



April 8, 2010

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The Honorable Lyman Hoffman
The Honorable Bert Stedman
Co-Chairs, Senate Finance Committee
Alaska State Senate
Juneau, AK 99801

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STUDENT ADVISORS

Re: Senate Bill 222
Constitutional Issues

Chairs Hoffman and Stedman:

Thank you for the opportunity to submit written testimony regarding Senate Bill 222 (CS JUD).

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several significant concerns with the proposed legislation.

**Section Nineteen – Unnecessary Invitation to
Governmental Abuse of Alaskan’s Internet Records**

Section 19 proposes that the Attorney General may issue administrative subpoenas to obtain an internet user’s name, address, and service history.

The general rule in criminal investigations has been that a warrant issues from a judge or other judicial authority. In some contexts, administrative warrants have been issued by various administrative agencies – to assist the IRS, for instance, in recovering owed taxes, or the SEC in identifying violations of securities regulations. Permitting a criminal enforcement agency to issue its own subpoenas for the purpose of prosecution inevitably leads to abuse.

a. U.S. Department of Justice Reports on Abuse of Federal Administrative Subpoenas

In January of this year, the U.S. Department of Justice, Office of the Inspector General issued a report on the FBI's use of non-judicially approved requests for telephone records. See, <http://www.justice.gov/oig/special/s1001r.pdf>.

As the OIG noted: "Our investigation also uncovered abuses in the FBI's use of administrative subpoenas." (pg.129) There, as proposed in this bill, the authorization is intended "in connection with the investigation of . . . offenses involving the sexual abuse or exploitation of children" (pg 130)

The New York Times summarized the report as follows:

The Federal Bureau of Investigation improperly obtained calling records for more than 3,500 telephone accounts from 2003 to 2006 without following any legal procedures, according to a newly disclosed report by the Justice Department's inspector general.

Instead, according to the 289-page report, F.B.I. agents informally requested the records from employees of three unidentified telephone companies who were stationed inside a bureau communications office.

Based on nothing more than e-mail messages or scribbled requests on Post-it notes, the phone employees turned over customer calling records, the report said.

On some occasions, the phone employees allowed the F.B.I. to upload call records to government databases. On others, they allowed agents to view records on their computer screens, a practice that became known as "sneak peeks."

Moreover, the report found that the F.B.I. improperly uploaded into its databases large numbers of calling records without determining whether they were relevant to an investigation.

On four occasions, the bureau made inaccurate statements to a court that authorizes national security wiretaps about how it had obtained calling records, the report said.

And agents twice improperly gained access to reporters' calling records as part of leak investigations.

<http://www.nytimes.com/2010/01/21/us/21fbi.html>

The OIG's March, 2008 Report on abuse of NSL's documents similar abuses. See, <http://www.justice.gov/oig/special/s0803b/final.pdf>. And the Washington Post, in a lengthy report, analyzed the issue. That report quotes former Republican Congressman Bob Barr:

Barr, the former congressman, said that "the abuse is in the power itself."

"As a conservative," he said, "I really resent an administration that calls itself conservative taking the position that the burden is on the citizen to show the government has abused power, and otherwise shut up and comply."

<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/05/AR2005110501366.html>.

b. Administrative Subpoena Powers are Unnecessary

Recent testimony to the Alaska Legislature to the effect that such sweeping authority should be removed from the hands of a judge – who traditionally affords constitutional protections as a neutral party – has indicated that the judicial process is too cumbersome or takes too much time. However, the submission of a warrant to a judge is the same procedure by which the phones of those accused of drug dealing are tapped, by which the homes of those accused of murder are searched, and by which those accused of rape are arrested. While the "affidavit" portion of a warrant request can be lengthy, much of it is boilerplate. The ACLU can provide the Committee with an exemplar affidavit showing that the original language necessary to complete the affidavit is rather minimal.

Testimony that it would be easier for the head of the state's law enforcement and litigation agency to read an application for an administrative subpoena than for any of the many state court judges to do so is similarly unpersuasive. Regardless of who will finally sign a warrant or subpoena, the same steps must be completed. The statement of probable cause must be drafted, the statement of what materials are to be seized must be prepared, and the application must be submitted for signature. Whether the application is faxed to a judge's chambers or carried upstairs does not add significantly to the time needed to complete the application.

One could imagine that the Attorney General would have less time to fully review the application than judges around the state. If the intention of the bill is that the Attorney General will designate representatives to sign these warrants in his name, such a practice invites different concerns. Devolving subpoena power to numerous subordinates whose actions would be difficult to track even within the Department of Law, opens even more avenues for abuse.

The context of the subpoena – internet usage – should prompt more scrutiny from the courts, since access to the internet is part of the freedom of speech. Allowing the government to discover who makes negative comments about political figures on websites, to find out whether a state employee is visiting a website about whistleblower law, and who is supporting rival

political campaigns threatens the privacy and the free speech rights of citizens. *Doe v. Alaska Superior Court*, 721 P.2d 617, 629 (Alaska 1986) (privacy clause protects “sensitive personal information”). It is no answer to say that the statute is supposedly about child exploitation when the subpoenas are not subject to independent scrutiny. The only entity able to challenge the subpoena would be the internet service provider, which has no particular interest in the freedom of speech or privacy of citizens.

Allowing a law enforcement agency to issue its own subpoenas without review by a neutral party has led in the past and will lead again to serious abuse by government officials.

Section 20 Proposed Amendments to Rule 16 of the Rules of Criminal Procedure

Section Twenty of the Bill proposes changes to the rules of criminal procedure that violate the state and federal constitutional rights to a fair trial and to effective representation, and would result in lengthy and costly litigation. The Section proposes that relevant evidence should be revealed to defendants, defense attorneys, and defense experts only at a state facility, under the control of a law enforcement agency. While protecting the privacy of the victims of certain crimes is an important interest, the proposed changes to the Rules of Criminal Procedure unnecessarily restrict the rights of the accused.

In some cases, the use of a technological expert is invaluable. Defendants are entitled to establish, for example, that images at issue in a trial are not illegal material, were placed on the drive by another party, or were altered in some way. The computer source files would require review at length by an expert witness. Being forced to conduct the review at a local police department or District Attorney’s office would make the work of these experts essentially impossible. Moreover, the analysis of hard drives and other media would likely require unique analysis programs which would necessitate examining the images on the expert’s own computers. The proposed Rule Amendment would effectively deprive defendants of the effective use of expert testimony, which would be a key defense resource in these cases.

Even where the use of an expert is unnecessary, the defense attorney may need to review the files at length, to establish the exact nature of images or files, or to determine whether some of them are duplicates. Requiring defense attorneys to do their work at times and places convenient to the state is unnecessarily and unconstitutionally restrictive.

A case from Washington State perfectly illustrates why the proposed rule would result in lengthy and expensive litigation which would ultimately result in the overturning of the statute. In *State v. Boyd*, for example, the prosecution in a child pornography case sought and obtained a protective order from the court which only permitted the defense to view the evidence at a state facility. 158 P.3d 54 (Wash. 2007). The Supreme Court of Washington ruled that the Rules of Evidence, the Fifth Amendment right to a fair trial, and the Sixth Amendment right to effective

representation by counsel all required that the protective order be struck down and the defendant be granted a new trial, because the defendant could not be adequately represented nor fairly tried under the order.

The important privacy needs of victims can be protected without the measures laid out in Section 20. For example, the *Boyd* court upheld an order requiring the defense to keep “mirror image” hard drives of evidence under lock and key, to use firewall software on any computer viewing images that was connected to the internet, making the attorney personally and professionally responsible for any unauthorized release of the images, and allowing state experts to verify the complete eradication of the images after the conclusion of the case.

The power of a court to issue a protective order in a particular case already exists and needs no augmentation by the legislature. An order issued after consideration of the unique facts of an individual case is far more likely to survive appellate review than a blanket rule set down by the legislature.

Section 20 of S.B. 222 violates the state and federal constitutional rights to a fair trial and to effective representation. We recommend the Bill be revised so that the courts would be permitted to manage the disclosure of evidence on a case-by-case basis, rather than by instituting a blanket rule that would invite litigation.

Sections Three and Twenty-One – Eliminating the Mental State Requirement of the Failure to Register Statute

Section 21 of the Bill eliminates any mental state requirement, or *mens rea*, for the offense of failure to register, set forth in Section 3. This means that a person who accidentally or in good faith neglects to complete the registration requirement could still be found guilty of the offense.

Generally, the criminal law requires “not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.” *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969). The Alaska courts have held that, for major felonies, a mental state requirement is mandatory, while some minor offenses, such as hunting or public health related offenses, may be strict liability offenses without a mental state requirement. *Speidel*, 460 P.2d 77 (holding that the statute declaring the failure to return a car to be a crime, regardless of mental state, violated due process); *see, also, State v. Guest*, 583 P.2d 836 (Alaska 1978); *State v. Fremgen*, 914 P.2d 1244 (Alaska 1996).

In some cases, the courts have avoided declaring a statute unconstitutional by creating a mental state requirement where a statute has no provision for mental state but no language stating that no mental state requirement exists. *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Alex v. State*, 484 P.2d 677 (Alaska 1971). With an explicit statement that no mental state is required, the

courts will not be able to avoid the constitutional conflict and may rule the statute unconstitutional.

Of note, as well, are the unique conditions here in Alaska. Many registered sex offenders live off the road system and in remote villages in which mail service gets interrupted, travel and telecommunications are irregular, and weather could keep an offender from being able to comply. Placing the burden on the defendant to prove his innocence reverses our legal tradition and the traditional balance of powers between the defense and the prosecution. The elimination of the mental state requirement and the substitution of a restrictive affirmative defense make Sections Three and Twenty-One subject to attack under the Alaska constitution.

Sections Six and Seven: First Amendment Issues

Sections 6 and 7 present First Amendment issues. By inclusion of non-obscene material, these proposed amendments run afoul of the U.S. Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), (child pornography cannot be banned if it is both (1) not constitutionally obscene and (2) not a depiction of real children).

As currently drafted, one could imagine a work of art, for instance, placing a photo of the head of a minor Britney Spears, on drawing intended as commentary on media depictions of youth and sexuality unconstitutionally qualifying as "criminal material." Absent, for example, language tracking the *Miller* standard (*Miller v. California*, (1973) 413 U.S. 15) these provisions are subject to facial challenge.

Conclusion

The ACLU takes seriously the need to address sexual assault in Alaska. But the sections cited invite constitutional challenge and will likely entangle the state in lengthy and costly litigation, and lead to unnecessary uncertainty in criminal verdicts

We hope that the Finance Committee will note these constitutional infirmities and consider amending them or eliminating them from the Bill to avoid these concerns.

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Thank you again for the opportunity 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 Egan
Senator Ellis
Senator Huggins
Senator Olson
Senator Thomas