after year -- and increasing as new offenders are added to the commitment rolls. Even victims' advocates question whether this is the best use of resources to keep communities safe. The effectiveness of the commitment programs is also suspect. The Vermont Psychiatric Association passed a resolution at its annual meeting this spring opposing the plan, and a representative of the association beseeched legislators not to force medical professionals into practicing what he termed “Soviet-style psychiatry.” He said that the language in the bill describing the mental health grounds by which someone would be committed simply had no clinical meaning.

The unknown in the whole debate, of course, will be the “fear factor.” Just this past week the press (*Sunday Rutland Herald-Times Argus*) picked up on this theme, suggesting that the Douglas administration has been pandering to people's fears -- at a time when violent crime rates in Vermont are lower than in many other states, including states with civil commitment laws. This drew an angry response from the chair of the Republican Party, Jim Barnett. Clearly, this is an issue that will continue to produce much smoke. Expect more press conferences and calls for the bill's passage when a sex offender or violent offender has done his time and is about to be released from prison.

Prescription drug monitoring (H. 45). I've described this bill in previous Legislative Updates. It would set up an electronic database to record the sale of certain prescription drugs in the state. The state Department of Health would collect a patient's name, address, date of birth, and Social Security number; the name of the drug prescribed, the quantity, the date the prescription was filled, the prescriber, and the dispensing pharmacy. The data “shall be confidential and not subject to public records law except as provided in this section.” And it's in the exceptions that things become problematic. One exception is for “a designated representative

of a board responsible for the licensure, regulation, or discipline of practitioners, pharmacists, or other persons who are authorized to prescribe, administer, or dispense controlled substances and who are involved in a bona fide specific investigation involving a designated person.” The system would be set up with a \$300,000 grant from the U.S. Department of Justice.

Aggregating records spread across many databases into one large database changes the nature of the records. In an instant, a review of someone’s records could reveal that person’s medical history. Such easy access could lead to abuses that citizens have a right to be protected from.

There is already a Vermont statute (Title 18, Chapter 84, Section 4218) that allows law enforcement officers access to pharmacy records – without a warrant or subpoena. Law enforcement has said that they want the same access to a centralized electronic database. We told the Senate Judiciary Committee that we were very troubled by this. We view the current statute as an unwarranted invasion of privacy, and we fear that a centralized database would represent an even greater threat to privacy.

The committee agreed that a proposal with implications as far-reaching as this bill seemed to have deserved much more analysis and review than could be provided through an end-of-the-session amendment. We expect to be involved in non-session discussions around this bill in an effort to make sure individuals’ privacy rights are protected. Medical records privacy is one of the top issues of concern to citizens when asked about threats to civil liberties.

Attorney’s fees for prevailing parties in litigation seeking production of a public record (S. 45). In its original form, this bill would have required a judge to award reasonable attorney’s fees and costs when the complainant in a public records case prevailed. Under current law, a judge has discretion whether to award fees and costs -- but it’s rare that awards are made. Although S. 45 was pushed by the Vermont Press Association, the bill was not just about the news media. It was also about individuals seeking public records. While no one wants to see local officials inundated with frivolous requests for reams of documents, some rather damning testimony was offered from both news reporters and private individuals about local officials’ stonewalling in providing documents that were clearly public. The Senate Judiciary Committee was not willing to include the provision of mandatory fees. Instead, the bill (which has passed the Senate) requires judges to determine -- in cases where the complainant prevails -- if records were unreasonably withheld, and if so to award attorney’s fees and costs. The House will presumably take up the bill next year.

Death with dignity (H. 168). This initiative was introduced last year but denied a serious hearing in the House. Supporters thought it would be given more consideration this year, given the change in party control and leadership, and so it was re-introduced. However, supporters were disappointed. The bill received the same cool treatment as before. Another public hearing was held, but the leadership made it clear the bill was headed nowhere this year. It’s unclear if a concerted effort next year by supporters would lead to greater success.

Criminal threatening (H. 254). The purpose of the bill was to “prohibit physical conduct intended to place a person in fear of imminent bodily injury and prohibit threats and actions intended to coerce or terrorize another person.” It seemed a broad-brush approach to an undefined problem, with troublesome constitutional questions as well. The bill itself received cursory review, and was not seriously considered. It should be noted, however, that a section of the “safe communities” bill contains a new, expanded definition of “aggravated stalking.” Possession of a “deadly weapon” is now grounds for stalking to be considered “aggravated stalking,” and hence a more serious crime. “Deadly weapon” is defined as “any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.”

-- Allen Gilbert, executive director, ACLU-Vermont

- *Of interest: Weekly vigils at the Donald Fell capital punishment murder trial continue on Wednesdays from noon to 1 p.m. outside the federal building (post office building) at Pearl and Elmwood streets in Burlington.*
- *Testimony in the Fell trial is set to begin Monday, June 20. On Wednesday, June 22, a public forum on the death penalty will be held at 7 p.m. at Contois Auditorium in Burlington. Speakers include David Kaczinsky (of New Yorkers Against the Death Penalty and brother of "Unabomber" Ted Kaczinsky), Sandy Baird (mother of murder victim Caroline Baird Crichfield and anti-death penalty activist), and Alice Kim (of the national Campaign to End the Death Penalty).*
- *You can sign a petition opposing the death penalty at www.petitiononline.com/vadp/petition.html.*
- *Vermonters Against the Death Penalty maintains a listserv on death-penalty issues and activities connected with the Fell trial. You can join at <http://lists.riseup.net/www/info/nodeathpenaltyvt>.*