

Washington Legislative Office Wrap Up for 2008

The Washington Legislative Office (WLO) of the American Civil Liberties Union fights to defend constitutional principles and preserve Americans' civil liberties. This year the ACLU worked closely with Congress in an attempt to contain the damage done by the Bush administration. What follows highlights the issues, the battles and the victories of the ACLU's Washington, DC based lobbying and advocacy efforts during 2008.

Safe and Free

It is clear that there has never been a more urgent need to preserve fundamental privacy protections and our system of checks and balances. Illegal government spying, Real ID and government-sponsored torture programs defy the Constitution and the bounds of law.

FISA

For years, the Bush administration illegally intercepted the emails and phone calls of millions of Americans without a warrant. Rather than rein in this abuse of power, lawmakers on Capitol Hill caved in and gave the administration *even more* expansive powers to spy on Americans by passing the FISA Amendments Act of 2008. Unrestrained and unchecked government surveillance not only intrudes upon Americans' right to privacy, it also has the dangerous effect of chilling speech and political dissent.

The ACLU will continue to push for greater congressional and judicial oversight of the domestic spying program.

Abuse of National Security Letters by the FBI

The USA Patriot Act greatly expanded the scope and use of the National Security Letter (NSL) statute. The NSL statute is a tool used by law enforcement to compel the release of personal information, such as phone, email or business records, without a court order. The FBI's gross abuse of the NSL statute was revealed in embarrassing reports issued by the Department of Justice's Office of the Inspector General. To make matters worse, in March, a Freedom of Information Act lawsuit filed by the ACLU uncovered abuses of the NSL statute by the Department of Defense (DoD). In response to this information, the ACLU called on the inspector general to begin an internal investigation into the FBI's use of NSLs, and whether they were used to funnel Americans' private information to the DoD. Shortly after that, the ACLU testified before the House Judiciary Subcommittee on Constitution, Civil Rights and Civil Liberties at a hearing on a bill introduced by the committee's chairman, Representative Jerrold Nadler (D-NY), entitled "The National Security Letters Reform Act of 2007." In June, the committee passed this legislation.

The ACLU wants to see greater congressional oversight of FBI activities, especially concerning revisions to guidelines that govern FBI investigations. The new guidelines,

which are set to go into effect on December 1, 2008, lowered the threshold needed to begin new investigations. More troubling still, the guidelines allow a person's race or ethnic background to be used as a factor in opening an investigation, a move that may institute racial profiling.

Terrorist Watch List

In July, the ACLU called attention to the nation's terrorist watch list as it reached one million names. The list includes members of Congress, nuns, war heroes and other 'suspicious characters,' with names like Robert Johnson and Gary Smith. Putting a million names on a watch list is a guarantee that the list will do more harm than good by interfering with the travel of innocent people and wasting huge amounts of our limited security resources on bureaucratic wheel-spinning.

Shortly after the ACLU exposed the ineffectiveness of the terrorist watch list, the House Homeland Security Subcommittee on Transportation Security and Infrastructure Protection held a hearing about how to clean it up.

The ACLU is asking the next president to issue an executive order requiring the lists to be reviewed and limited to only those for whom there is credible evidence of terrorist ties or activities.

Real ID

On multiple fronts – in the states, in Congress and at the Department of Homeland Security – the ACLU has been fighting implementation of the Real ID Act of 2005, which would turn our state drivers' licenses into national identity cards. Real ID imposes numerous expensive new burdens on taxpayers, citizens and state governments, while doing nothing to protect against terrorism. Caroline Fredrickson, director of the ACLU's Washington Legislative Office, testified before the Senate Committee on Homeland Security about the privacy and security concerns with creating a federal identity document.

The cost to implement Real ID is expected to run between \$9.9 and \$23.1 billion, with state governments forced to pick up much of the tab. As of October 2008, 21 states have passed laws rejecting Real ID, with that number expected to grow.

Torture

The ACLU has exposed and challenged the Bush administration's torture and abuse of detainees held in U.S. custody.

In March, President Bush vetoed the 2008 Intelligence Authorization Act largely due to a provision that would have banned U.S. government soldiers and agents from inflicting torture on detainees. This provision applied the Army Field Manual (AFM) on Interrogations to all government agencies, including the CIA. The AFM, which currently applies only to the Department of Defense, prohibits specific acts of torture and abuse, including waterboarding, and authorizes an array of time-tested interrogation methods.

A month after Bush's veto, the president admitted that he knew his top national security advisers approved of the CIA's use of torture. Bush also defended the use of waterboarding. In response, the ACLU called on Congress to demand the appointment of a special counsel to investigate possible violations of the law by the Bush administration including the War Crimes Act, the federal Anti-Torture Act and federal assault laws.

At the end of the September, the ACLU commended the Senate Judiciary Committee's vote to authorize a subpoena of the DOJ legal opinions justifying harsh interrogation tactics. The committee has repeatedly requested these documents and has seen very little cooperation from Department of Justice. The ACLU has and will continue to lead in calling for an independent prosecutor to investigate any violations of federal laws related to the interrogation of detainees.

Travelers' Privacy Protection Act

In July, the Department of Homeland Security made public its policies regarding searches at the border. These expansive policies now allow the copying of books, documents and data, as well as intrusive questioning, all without probable cause. The ACLU was pleased to see the Travelers' Privacy Protection Act (TPPA) introduced in both the Senate and the House of Representatives. The TPPA restores privacy protections, while still protecting our security.

Employment Verification

At the beginning of June, President Bush issued a presidential directive requiring all government contracts to go through an employment verification process, checking potential employees against their Social Security file. The Social Security Administration's (SSA) database has been plagued with errors for individual records, resulting in massive backlogs in SSA field offices. Adding employment verification to the SSA's duties would only exacerbate problems. The day after the directive was issued, Timothy Sparapani, ACLU senior legislative counsel, testified before the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law about the effects of implementing a mandatory electronic employment verification system in the United States. Sparapani explained that imposing a mandatory system will endanger the privacy of American citizens, and that its inevitable systemic errors will create a 'No-Work' list of eligible Americans who are wrongly prevented from working by the U.S. government.

Fusion Centers

The ACLU has led efforts to shed light on fusion centers' growing role in law enforcement and reveal their expanding ties to private industry, including relationships with massive data-brokering companies. Fusion centers are intelligence gathering institutions that have the potential to become privacy nightmares. The ACLU enumerated many of the threats fusion centers pose to Americans' privacy in a report titled "What's Wrong with Fusion Centers" released last year and updated this summer. The threats include overzealous intelligence gathering, hostility to open government

laws and other tax information sharing practices – which have gone from being exceptional to pervasive.

Whistleblower Protections

The numerous instances of government abuse of power and mismanagement that have come to light this year have been an important reminder to lawmakers that they should offer better protections to government employees who expose wrongdoing or national security breaches. ACLU National Security Policy Counsel and FBI whistleblower Mike German testified about the need for greater protections for whistleblowers before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security in May.

Homegrown Terrorism

The ACLU fought congressional efforts to pass the Violent Radicalization and Homegrown Terrorism Prevention Act of 2007. The ACLU and nearly twenty other groups provided Congress with their concerns about the report, most notably the free speech implications of labeling the Internet a "weapon" and unfairly singling out members of one religious group as possible "extremists."

Abuse of State Secrets Privilege

The ACLU has pushed back against this administration's frequent and consistent misuse of the state secrets privilege by urging passage of two bills introduced in the Senate and House by Senator Edward Kennedy (D-MA) and Congressman Jerrold Nadler (D-NY) respectively. Both bills would allow Americans to hold their government accountable by limiting the scope of the privilege. The Bush administration, which threatened to veto the bill, has used the privilege to halt several important lawsuits against the government, including an ACLU case involving the extraordinary rendition of an innocent German citizen, Khaled El-Masri.

Steven R. Shapiro, ACLU legal director, testified before the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and said, "The Bush administration has consistently used the state secrets privilege as an alternative form of legal immunity. As a result, a broad range of executive misconduct has been shielded from judicial review. The state secrets privilege was never meant to shield the government from accountability or deny victims of government misconduct their day in court."

Civil Rights

The ACLU's work on civil rights issues is fundamental to ensuring that the right to live free from discrimination is protected and defended, and that every American is able to fully participate in our democracy. This year, the ACLU's battles resulted in three major civil rights victories: passage and enactment of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), the Emmett Till Unsolved Civil Rights Crime Act and the Genetic Information Nondiscrimination Act (GINA). In addition to these major victories, the ACLU beat back several bad pieces of legislation, submitted comments on

major regulations, worked with the administration to encourage the implementation of non-discrimination policies and gained support for vital civil right legislation.

ADAAA

The ACLU was an instrumental player in the coalition that successfully lobbied for the passage of the ADAAA. This essential legislation rolled back two decades worth of legal decisions that thwarted the original intent of the Americans with Disabilities Act of 1990 (ADA). Courts have held that individuals with impairments who function well due to their use of “mitigating measures,” such as medication, hearing aids, and prosthetics, are not covered by the ADA, even if they are discriminated against because of that impairment. Judges have also interpreted the definition of “disability” so strictly that they have created an overly demanding standard for qualifying as disabled. The passage of the ADAAA gave the American dream back to persons with disabilities by restoring the original promise of the ADA – that individuals who are willing and able to work, should be able to do so free from discrimination.

Emmett Till Unsolved Civil Rights Crimes Act

With the passage of the Emmett Till Unsolved Civil Rights Crimes Act, the Department of Justice has the added resources to resolve civil rights era crimes. This law, which bears the name of a young boy whose tragic death 53 years ago helped propel the civil rights movement in America, will finally ensure that some of the individuals who are guilty of civil rights crimes will be held accountable.

GINA

The ACLU’s efforts on GINA resulted in a groundbreaking step toward securing civil liberties in the emerging field of medical technology, and a landmark victory for those fighting to ensure civil rights in American workplaces. By providing national guidelines for health insurers, employers and states about how to use information regarding potential illnesses or medical conditions acquired through genetic tests, the new law safeguards workers from discrimination. Genetic tests reveal the most intimate and personal health-related information that exists about any individual. Even though all medical information should be treated as private, genetic information is uniquely sensitive because it reveals potential, but not certain, health concerns, such as a family tendency to have breast cancer. GINA not only established necessary privacy protections, but also began the conversation about the importance of ensuring that medical technology does not become a new tool for discrimination.

DNA Collection

The ACLU battled a regulation that allowed the Department of Justice to collect and store DNA from anyone arrested by a federal agent – whether or not they are convicted of a crime. This practice is a violation of due process and an example of the Bush administration’s Justice Department skirting around the edges of the Fourth Amendment search and seizure requirements. The ACLU was able to prevent Congress from including language in a bill that would have provided incentives for states to collect

samples from arrestees. Had the language been enacted, DNA databases would have been flooded with the profiles of people who have not been convicted of a crime. However, the legislative successes have not solved the trouble with DNA collection. New DOJ rules requiring more DNA collection are due for implementation next year.

2008 Election Day Plan

Through a series of meetings at the Department of Justice, a coalition of civil rights groups, including the ACLU, pressed Grace Chung Becker, acting assistant attorney general for the Civil Rights Division, to withdraw her original 2008 Election Day plan to have criminal prosecutors serve as poll monitors. In the latest letter to the DOJ, the coalition continues to push for a statement from Attorney General Michael Mukasey to election officials that states voter suppression is illegal and the department will fully enforce the law.

HIV/AIDS Travel Ban

With coalition partners, the ACLU successfully lobbied to lift the ban on HIV/AIDS travelers to the U.S. that had been in effect for over two decades. The legislation ends the blanket ban on HIV travelers and returns the policy to a case-by-case decision by health care officials at the Department of Health and Human Services.

Don't Ask, Don't Tell

The ACLU's efforts to repeal "Don't Ask Don't Tell" have gained momentum. Since this controversial policy was implemented over 12,000 servicemen and women, many in key positions, have been discharged from the armed services. Proposed legislation repealing this policy has gained 143 co-sponsors in the House of Representatives and led to hearings before the House Armed Services Committee, where both Republicans and Democrats spoke to the absurdity of the policy.

Domestic Partner Benefits

The Senate held hearings on the Domestic Partner Benefits and Obligations Act, a bill that will offer domestic partners of federal employees the same benefits and obligations as opposite-sex married couples. It has 90 co-sponsors in the House, and 22 in the Senate. The ACLU has strongly advocated for passage of this bill, calling it fundamental and necessary civil rights legislation.

HHS Refusal Rule on Women's Health

On August 21, the Department of Health and Human Services (HHS) issued a rule that allows certain publicly funded health care entities that have a religious objection to performing abortions to refuse to provide women with even the most basic information and counseling about the procedure. Moreover, statements by HHS's secretary suggest the agency intends for the rule to create a new right for institutions and individuals to refuse to provide contraceptive services. In addition to sending comments from the WLO and the Reproductive Freedom Project, the ACLU mobilized our activists and affiliates to

submit comments. 41,111 individuals submitted comments through the ACLU action center, making this one of the highest performing action alerts in memory. In all, the sheer volume of comments – over 200,000 – opposed to the regulations sent a strong message to the administration and Congress that Americans do not want access to quality health care interrupted or minimized as part of a political agenda.

Abstinence-Only-Until-Marriage Programs

The ACLU has been working with Congress to defund abstinence-only programs, which were flat-funded in the 2008 appropriations cycle. The ACLU has also been encouraging states to opt out of receiving Title V abstinence-only funding. To date, 25 states have opted out of the program. The ACLU is also advocating for the funding of comprehensive sex education instead of abstinence-only programs.

Human Trafficking

The ACLU has been working with Congress on the Trafficking Victims Protection Reauthorization Act (TVPRA), specifically trying to provide protections for women who are trafficked by diplomats and treated like indentured servants, and who therefore have limited or no available recourse due to diplomatic immunity. Because of the ACLU's efforts, the Senate TVPRA includes strong measures to protect women trafficked by diplomats. The House has already passed its version of the bill.

Gender Identity

An ACLU client, Army Colonel Diane Schroer, testified in the first ever congressional hearing on transgender issues and gender identity discrimination in the workplace. Colonel Schroer was an Airborne Ranger qualified special operations forces officer who received numerous decorations, including the Defense Superior Service Medal, and was hand-picked to head up a classified national security operation. She began taking steps to transition from male to female shortly after retiring as a colonel following 25 years of distinguished service. When she interviewed for a job as a terrorism research analyst at the Library of Congress, she thought she had found the perfect fit. Schroer accepted the position, but when she told her future supervisor that she was in the process of gender transition, the Library of Congress rescinded the job offer.

Our constitutional values of fairness and equality state it should be hard work, education, skills and experience which determine our success in the job market. Unfortunately, this was not the case for Colonel Schroer. Her testimony was the first necessary step for Congress to act to protect transgender individuals from discrimination in the workplace.

Paycheck Fairness Act and Lily Ledbetter Fair Pay Act

The ACLU urged members of Congress to support the Paycheck Fairness Act, which would amend the Equal Pay Act, one of the most important laws addressing pay discrimination. The bill would strengthen and improve the effectiveness of the Equal Pay Act by requiring employers to demonstrate that differences in wages among employees

are not based on gender, strengthening penalties for equal pay violations, bolstering the Equal Employment Opportunity Commission's (EEOC) ability to handle pay discrimination cases and requiring the EEOC to develop regulations directing employers to collect wage data, reported by race, sex and national origin, of employees.

Last summer, the House of Representatives acted to protect victims of workplace discrimination by passing the Lilly Ledbetter Fair Pay Act. The need for the Lily Ledbetter Fair Pay Act arose out of the Supreme Court's decision in *Ledbetter v. Goodyear*, which rolled back decades of civil rights law – all but shutting the courthouse doors on victims of wage discrimination. Due to this ruling, Americans now have only 180 days from the time their employer decides to discriminate against them to file a claim. Before *Ledbetter*, each paycheck lessened by ongoing discrimination reset the 180-day clock. This is vitally important for employees who are discouraged, if not forbidden, from discussing their salaries. The Lily Ledbetter Fair Pay Act will restore the right of American workers to seek justice if they find themselves subject to wage discrimination.

Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008

Working closely with the Senate Judiciary Committee, the ACLU WLO successfully pushed for an amendment to repeal the incarceration of runaways, truants and other juvenile non-criminals. The amendment became a provision of S. 3155, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008, a bill setting standards and providing funding to protect the rights of juveniles in the criminal justice system.

Crack/Cocaine Sentencing Disparity

Working to end a 20-year discriminatory law, the ACLU submitted testimony to the Subcommittee on Crime and Drugs of the Senate Judiciary Committee demanding an end to the 100-to-1 crack/powder federal sentencing disparity. The ACLU pointed out that the sentencing disparity has resulted in inequities in the criminal justice system based on race. Standing with numerous civil rights and professional organizations from across the country, the ACLU participated in a press briefing and lobby event to call for an end to the discriminatory 100-to-1 sentencing disparity.

Medical Care for ICE Detainees and Death in Custody

In September, after months of compelling TV and newspaper exposés detailing deficient medical care and over 60 immigration detention deaths, the House Judiciary Committee marked up the Detainee Basic Medical Care Act of 2008. This ACLU-backed legislation requires the Department of Homeland Security (DHS) to develop procedures ensuring that all detainees held by Immigrations and Customs Enforcement (ICE) receive adequate medical and mental health care.

The ACLU will continue to fight for better medical care for detainees and increased accountability for ICE. After repeatedly requesting critical information about dozens of detainee deaths, the ACLU filed a federal lawsuit seeking a court order requiring DHS to expedite and comply with the request for information about deaths in ICE custody.

Unlawful Detention

Senators Robert Menendez (D-NJ) and Edward Kennedy (D-MA) introduced legislation to protect U.S. citizens and lawful permanent residents from being unlawfully detained and deported by the DHS. In the wake of sweeping immigration raids that have devastated communities, the ACLU welcomed introduction of the Protect Citizens and Residents from Unlawful Raids and Detention Act. This bill is the first legislation to require DHS to follow due process standards in executing immigration raids.

First Amendment

The ACLU's work to preserve our right to free speech guaranteed by the First Amendment goes on in Congress and before federal agencies – including the Federal Communications Commission (FCC). This year, the ACLU advocated that lawmakers enact open Internet principles, worked for media shield protections, opposed media consolidation, and responded to outmoded fines levied by the FCC for fleeting expletives.

Open Internet

The Internet's openness has allowed it to blossom into one of today's most important places for the free exchange of ideas and information. Unfortunately, Internet providers and wireless phone companies increasingly are disrupting this forum by acting as censors for what we can do and see online. The ACLU, which has been fighting for free speech for almost 88 years, is demanding that leaders both at the FCC and in Congress take immediate action to safeguard free speech and innovation online. On March 11, 2008, Caroline Fredrickson, the director of the ACLU's WLO, testified before the House Judiciary Committee hearing on net neutrality. Her testimony urged Congress to safeguard free speech on the Internet. The NoCal ACLU's Nicole Ozer testified at a FCC field hearing on Internet freedom and net neutrality in Palo Alto, CA. In addition, the ACLU and its members filed comments with the FCC encouraging the agency to adopt principles that would allow the Internet to remain a marketplace for ideas.

Deep Packet Inspection

The ACLU warned Congress about the landmines inherent in deep packet inspection (DPI), a process that allows the government access to all of our Internet activity, and asked Congress to act as Americans' firewall against such an invasive practice. The expanding use of DPI is increasingly sophisticated, complicated and lacking in transparency, posing a significant risk to Americans' privacy. Service providers will have access to a complete cached record of Americans' Internet activity including our search terms, the pop up ads that appeal to us, the news we read, the blogs we visit and post to and anyone with whom we're associated on the Internet.

Media Shield

The ACLU strongly advocated for passage of the Free Flow of Information Act, legislation that would enact a federal shield law for journalists. The ACLU pointed out

that although forty-nine states and the District of Columbia recognize some form of reporters' privilege, either through statute or common-law, the absence of a federal reporters' shield law has undercut these state shield laws. A federal shield law is needed to make certain that the protections afforded to journalists are consistent. The issue of media shield received significant attention during the ACLU's Annual Membership Conference at which Senator Arlen Specter participated on a panel entitled, "The War on Terror: An Exchange About Censorship, Surveillance and Guantanamo." Senator Specter remarked, "They call it a chilling effect," discussing the Bush administration's tough tactics in dealing with investigative reporters. "I call it a freezing effect."

The ACLU also objected when a federal grand jury issued a subpoena to *New York Times* reporter James Risen earlier this year in an attempt to force disclosure of a confidential source.

Media Consolidation

To ensure that Americans have access to diverse voices of public opinion, the ACLU has long opposed media consolidation. In a letter to Senate Commerce Committee Chairman Senator Daniel Inouye (D-HI) and Vice Chairman Senator Ted Stevens (R-AK), the ACLU urged them to support a resolution disapproving of the FCC's rule on broadcast media cross-ownership. The ACLU explained that by endorsing the greater concentration of media, the effect of the FCC rule has been to diminish Americans' access to a wide range of news, information and political commentary.

FCC Indecency Fine

And finally, the ACLU opposed the government's attempts to act as a nanny for what grown adults can and cannot watch on television. The ACLU objected when the FCC levied a \$1.4 million fine against 52 ABC network affiliates that aired a 2003 episode of *NYPD Blue* during which a woman's nude buttocks can be seen. Caroline Fredrickson, director of the ACLU WLO said, "The government cannot be the parent – it certainly should not try to parent the parents."