



March 4, 2010

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The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Senate
State Capitol, Room 417
Juneau, AK 99801-1182

Re: Senate Bill 202
Constitutional Issues

Chair French:

Thank you for the opportunity to submit written testimony regarding Senate Bill 202.

As you know, the American Civil Liberties Union of Alaska represents thousands of members and activists throughout the state who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. The ACLU supports legislation designed to protect the civil rights of individuals who may be targeted for violence or harassment based on membership in a historically disfavored class.

However, we are also concerned that the important First Amendment rights of all Alaskans are carefully protected. Whether under the US or Alaska Constitutions, the rights of freedom of speech and of association are crucial to our democratic society. The ACLU must oppose any legislation which would lead to governmental restrictions on, or chilling of, any speech or associational rights, even if those rights represent unpopular or repugnant views.

We applaud the Bill's sponsor for introduction of this legislation and trust that – through working with her office and the Judiciary Committee – we can address the following concerns:

1. Inclusion of necessary protections of speech and associational rights;
2. Addition of language regarding “gender identity;” and
3. Alternatives to mandatory minimum sentencing clauses.

Amendment to Protect Speech and Associational Rights

As currently drafted, SB 202 would allow prosecution of a defendant and introduction at trial of constitutionally protected speech or association as substantive evidence of the defendant's motivation, whether or not that evidence directly related to the alleged crime.

For example, if a defendant were alleged to have targeted a victim who was Jewish, the defendant's membership in the Klu Klux Klan, or internet postings he wrote attacking Zionism could be introduced at trial. Such introduction would not only be unconstitutional, but also the basis for challenging and overturning a conviction.

Contrast with the above example, a defendant who – while attacking the same Jewish victim – states: “Jews have no place in America.” Introduction of such evidence would not be based on the defendant's associations or beliefs, but rather relate to the attack and specifically relevant to his motivation to commit the alleged crime.

In order to differentiate between these two situations, we recommend the inclusion in SB 202 of language such as:

In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense.

However, nothing in this section affects the rules of evidence governing the impeachment of a witness.

It is instructive to note that similar language was included in the Federal MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT, HR 2647; Public Law No. 111-084:

SEC. 4710. RULE OF CONSTRUCTION.

For purposes of construing this division and the amendments made by this division the following shall apply:

(1) IN GENERAL.—Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division or an amendment made by this division, in the absence of a stipulation by the parties, to admit evidence of speech, beliefs, association, group membership, or expressive conduct unless that evidence is relevant and admissible under the Federal Rules of Evidence. Nothing in this division is intended to affect the existing rules of evidence.

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ084.111.pdf
(pg. 653 of 656).

Inclusion of Gender Identity

As currently drafted, SB 202 leaves unprotected a minority group which has been shown to suffer violence at a far greater rate than their representation in the population: transgender individuals. It is essential that “gender identity” be included in this Bill.

Some information and statistics that may be of interest to the Committee are available at <http://www.avp.org/documents/2008HVRReportDraft3smallerfile.pdf>, *Hate Violence against Lesbian, Gay, Bisexual, and Transgender People in the United States, a Report by THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS*. Additional information regarding “Trans Murder Statistics 1970 to 2004” is at <http://www.gender.org/resources/dge/gea02002.pdf>.

Again, it is instructive to note that protections for transgender individuals were, in fact, included in the Hate Crimes Prevention Act passed by Congress:

SEC. 4707. PROHIBITION OF CERTAIN HATE CRIME ACTS.

. . . (2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY.—

“(A) IN GENERAL.—Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person . . .

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ084.111.pdf
(pg. 651 of 656), Public Law 111-084.

Elimination of Mandatory Minimums

As a general rule, the ACLU does not support mandatory minimum sentencing, and recommends that sentencing be determined by the Courts based on the particularized facts of each incident prosecuted.

Presuming the amendments outlined above, the ACLU will support SB 202, and would welcome the opportunity to work with the Bill's Sponsor and the Committee in addressing these issues.

Thank you again permitting us to share our concerns. Please feel free to contact the undersigned should you require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. A. Mittman', with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Wielechowski, Vice Chair
Senator Davis, Sponsor
Senator Egan
Senator McGuire
Senator Coghill