

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9871 HOUSE JUDICIARY

1 * Sec. 5. AS 29.10.200 is amended by adding a new paragraph to read:

2 (60) AS 29.71.070 (personal exercise of religious freedom protected).

3 * Sec. 6. AS 29.71 is amended by adding a new section to read:

4 **Sec. 29.71.070. Personal exercise of religious freedom protected.** (a) A
5 municipality may not place a substantial burden on a person's free exercise of religion
6 unless

7 (1) the burden is in the form of a rule of general applicability and does
8 not intentionally discriminate against religion or among religions; and

9 (2) application of the burden to the person is essential to further a
10 compelling governmental interest and is the least restrictive means of furthering that
11 compelling governmental interest.

12 (b) A person may bring a civil action against a municipality for a violation of
13 this section, and the court may grant appropriate relief.

14 (c) This section may not be construed to create an establishment of religion
15 or to authorize the infringement of the individual rights of a third party.

16 (d) This section applies to home rule and general law municipalities.

17 * Sec. 7. AS 44.62 is amended by adding a new section to article 2 to read:

18 **Sec. 44.99.130. Personal exercise of religious freedom protected.** (a) A
19 state agency may not place a substantial burden on a person's free exercise of religion
20 unless

21 (1) the burden is in the form of a rule of general applicability and does
22 not intentionally discriminate against religion or among religions; and

23 (2) application of the burden to the person is essential to further a
24 compelling governmental interest and is the least restrictive means of furthering that
25 compelling governmental interest.

26 (b) A person may bring a civil action against a state agency for a violation of
27 this section, and the court may grant appropriate relief.

28 (c) This section may not be construed to create an establishment of religion
29 or to authorize the infringement of the individual rights of a third party.

30 (d) In this section, "state agency" means a department, institution, board,
31 commission, division, authority, public corporation, committee, or other administrative

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1 unit of the executive branch of state government, including the University of Alaska,
2 the Alaska Railroad Corporation, and the Alaska Aerospace Development Corporation.



NRLA

NORTHWEST RELIGIOUS LIBERTY ASSOCIATION

Chairman
Jere D. Patzer

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Government Relations
Joseph Story, Alaska
L. H. Opp, Idaho
Morris Brusett, Montana
Dan McCulloch, Oregon
H. J. Bergman, Washington

March 30, 2000

Alaska State Legislature
Alaska State Affairs Committee

Re: HB 387 - The Alaska Religious Freedom Protection Act

Honorable Chair and Committee Members,

We strongly support House Bill 387 for several reasons but I wish to express my appreciation to the sponsor and cosponsors of this bill. First, we support this bill and are mindful of the fact that the Supreme Court's decision in *Sherbert v. Verner* (1963) specifically involved a Seventh-day Adventist church member who had been discriminated against at her place of employment on the basis of her firmly held beliefs. We take special interest in the fact that it was in this particular case that the high court ruled that the state's interest in denying unemployment benefits - merely because Mrs. Sherbert would not make herself available for work on Saturday (her Sabbath) as required by the state's unemployment compensation law - was insufficiently compelling to warrant an infringement upon this most fundamental right: the free exercise of religion.

★ LEGAL RATIONALE

Second, the sponsors efforts to restore the "compelling state interest" and "least restrictive means" tests as established in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972), respectively, could not come at a better time. Such a provision will effectively restore an individual's right to free exercise of their religious convictions at the state level, and prevent the unnecessary discrimination that occurs on a daily basis in the public sector, particularly in the workplace. As Justice Sandra Day O'Connor stated in the Supreme Court's Decision in *Employment Division of Oregon v. Smith*, the court made a critical mistake when they failed to offer "convincing" evidence "to depart from the settled First Amendment jurisprudence." This fundamental departure allows states to 1) "make criminal an individual's religiously motivated conduct" in a way that burdens [an] individual's free exercise of religion"; 2) puts at a clear disadvantage minority religions and religious practices when leaving accommodation to the political process; and 3) enables government to ignore religious claims altogether, if it suits them, without offering any compelling justification to support their actions (494 U.S. 872 at 897, 902). However, as Justice O'Connor reiterated in *Smith*,

The essence of a free exercise claim is relief from a burden imposed by government on religious practice or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community (494 U.S. 872 at 897).

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★ HISTORICAL RATIONAL

Third, to place on the shoulders of government the burden to prove a compelling interest in order to protect the greater, or common good, is to place an individual's claim to religious freedom in its rightful place. America's founders, namely Thomas Jefferson and James Madison, believed that the free exercise of religion was the most "liberal" of all the rights Americans could claim, the one right that placed the greatest trust in the capacity of private choice, and the one least dependent on positive law. In other words, a right that was considered "unalienable." Again, as Justice O'Connor stated in *Smith*, "The First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority" (493 U.S. 872 at 902). We believe that HB 387 will restore this historical intent at the state level.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Joseph L. Story, Government Relations Representative
Northwest Religious Liberty Association



NRLA

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March 30, 2000

Alaska State Legislature
Alaska State Affairs Committee

Re: **HB 387 The Alaska Religious Freedom Protection Act**

Honorable Chair and Committee Members,

★ **WHY EXEMPTIONS ARE NOT NECESSARY**

Smith left the Free Exercise Clause virtually toothless in all but the rarest of cases. Yet the ACLU would rather leave religious believers statutorily defenseless than enact a Religious Freedom Restoration Act (like the Alaska's Religious Freedom Protection Act) that would apply to all claims and all Americans. Specifically, we have learned that the ACLU wants the Alaska Religious Freedom Protection Act amended so it could not be invoked by many believers against an antidiscrimination law. Call it by any other name - but this would be a carveout, a repudiation of the bedrock of "inalienable rights" and equal protection of the laws.

For the following reasons, the Northwest Religious Liberty Association - a member of the National Coalition for the Free Exercise of Religion - would have to vigorously oppose the Alaska Religious Freedom Protection Act if it were amended to exclude a class of religious practices or claims from its protection.

1. The Free Exercise of Religion should not *Always* be Subordinated to other Civil Rights.

As a matter of principle, should the First Freedom always prevail over antidiscrimination law? No. Society's interest in eradicating racial discrimination will continue to trump claims that one's religion compels racist practices.

But neither should the opposite extreme be legislated: that certain civil rights always outweigh the believer's interest in religious exercise. A principled Religious Freedom Protection Act would apply the same test to all religious practices substantially burdened by government, and leave the courts a case-by-case application of that uniform test. The explicit and prominent constitutional regard for free exercise of religion admits of no exceptions, qualifiers or disclaimers.

The First Freedom protected by the Framers in our Bill of Rights is religious freedom including protection from government prohibition on "the free *exercise*" of religion. Religious freedom is a "civil right," arguably the foundational and preeminent one upon which all others depend. If a government will not accommodate a citizen's fulfillment of his or her obligation to God, then no other human right is safe from government.

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hardly object to the Senate's version, which contained carveouts for incarcerated persons and a special provision on regulation of land use by religious groups. One carveout begat another. And thus shall it be if Alaska opens the Pandora's Box of stripping the Religious Freedom Protection Act's protection from disfavored religious practices and believers.

Please oppose any carveout amendments to House Bill 387. On the basis of this reasoning, we strongly urge you to support House Bill 387 without any exemptions.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Joseph L. Story, Government Relations Representative
Northwest Religious Liberty Association



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Alaska

Cases during the time of the Religious Freedom Restoration Act

The time period is from Nov. 23, 1993 to July 1, 1997¹

The Numbers

2,307	Total Alaska Civil Cases ²
387	Total Prisoner Civil Cases ² <ul style="list-style-type: none">• 16.8% of total civil cases
155	Total Prisoner Civil Rights Cases (Section 1983) ² <ul style="list-style-type: none">• 6.7% of total Civil Cases• 40.1% of total Prisoner Civil Cases
2	Total Reported Religious Freedom Restoration Act Cases ³ <ul style="list-style-type: none">• 0.0867% of total Civil Cases
0	Total Reported Prisoner Religious Freedom Restoration Act Cases ⁴ <ul style="list-style-type: none">• 0.0000% of total Civil Cases• 0.0000% of total Prisoner Civil Cases
0	Total Reported Prisoner Religious Freedom Restoration Act Cases that did not include the phrase, "First Amendment" ⁵ <ul style="list-style-type: none">• 0.0000% of total Civil Cases• 0.0000% of total Prisoner Civil Case

¹ Act was signed November 16, 1993 and struck down by the Supreme Court June 25, 1997.

² Derived using the C-3 charts of the Bureau of Justice. (Includes 1994-1996, 1/12 of 1993, and 1/2 of 1997.)

³ Derived using a Westlaw search: (Included the phrase, "Religious Freedom Restoration Act.")

⁴ Derived using a Westlaw search: (Included the phrase, "Religious Freedom Restoration Act" and any one of the following words: Prison, Prisoner, Prisons, Correction, Corrections, Correctional, Inmate, Warden, Penitentiary and from the dates 11/23/1993 to 7/1/1997. Each case was then examined, and only verified prisoner cases were included.)

⁵ Derived using a Westlaw search: (Included the phrase, "Religious Freedom Restoration Act" but not the phrase, "First Amendment" and including any one of the following words: Prison, Prisoner, Prisons, Correction, Corrections, Correctional, Inmate, Warden, Penitentiary and from the dates 11/23/1993 to 7/1/1997. Each case was then examined, and only verified prisoner cases were included.)

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Arizona

Cases during the time of the Religious Freedom Restoration Act

The time period is from Nov. 23, 1993 to July 1, 1997¹

The Numbers

- | | |
|--------|---|
| 13,285 | Total Arizona Civil Cases ² |
| 6,129 | Total Prisoner Civil Cases ² <ul style="list-style-type: none">• 46.1% of total civil cases |
| 4,337 | Total Prisoner Civil Rights Cases (Section 1983) ² <ul style="list-style-type: none">• 32.6% of total Civil Cases• 70.8% of total Prisoner Civil Cases |
| 15 | Total Reported Religious Freedom Restoration Act Cases ³ <ul style="list-style-type: none">• 0.1129% of total Civil Cases |
| 12 | Total Reported Prisoner Religious Freedom Restoration Act Cases ⁴ <ul style="list-style-type: none">• 0.0903% of total Civil Cases• 0.1958% of total Prisoner Civil Cases |
| 5 | Total Reported Prisoner Religious Freedom Restoration Act Cases that did not include the phrase, "First Amendment" ⁵ <ul style="list-style-type: none">• 0.0376% of total Civil Cases• 0.0816% of total Prisoner Civil Case |

¹ Act was signed November 16, 1993 and struck down by the Supreme Court June 25, 1997.

² Derived using the C-3 charts of the Bureau of Justice. (Includes 1994-1996, 1/12 of 1993, and 1/2 of 1997.)

³ Derived using a Westlaw search: (Included the phrase, "Religious Freedom Restoration Act.")

⁴ Derived using a Westlaw search: (Included the phrase, "Religious Freedom Restoration Act" and any one of the following words: Prison, Prisoner, Prisons, Correction, Corrections, Correctional, Inmate, Warden, Penitentiary and from the dates 11/23/1993 to 7/1/1997. Each case was then examined, and only verified prisoner cases were included.)

⁵ Derived using a Westlaw search: (Included the phrase, "Religious Freedom Restoration Act" but not the phrase, "First Amendment" and including any one of the following words: Prison, Prisoner, Prisons, Correction, Corrections, Correctional, Inmate, Warden, Penitentiary and from the dates 11/23/1993 to 7/1/1997. Each case was then examined, and only verified prisoner cases were included.)

**Alaska Civil Liberties Union
Statement on the Protection of Religious Liberty
Before the House Committee on Health, Education
& Social Services**

**Presented by Jennifer Rudinger, Executive
Director**

March 7, 2000

I. INTRODUCTION

Mr. Chairman and members of the Committee,

The Alaska Civil Liberties Union (AkCLU) greatly appreciates the opportunity to present this position paper on the importance of ensuring that any state legislation enhancing the protection of religious exercise will not cause any unintended harm to the enforcement of state and local civil rights laws. The American Civil Liberties Union (ACLU) historically supports legislation providing stronger protection of religious exercise--even against neutral, generally applicable governmental restrictions. But our concern is that some courts may turn a statutory shield for religious exercise into a sword against state and local civil rights laws.

Thus, the AkCLU regrets that we have no choice but to ask the Committee to refrain from passing House Bill 387 (Alaska Religious Freedom Protection Act, or "ARFPA") unless it will have no adverse consequences on the hard-won civil rights laws enacted and enforced by state and local governments. We offer several amendments, described below, to prevent any unintended adverse consequences. For the past decade, the ACLU has fought in Congress and the courts to preserve or restore the highest level of constitutional protection for claims of religious exercise. We have directly represented persons asserting burdens on their religious beliefs, filed *amicus* briefs with the Supreme Court, and were founding members of the coalition that supported the Religious Freedom Restoration Act in 1993, and the Religious Liberty Protection Act ("RLPA") during most of the last Congress.

However, we are no longer part of the coalition supporting the federal RLPA, as introduced in the House, because we could not ignore the potentially severe consequences that it may have on state and local civil rights laws. Although we believe that courts should find civil rights laws compelling and uniform enforcement of those civil rights laws the least restrictive means, we know that at least several courts have already rejected that position. We agree with Representative Croft that the result reached by the Alaska Supreme Court in *Swanner* is a good result. *Swanner, d/b/a Whitehall Properties v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994). However, we all know that the principle of stare decisis is not absolute. Furthermore, it is not at all clear whether the same compelling interest the *Swanner* Court found in preventing housing discrimination on the basis of marital status would also be extended to preventing discrimination on the basis of other classifications, such as familial status, pregnancy status, disability, sexual orientation, or religion.

There is much disagreement in other jurisdictions about the issues raised in *Swanner*. We have found that landlords across the country have been using state religious liberty claims to

challenge the application of state and local civil rights laws protecting persons against marital status discrimination. None of the claims, including those in *Swanner*, involved owner-occupied housing; all of the landlords owned so many investment properties that they were outside the state laws' exemptions for small landlords. These landlords all sought to turn the shield of religious exercise protections into a sword against the civil rights of prospective tenants.

To confuse matters even more, the U.S. Court of Appeals for the Ninth Circuit (which governs Alaska) recently applied a strict scrutiny standard of review to a local civil rights law in deciding a claim by landlords that compliance with that law protecting unmarried couples from discrimination based on marital status burdened the landlords' religious beliefs. *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999). The court held that the governmental interest in preventing marital status discrimination was not compelling. As a result, the landlords did not have to comply with that civil rights law. The AkCLU has submitted an *amicus* brief in this case, arguing that the state does have a compelling interest in preventing discrimination on the basis of marital status in housing, a la *Swanner*, and the case is scheduled to be reheard by an en banc panel of the Ninth Circuit this month.

Besides the Ninth Circuit, the Massachusetts Supreme Court and a plurality of the Minnesota Supreme Court have also found that defendants in similar civil rights cases may have a religious liberty defense against state civil rights claims. The only two state court decisions that found in favor of the civil rights plaintiffs in similar cases are in California and Alaska--but both states are in the Ninth Circuit.

An improperly drafted statute could jeopardize more than marital status protection. The Ninth Circuit's analysis calls into question all state and local civil rights laws which are not motivated by a "firm national policy" in favor of eradicating specific forms of discrimination. Thus, persons protected because of characteristics such as marital status, familial status, pregnancy status, sexual orientation, disability, and perhaps religion itself, could find their protections under state or local laws eroded by federal law. If legislation such as an unamended HB 387 becomes law, an applicant for a job or housing may have no state or local law protection against having to answer questions such as: Is that your spouse? Are those your children? Are you straight or gay? Are you pregnant? Are you HIV-positive? Mentally ill? Physically disabled? What is your religion?

Even where a "firm national policy" in eradicating certain types of discrimination could be shown, such as classifications based on race or sex, courts may conclude that such a compelling governmental interest could be achieved without prohibiting the discriminatory conduct of the particular defendant claiming a religious exemption to a civil rights law. I am attaching a paper submitted by the NAACP to Congress in opposition to the federal RLPA. The NAACP paper analyzes this danger in greater detail.

In the wake of recent court decisions around the country and in our very own Ninth Circuit, and in light of the lack of Alaskan precedent on so many of these issues, the Committee should not leave the problem of a state religious liberty statute's potential effect on state and local civil rights laws unresolved. The stakes are too high.

Instead, the AkCLU urges you to consider other alternatives for providing a shield for religious exercise without creating a sword against civil rights laws. As Texas State Representative Scott Hochberg's testimony to Congress (also attached with this paper) explains, Texas Governor George W. Bush signed into law--only last summer--a state RFRA that protects Texas' civil rights laws. In Congress, the ACLU and many other groups are supporting a civil rights amendment to RLPA offered by Congressman Nadler that will have a similar result.

The AkCLU very much appreciates your willingness to consider these concerns as you consider HB 387. We believe that members of the legislature who justifiably care deeply about protecting both religious exercise and state and local civil rights laws should not be forced to choose. It is a false choice because both goals can be made compatible. We hope to work with members of the Committee to resolve this problem. Thank you once again for this opportunity to present our concerns.

II. SCOPE OF THE POTENTIAL PROBLEM

This Committee is presently considering HB 387, the Alaska Religious Freedom Protection Act ("ARFPA"), which would provide extensive statutory protection for religious exercise to replace or enhance the constitutional protection previously afforded religious exercise prior to a 1990 Supreme Court decision that lowered the standard of review for religious exercise claims. HB 387 provides, in relevant part, that:

A [government entity] may restrict a person's free exercise of religion only if (1.) the restriction is in the form of a rule of general applicability and does not intentionally discriminate against religion or among religions; and (2.) application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

... This section may not be construed to create an establishment of religion or to authorize the infringement of a person's individual rights.

As introduced, HB 387 does not have any provision specifically addressing its potential effect on state and local civil rights laws.

The scope of the potential civil rights problem raised by religious freedom statutes is broad. The U.S. Court of Appeals for the Ninth Circuit and four state supreme courts have recently decided five cases with nearly identical fact patterns, namely, landlords claiming that their religious beliefs defeat housing discrimination claims brought by unmarried heterosexual persons based on marital status.¹ The decisions were split, with the Ninth Circuit and the Massachusetts and Minnesota courts holding that a religious liberty defense could defeat civil rights claims based on state or local laws. The courts could apply the reasoning in those decisions to civil rights claims made by members of other groups that also receive less protection from the courts and the federal government. Although the Alaska Supreme Court in *Swanner* upheld the anti-discrimination laws in the context of marital status, it is unclear whether the court's reasoning would extend to other types of civil rights claims.

The intent of at least some of the supporters of federal RLPA is clear. Several witnesses during hearings before the House and Senate Judiciary Committees specifically stated their belief that RLPA could and should be used as a defense to civil rights claims based on gender, religion, sexual orientation, and marital status.

In applying standards of review substantially similar to the ARFPA and RLPA religious exercise standard, numerous courts have recently decided cases in which defendants raised a religious liberty defense to civil rights claims based on state or local laws protecting against discrimination in housing based on marital status. See *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999) (governmental interest in preventing marital status discrimination was not compelling); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996) [hereinafter "*Smith v. FEHC*"] (no substantial burden on religious exercise found); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (remanding for further

consideration of whether the governmental interest in eliminating discrimination based on marital status was compelling and whether uniform application of the state anti-discrimination law was the least restrictive means); *Swanner, d/b/a Whitehall Properties v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994) (the government's interest in providing equal access to housing was compelling and uniform application of the state anti-discrimination law was the least restrictive means); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) ("marital status" did not include unmarried cohabiting couples; a plurality of the court also found no compelling governmental interest in preventing marital status discrimination). Thus, in the Ninth Circuit and Massachusetts and Minnesota, defendants may successfully use their religious beliefs to defeat at least certain civil rights claims based on state or local laws.

In those housing cases, the owner-occupied exceptions found in all state fair housing laws did not apply; the rental properties at issue were *not* owner-occupied, but instead were used solely for investment purposes. See *Thomas*, 165 F.3d 692 (statute provides exception for "space rented in the home of the landlord"); *Desilets*, 636 N.E.2d at 238 n.8 (law applicable only to "dwellings that are rented to three or more families living independently of each other"); *Swanner*, 874 P.2d at ___ (statute provides exception for individual home "wherein the renter or lessee would share common living areas with the owner"); *French*, 460 N.W.2d 2 (owner did not live in subject property, a two-bedroom house); *Smith v. FEHC*, 913 P.2d at 912 (Smith "does not reside in any of the four units"). The landlords all claimed that their sincerely held religious beliefs about premarital sexual relations required them to deny housing to unmarried couples, despite state or local laws prohibiting discrimination on the basis of marital status in housing. Although the religious liberty defense was not always successful, the courts were split on whether the anti-discrimination laws impose a substantial burden on the exercise of the landlord's religion, and on whether the governmental interest in eradicating marital status discrimination in housing is compelling and pursued by the least restrictive means.

Defendants in civil rights cases have also raised religious liberty defenses in cases involving such characteristics as race or sexual orientation and in contexts ranging from educational institutions to employment. For example, defendants or courts unsuccessfully raised religious rationales for racially discriminatory practices. E.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (religious university claimed that its religious beliefs about miscegenation – interracial marriage -- justified racial discrimination in admissions); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a Virginia antimiscegenation statute).²

Prior to the Supreme Court lowering the standard of review for religious liberty claims in *Employment Division of Oregon v. Smith*, 485 U.S. 660 (1988), the use of religious liberty defenses to civil rights claims was widespread. See, e.g., *Bob Jones Univ.*, 461 U.S. 574, 604; *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (religious publishing house claimed that dismissing employee in retaliation for bringing discrimination charges was based on religious doctrine forbidding members of the church from bringing lawsuits against the church); *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) (health club's owners insisted on hiring only employees whose religious beliefs were consistent with the owners' religious beliefs despite state anti-discrimination law forbidding employment discrimination based on religion, sex, and marital status); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (religious university argued that its religious beliefs justified the denial of "university recognition" to gay student group, despite a District of Columbia civil rights law prohibiting discrimination on the basis of sexual orientation).

Currently, Alaska state and local laws also provide protection based on other characteristics that receive less than strict scrutiny, such as disability, sexual orientation, age, familial status, or pregnancy. Although the governmental interest in eradicating discrimination has been found compelling in the context of *Swanner*, providing a new defense in civil rights actions will--at minimum--increase the cost of litigation for plaintiffs. However, the risk for persons claiming civil rights protection based on characteristics that receive lower levels of scrutiny is substantial. Because many of the groups claiming protection under state and local civil rights laws do not currently receive heightened scrutiny for their claims in court, and receive little or no explicit federal statutory protection from Congress, it is likely that at least some courts would find that the governmental interest in ending discrimination against these groups is not compelling. As noted above, courts around the country are divided on these questions, and these decisions have come from states that traditionally have been vigorous and strict in enforcing their civil rights laws.

III. APPLICATION OF THE FOUR-PART ARFPA TEST TO CIVIL RIGHTS CLAIMS

HB 387 provides, in relevant part, that:

A [government entity] may restrict a person's free exercise of religion only if (1.) the restriction is in the form of a rule of general applicability and does not intentionally discriminate against religion or among religions; and (2.) application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Thus, in deciding a challenge to a civil rights claim based on a state or local anti-discrimination law, a court must apply a four-part test: (i) is the defendant's discrimination "religious exercise"?; (ii) does the applicable state or local anti-discrimination law "restrict" the defendant's religious exercise?; (iii) is the government's interest in eradicating the discrimination "compelling"?; and (iv) are uniformly applied anti-discrimination laws the least restrictive means of furthering any compelling governmental interest?

A. Is Discrimination "Religious Exercise" Under ARFPA?

The first part of the ARFPA test is whether a refusal to comply with civil rights laws is religious exercise. Because ARFPA does not define what constitutes a religious exercise, any civil rights defendant who can show that his or her discriminatory actions were in any way "restricted" will be able to meet this prong of ARFPA. Under the pre-*Smith* Free Exercise Clause jurisprudence which ARFPA purports to restore, the "Supreme Court free exercise of religion cases have accepted, either implicitly or without searching inquiry, claimants' assertions regarding what they sincerely believe to be the exercise of their religion, even when the conduct in dispute is not commonly viewed as a religious ritual." *Desilets*, 636 N.E.2d at 237 (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 137 (1987); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981)).

Courts have held that refusal to rent an apartment to an unmarried heterosexual couple based on the landlord's religious belief that promoting premarital sex is sinful is religious exercise. *See, e.g., Smith v. FEHC*, 913 P.2d at 923 ("While the renting of apartments may not constitute the exercise of religion, if Smith claims the laws regulating that activity indirectly

in rental properties can, if she does not wish to comply with an anti-discrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." *Smith v. FEHC*, 913 P.2d at 925. The court also noted that "the landlord in this case does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples. No religious exercise is burdened if she follows the alternative course of placing her capital in another investment." *Id.* at 926.

Because the court in *Smith v. FEHC* used an analysis for "substantial burden" that may be more stringent than the analysis required by ARFPA, Alaska courts are likely to view the "choice" of engaging in a different occupation or complying with the anti-discrimination law and violating one's religious beliefs as too harsh, and conclude that the burden is substantial. *See, e.g., Desilets*, 636 N.E.2d at 237-38 (substantial burden imposed because the civil rights law "affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation," and "both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of the defendants' religion"). Indeed, all courts, other than the court in *Smith v. FEHC*, that have considered the question in the housing context have found that the state or local anti-discrimination law substantially burdened the defendant's exercise of his or her religious beliefs.

C. Is the Governmental Interest in Eradicating Discrimination Compelling?

The third part of the ARFPA test provides that only a compelling governmental interest justifies imposing a restriction on the exercise of religion. The courts that recently decided civil rights cases in which a defendant raised a religious liberty defense have split most sharply on this part of the test.

The governmental interest in eradicating certain types of discrimination, particularly racial and sex-based discrimination, should meet the compelling interest standard. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("The governmental interest at stake here is compelling. . . . [T]he government has a fundamental, overriding interest in eradicating racial discrimination in education That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (the state government's "compelling interest in eradicating discrimination against its female citizens justifies the impact . . . on the male members' associational freedoms"). Such plaintiffs, however, should anticipate incurring litigation costs as defendants raise the defense.

Because sexual orientation, marital status, disability, and other newly protected classes currently do not receive the same level of judicial scrutiny as race and sex, however, it may be more difficult to persuade all courts that the governmental interest in preventing discrimination on those grounds is compelling. For example, courts have reached divided results in determining whether preventing discrimination based on characteristics such as sexual orientation or marital status is compelling. *See, e.g., Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. App. 1987) (District of Columbia's interest in prohibiting educational institutions from denying equal access to tangible benefits on the basis of sexual orientation is compelling); *Swanner*, 874 P.2d at 282-83 (Anchorage's interest in prohibiting marital status discrimination in housing is compelling), *Desilets*, 636 N.E.2d 233 (remanding for further consideration of whether the government's interest in prohibiting marital status discrimination is compelling); *French*, 460 N.W.2d at 10-11 (plurality op.) (no compelling governmental interest in ending discrimination against unmarried couples).

Because ARFPA requires that the "application of the restriction to the person is essential to further a compelling governmental interest", courts could require the government to prove that there is a compelling interest in requiring the specific landlord or employer to comply with the civil rights law. *See, e.g., Desilets*, 636 N.E.2d at 238 (the issue is "whether the record establishes that the Commonwealth has or does not have an important governmental interest that is sufficiently compelling that the granting of an exemption to people in the position of the defendants would unduly hinder that goal"); *French*, 460 N.W.2d at 9 ("French must be granted an exemption . . . unless the state can demonstrate compelling and overriding state interest, not only in the state's general statutory purpose, but in refusing to grant an exemption to French."). However, the majority of courts have considered simply whether the government had a compelling interest in enforcing the law at issue.

When a state or municipality chooses to target and prohibit a specific form of discrimination, presumably it does so because it believes that there is a serious problem. *See EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.'"). Courts have sometimes found that legislative determination alone, however, is not always dispositive of whether the state's interest is compelling. *See Gay Rights Coalition*, 536 A.2d at 33 ("While not lightly to be disregarded, the Council's strong feelings do not resolve the issue whether its ban on sexual orientation discrimination represents a compelling governmental interest."); *Desilets*, 636 N.E.2d at 240 ("we are unwilling to conclude that simple enactment of the prohibition against discrimination based on marital status establishes that the state has" a compelling interest in ending marital status discrimination in housing).

To the extent that other state or municipal laws or policies discriminate against the class, courts are sometimes less likely to find that the governmental interest in ending discrimination against that class is compelling. Thus, in some states, anti-fornication or sodomy statutes have provided additional support for concluding that there is no compelling governmental interest in protecting against discrimination based on marital status or sexual orientation. *See, e.g., Thomas*, 165 F. 3d at 716-17 (citing state statutes providing less favorable benefits to unmarried couples than to married couples); *French*, 460 N.W.2d at 10 (plurality op.) ("How can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it?"); *Desilets*, 636 N.E.2d at 240 (the existence of a criminal statute against fornication "suggests some diminution" in the state's interest). On the other hand, the Alaska Supreme Court in *Swanner* noted that differential treatment of married and unmarried people in areas other than housing does not prove that the state views marital status discrimination in housing as insignificant.

Courts have taken different positions on defining the scope of the governmental interest at stake in prohibiting discrimination. Defining the governmental interest broadly, the *Swanner* court had no difficulty in concluding that the state's "interest in preventing discrimination based on irrelevant characteristics" is compelling. *Swanner*, 874 P.2d at 282-83. "The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination." *Id.*; accord *Gay Rights Coalition*, 536 A.2d at 37 ("The compelling interests . . . that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit

from society, and equal protection of the life, liberty, and property that the Founding Fathers guaranteed to us all.").

In contrast, the Massachusetts Supreme Court in *Desilets* insisted on a much more narrow reading of the governmental interest, noting that "[t]he general objective of eliminating discrimination of all kinds. . . cannot alone provide a compelling State interest that justifies the . . . disregard of the defendants' right to free exercise of their religion. The analysis must be more focused." *Desilets*, 636 N.E.2d at 238. This narrow reading led the court to insist that Massachusetts "demonstrate that it has a compelling interest in the elimination of discrimination in housing against an unmarried man and an unmarried woman who have a sexual relationship and wish to rent accommodations to which [the civil rights statute] applies." *Id.*

D. Are Uniformly Applied Anti-Discrimination Laws the Least Restrictive Means Available?

The fourth part of the ARFPA test is whether the challenged state or local law uses the least restrictive means to achieve the government's compelling interest. Several courts have held that uniform application of anti-discrimination laws is the least restrictive means available. *See, e.g., Swanner*, 874 P.2d at 280, n.9 ("The most effective tool the state has for combating discrimination is to prohibit discrimination; these laws do exactly that. Consequently the means are narrowly tailored and there is no less restrictive alternative."); *Gay Rights Coalition*, 536 A.2d at 39 ("The District of Columbia's overriding interest in eradicating sexual orientation discrimination, if it is ever to be converted from aspiration to reality, requires that Georgetown equally distribute tangible benefits to the student groups."); *McClure*, 370 N.W.2d at 853 ("the state's overriding compelling interest of eradicating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected class"). However, the Massachusetts Supreme Court remanded that question when it held that the government may be required to prove that "uniformity of enforcement of the statute . . . [is] the least restrictive means for the practical and efficient operation of the anti-discrimination law." *Desilets*, 636 N.E.2d at 241.

Persons using a religious liberty defense to a civil rights claim have argued that uniform application of civil rights laws cannot be the least restrictive means if the civil rights statute in question contains exemptions for religious organizations and small landlords or employers. Those defendants have argued that a less restrictive means is available, namely, granting an exemption to persons who hold sincere religious beliefs. For example, one court found that "the compulsion of the state's interest appears somewhat weakened because the statute permits discrimination by a religious organization in certain respects . . . if to do so promotes the principles for which the organization was established." *Desilets*, 636 N.E.2d at 240. Similarly, the Ninth Circuit cited the state's "underenforcement" of its purported interest in eradicating marital status discrimination," as expressed in statutory exemptions within the state fair housing law, as evidence that the state's interest was not compelling. *Thomas*, 165 F.3d at 717. However, another court recognized that while the government permits exemptions for "religious corporations when religious beliefs shall be a bona fide occupational qualification," "the state's overriding interest permits of no exemption to appellants in this case. . . . [W]hen appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of citizens of the state as a whole in an effort to eliminate pernicious discrimination." *McClure*, 370 N.W.2d at 853; The split on how to apply

the least restrictive means part of the strict scrutiny test is particularly important when most state and local civil rights laws have numerous exemptions.

Finally, as we pointed out in our introduction to this position paper, we concur with the analysis by the NAACP. We share their concerns, and those of many other civil rights and religious groups, that even where a "firm national policy" in eradicating certain types of discrimination could be shown, such as classifications based on race or sex, courts may conclude that such a compelling governmental interest could be achieved without prohibiting the discriminatory conduct of the particular defendant claiming a religious exemption to a civil rights law.

IV. CONCLUSION AND SUGGESTED AMENDMENTS

The AkCLU urges the Committee, as it addresses the problem of increasing protection for religious exercise against neutral state and local laws, to avoid unintentional harm to the enforcement of state and local civil rights laws. Without careful drafting, a state religious liberty statute could provide a new federal defense against state and local civil rights claims made by persons who already receive the least protection from the courts and the federal government. This Committee should not pass any religious liberty legislation without ensuring that it will not deprive persons of their civil rights under state and local laws.

The AkCLU therefore proposes the following three amendments to clarify the intent of the bill and to protect religious freedom at the same time as it protects civil rights.

- (i.) To clarify subsection (d) throughout HB 387, we suggest rephrasing (d) to read, "This section may not be construed to create an establishment of religion or to authorize the infringement of the rights of others by the person claiming a religious exemption to a facially neutral law of general applicability. This Act does not establish or eliminate a defense to a civil action or criminal prosecution under a federal, state, or local civil rights law."

The sponsor has stated that his intent in (d) is to prevent one person's free exercise of religion from infringing on the rights of another person. In other words, everyone has the right to practice his/her religion freely, exempt from laws that burden his/her religious exercise, as long as no one else is injured in the process. The AkCLU agrees with this assertion, and we feel that our amendment clarifies this balancing.

To cite a specific example where we support ARFPA for you, last year the AkCLU looked into a case in which a Muslim couple objected on religious grounds to the State of Alaska performing an autopsy on their deceased infant. Alaska law requires an autopsy to be performed in all SIDS (Sudden Infant Death Syndrome) cases, but the parents in this case sincerely believed, in accordance with their faith, that their baby would not go to Heaven if the baby's body was not presented whole unto God. (FYI, other faiths, such as Orthodox Judaism, also profess this religious tenet.) Since the cause of death can often be determined by "less restrictive" means that do not involve cutting into the corpse – i.e. magnetic resonance imaging, or MRI – HB 387 would protect the rights of relatives to be exempt from the state's generally applicable autopsy laws. Similarly, if the cause of death for suspected SIDS cases can be determined by means that do not infringe on religion, then the state should respect the religious practices of the parents of that infant.

Our suggested amendment fairly balances the religious freedom of the individual with the rights of the rest of society by preventing harm to any third parties from the exercise of an individual's religious rights.

(2.) As we have already pointed out, throughout HB 387, subsection (b) states that a government entity "may restrict a person's free exercise of religion only if...". (Emphasis added.) Our concern is that "restrict" may be read very broadly to include any level of restriction, no matter how minor its impact on the free exercise of religion. The federal RLPA uses a different standard. The federal RLPA provides in relevant part that "a [state or local] government shall not substantially burden a person's religious exercise..." (emphasis added). Courts have defined standards for substantial burdens, as discussed above. We propose that in (b) throughout the bill, the word "restrict" be replaced by "substantially burden".

(3.) Finally, we have some great qualms about the wording of Section (4) in the legislative findings. We think that the intent of (4) is to protect against discrimination, but by limiting the protection to the degree currently set forth in the Alaska Constitution, Section (4) leaves open a lot of gray area where courts have not yet granted compelling interest status to the state's interest in remedying certain types of discrimination. We suggest the following wording for Section (4): "while it is improper for the legislature to tell the judiciary how to interpret the Constitution of the State of Alaska, it is proper for the legislature to codify protection for the free exercise of religion, so long as that legislative action does not authorize the infringement of the rights of others by the person claiming a religious exemption to a facially neutral law of general applicability."

ENDNOTES

1In addition, the supreme courts of Michigan and Illinois recently vacated decisions that had held that their respective state fair housing laws protecting persons based on marital status served a compelling governmental interest and were narrowly tailored. *McCready v. Hoffius*, 1999 Mich. Lexis 694 (Mich. April 16, 1999), *vacating and remanding*, 586 N.W.2d 723 (Mich. 1998); *Jasniowskiv. Rushing*, 685 N.E.2d 622 (Ill. 1997), *vacating for lack of case or controversy*, 678 N.E.2d 743 (Ill. App. 1997). The Michigan Supreme Court reversed its own earlier decision after newly elected justices joined the court. The Illinois Supreme Court vacated an intermediate appellate decision for the procedural reason of a lack of a case or controversy.

2In *Loving*, the Supreme Court reversed a decision of the Virginia Supreme Court which had affirmed, in part, a Virginia state trial court decision that stated:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Decision of Circuit Court for Caroline County (Jan. 6, 1959), (*quoted in Loving*, 388 U.S. at 3).

COMPELLING INTERESTS ASSERTED BY GOVERNMENT OFFICIALS

- Protecting health and safety through municipal building codes, *see City of Solon v. Solon Baptist Temple*, 457 N.E.2d 858 (Ohio Ct. App. 1982);
- Protecting health and safety through municipal health regulations, *see Schulman v. New York City Health and Hospitals Corp.*, 355 N.Y.S.2d 781 (N.Y. Sup. Ct. App. Div. 1974); *Dr. K. v. State Board of Physician Quality Assurance*, 632 A.2d 453 (Md. 1993);
- Requiring blood tests for putative fathers, *see State v. Meacham*, 612 P.2d 795 (Wash. 1980);
- Requiring driver's licenses, *see State v. Clifford*, 787 P.2d 571 (Wash.App. 1990), *rev. denied*, 792 P.2d 535 (Wash. 1990);
- Preventing discrimination based on race, *see Palmore v. Sidoti*, 466 U.S. 429 (1984); *Bob Jones University v. United States*, 461 U.S. 574 (1983);
- Maintaining the tax system, *see Hernandez v. Commissioner*, 490 U.S. 680 (1989);
- Maintaining the Social Security system, *see United States v. Lee*, 455 U.S. 252 (1982);
- Upholding military conscription laws, *see Gillette v. United States*, 401 U.S. 437 (1971);
- Maintaining uniform day of rest, *see Braunfield v. Brown*, 366 U.S. 599 (1961);
- Protecting children from indecent and patently offensive speech, *see Reno v. ACLU*, 521 U.S. 844 (1997);
- Restricting the number of candidates so that voters can understand the ballot, *see Morse v. Republican Party*, 517 U.S. 186 (1996);
- Protecting voters from intimidation at the polling place, *see Burson v. Freeman*, 504 U.S. 191 (1992);
- Prohibiting child pornography, *see Osborne v. Ohio*, 495 U.S. 103 (1990);
- Preventing sex discrimination in places of public accommodation, *see New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988);
- Eliminating effects of racial discrimination, *United States v. Paradise*, 480 U.S. 149 (1987);
- Fighting illegal drug use, *see Mood for a Day, Inc. v. Salt Lake County*, 953 F.Supp. 1252 (D. Utah 1995);
- Enforcing laws relating to drugs, *see State v. Balzer*, 954 P.2d 931 (Wash.App. 1998);
- Promoting improvements in the administration of justice and the science of jurisprudence, *see Falk v. State Bar of Michigan*, 305 N.W.2d 201 (Mich. 1981);
- Protecting maternal health, *see Simopoulos v. Commonwealth*, 277 S.E.2d 194 (Va. 1981).

HOME SCHOOL LEGAL DEFENSE ASSOCIATION

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To: Members of the Alaska House Community and Regional Affairs Committee

From: Chris Klicka

Date: February 29, 2000

Re: House Bill 387, The Alaska Religious Freedom Protection Act

By way of introduction, the Home School Legal Defense Association is a national organization which has as its primary purpose the protection of the right of parents to direct the education of their children. We presently have more than 66,000 member families in all 50 states and the District of Columbia, with many member families in Alaska. Because the vast majority of our members choose to home school out of religious convictions, the protection of religious freedom is essential to our cause.

The Alaska Legislature has a tremendous opportunity to restore the protection of religious freedom for all citizens in the state. The U.S. Supreme Court, in 1997, denigrated the right of the free exercise of religious beliefs to a second class right. The Alaska Legislature must act now to protect religious liberty. Below are some commonly asked questions about state Religious Freedom Restoration Acts.

What will HB 387, the Alaska Religious Freedom Restoration Act, do?

The Alaska Religious Freedom Restoration Act (RFRA) reestablishes a test which courts must use to determine whether a person's religious belief should be accommodated when a government action or regulation restricts his or her religious practice. Known as the "compelling interest test," this test requires the government to prove with evidence that its regulation is (1) *essential* to achieve a compelling governmental interest and (2) the *least restrictive means* of achieving the government's compelling interest.

For example, in *People v. DeJonge*, a case argued by the Home School Legal Defense Association (HSLDA), a Michigan couple had the religious belief that they as the parents, although they were not certified teachers, should be teaching their children in their home rather than sending them to school. But the state law requiring all teachers to be certified did not permit

the couple to exercise this religious belief. Using the "compelling interest test," the court required the state to show that (1) teacher certification is *essential* to fulfill the state's compelling interest that children be educated and (2) that teacher certification was the *least restrictive means* to fulfill its interest. The state was able show without much difficulty that it had a compelling interest in seeing that its citizens were educated. But because this couple's children were scoring above the 90th percentile on standardized tests, the state could not prove teacher certification was *essential* for children to be educated and the least restrictive means to achieving that end. Thus, because the state could not satisfy the "compelling interest test," the parents were allowed to continue teaching their children according to their religious beliefs.

Why does Alaska need a RFRA?

Prior to 1990 the U.S. Supreme Court used the above test—the "compelling interest test"—when deciding religious claims. However, in a 1990 decision (*Employment Div. of Oregon v. Smith*) the Court tipped the scales of justice in favor of government regulation. The Court threw out the compelling interest test, which had shielded our religious freedom from onerous government regulation for more than 30 years.

The *Smith* decision reduced the standard of review in religious freedom cases to a "reasonableness standard." In other words, if a state regulation is "reasonable" (which they nearly always are), a religious objector loses. While all other fundamental rights (freedom of speech, press, assembly, etc.) remain protected by the stringent "compelling interest test," the Court singled out religious freedom, reducing its protection to the weak "reasonableness test."

In 1993, Congress attempted to remedy the *Smith* decision by enacting the federal Religious Freedom Restoration Act. This Act simply restored the "compelling interest test" in religious freedom cases. Four years later, the federal RFRA was struck down by the U.S. Supreme Court in the 1997 *City of Boerne* case.

As a practical matter, here are a few real-life examples of government restricting the free exercise of religion that have taken place under the "reasonableness test."

- a) the long-standing practice of pastor-laity confidentiality has been repeatedly violated;
- b) a Catholic hospital was denied accreditation for refusing to teach abortion techniques;
- c) among other zoning ordinance conflicts, a church ministry to the homeless was shut down because it was located on the second floor of a building with no elevator;
- d) a church was prohibited by a local city ordinance from feeding more than 50 people per day; and
- e) Justice Fellowship reports that a Jewish minimum-security prisoner (CPA in jail for fraud, in 6th year of 8-year term) was denied the right to attend high holy day celebrations.

But Hasn't the U.S. Supreme Court already ruled the RFRA unconstitutional?

The 1993 federal RFRA attempted to use Congress' powers under Section 5 of the 14th Amendment to require both the federal and state governments to use the "compelling interest test" in religious freedom cases.

However, when the Supreme Court struck down the federal RFRA in 1997 (*City of Boerne v. Flores*), the problem wasn't with the "compelling interest test." The test had been used, as mentioned earlier, by the U.S. Supreme Court itself for more than 30 years. Rather, while the Supreme Court recognized the legitimacy of the "compelling interest test," it ruled that Congress could not *require* states to use this test in religious freedom cases.

A widely recognized principle of law is that states are free to protect an individual's right with a much higher standard than the U.S. Constitution itself affords. Under this principle and the *Boerne* decision, states are free to enact their own RFRA's, thereby choosing to apply the higher "compelling interest test" standard in their own religious freedom cases.

Should civil rights laws and ordinances be exempted from application of the Religious Freedom Restoration Act?

No. Religious freedom is one of many civil rights which all Americans should be allowed to enjoy. A civil rights exclusion in the RFRA simply makes religious freedom a "second-class" right, subordinate to all other civil rights. Instead, when a religious freedom right conflicts with another civil right, the two rights should be given the same level playing field by a balancing of interests using the compelling interest test.

In some situations, a civil rights law or ordinance should be upheld even when it conflicts with an individual's religious practice, while in other situations, the religious practice should be accommodated. Using the "compelling interest test" provided by HB 387, a court will be able to properly determine whether the government's interest in enforcing a particular civil rights law is compelling enough to override an individual's religious practice. If, however, civil rights laws are exempted from HB 387, religious freedom will *always* be curtailed when it conflicts with civil rights laws, even if the courts could have made a reasonable accommodation.

Will HB 387 create an increase in litigation?

No. This bill will simply restore the "compelling interest test," which the U.S. Supreme Court established almost 40 years ago as the standard of review for fundamental rights cases.

This "compelling interest test" worked well for over 30 years with no explosion of religious freedom cases. The consistent application of the "compelling interest test" in the courts "evened the playing field," giving people of sincere religious faith a fair chance against state regulations that violated their religious beliefs. Many times, both conservative and liberal religious and civil liberty organizations successfully used the "compelling interest test" to defend individuals' rights to freely exercise their religious beliefs.

As mentioned above, the federal RFRA, which restored the "compelling interest test" in religious freedom cases, was effective from its enactment in 1993 until the U.S. Supreme Court struck it

down in 1997. There is no record of an explosion in religious freedom litigation during this four-year period.

Furthermore, eight states have formally passed RFRA to specifically restore the application of the "compelling interest test" in religious freedom cases (AL, IL, FL, TX, AZ, CT, RI, and SC). Seven more states, through state court precedents, have established a "compelling interest test" independent of the U.S. Supreme Court's damaging precedence in *Smith and Boerne*. (KS, MA, MN, VT, WA, WI, and MI.) None of these 15 states are experiencing an explosion in free exercise litigation.

Based on the lack of examples of excessive litigation during the almost 30 years of experience of using the "compelling interest test" for religious liberty (both before the *Smith* decision and during the federal RFRA years), we believe that restoring this test will generate very little, if any, new litigation. In fact, clarifying the standard for religious liberty under state law may prove to *reduce* the amount of litigation, because a clearly defined legal standard often leads parties to settle disputes before litigation ensues.

Will the passage of HB 387 result in a huge increase in litigation against local governments? Will this also increase the costs for the attorney general's office in defending state officials?

No. The same arguments above apply. The "compelling interest test" is not new. It has been in effect for most of the last 40 years. Local governments and state officials have not been inundated with religious freedom suits.

None of the eight states that have passed state RFRA have experienced any explosion of religious liberty cases, including Rhode Island where the law is seven years old. The "compelling interest test" is time-tested.

Furthermore, the "compelling interest test" is simply a "balancing test." It does not give religious claimants an automatic win. It only "evens the playing field" for the little guy.

Is it acceptable to exclude certain people, such as prisoners, from protection under HB 387?

No. As an inalienable right, religious liberty should not be denied to any class of persons. Home School Legal Defense Association urges states not to deny the protections of a state RFRA to anyone (including prison inmates). Religious liberty is diminished for all if it is denied to any. Once the government excludes one politically unpopular group, it is all too easy to exempt others. Of the states that have enacted RFRA to date, none has found the need to exclude anyone.

But won't HB 387 create an explosion in frivolous cases filed by prisoners?

No. Studies show no sudden surge in religious freedom litigation filed by prisoners during the four years of the federal RFRA demonstrate there was no explosion of cases. Justice Fellowship compiled the following data (provided by the Statistical Division of Administrative Office of the U.S. Courts):

- Prisoner RFRA cases for the years 1995–1996 accounted for about one-tenth of one percent (0.01%) of cases in U.S. courts.
- The National Federal Court statistics show that in 1995, out of 43,158 total U.S. civil cases nationwide (1110 prisoner cases), only 50 of the cases invoking the federal RFRA were filed by prisoners.
- In 1996, out of 48,755 U.S. civil cases, only 51 RFRA cases were filed by prisoners.

A state-by-state breakdown of information was only available for the following three states:

- In New Mexico, out of 407 U.S. civil cases filed in 1995, 0 were filed by prisoners invoking the federal RFRA. In 1996, out of 492 U.S. civil cases filed, 0 were filed by prisoners invoking the federal RFRA.
- According to the Virginia Attorney General's office, out of 1,099 prisoner lawsuits filed against sheriff departments between 1993 and 1997 only 7 were "religious-styled" cases.
- In Florida, only 5 prisoner religious freedom cases invoked the federal RFRA during 1993–1997.

These statistics show that the federal RFRA caused no explosion of cases filed by prisoners—a group considered most likely to take advantage of such a law.

What is HB 387 based on?

The state RFRA model supported by HSLDA is based on other time-tested state Religious Freedom Restoration Acts. It is a combination of the Rhode Island RFRA (the oldest—passed in 1993) and the Illinois RFRA. The substantive provisions of the bill, its heart, are found in all RFRA states. (e.g. Texas, South Carolina, Arizona, Connecticut, Florida, and Alabama). Of course, the "compelling interest test" is patterned directly after the U.S. Supreme Court's description of the test found in dozens of cases over the last 40 years.

Why can't we simply let the Alaska Supreme Court reestablish the "compelling interest test"?

States which have neither an enacted RFRA nor their own body of case law applying the "compelling interest test" have simply followed whatever the current federal standard is. Courts in these states have always relied on the U.S. Supreme Court's religious freedom standard of review and its interpretation and application of the "compelling interest test." The states need to establish their own standard.

Since *Smith* and *Boerne* set the current federal precedent, this means trouble for Christians and other people of sincere religious faith.

Does HB 387 replace all existing remedies to protect religious freedom?

No. It only creates an additional "track" which a religious claimant can use to protect his free exercise of religion. State constitutional and federal constitutional remedies are still available.

Is there a problem with the lack of definition for "religious belief"? For example, what if a group got together (such as a satanic group) and said it was a "religious group" and wanted to meet in a high school gym, but did inappropriate things? Under this law, would the school have to let everyone (including this group) meet in the gym, or let no one do it? Would schools that allow Fellowship of Christian Athletes or Young Life to meet in the gym also be forced to let everyone else in (or no one)?

The first issue is the concern over the absence of a definition of religious belief.

There is a large body of case law relating to the definition of "religion." (For a good summary of the case law see Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 Notre Dame L. Rev. 581, 609-612 (1995)). For example, in *U.S. v. Seeger*, 380 U.S. 163, 176 (1965), the U.S. Supreme Court defined religious belief as "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God."

The drafters of the 1993 federal RFRA considered defining "religion" but decided against it primarily because the U.S. Supreme Court had already done so. Since the U.S. Supreme Court has defined religious belief in dozens of cases with sufficient clarity, it is not necessary to define it in a state RFRA.

Secondly, a response to the school hypothetical:

The hypothetical Satanists who are denied access to a school could make claims under the Free Speech Clause, the Free Exercise Clause, and the Equal Access Act. Their case would likely be considered under the Equal Access Act and the First Amendment's Free Speech Clause—not free exercise law. Under the Equal Access Act (effective since 1984), if a school lets one noncurriculum group meet, it must let all noncurriculum groups meet. When Congress was considering the Equal Access Act, people were concerned that it would lead to an explosion of Satanists, Nazis, and hate groups wanting to meet and organize in schools; however, this "explosion" has not occurred.

Under the Free Speech Clause of the First Amendment, religious expression receives the same level of protection as nonreligious expression. See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951) (meeting permit). Free speech rights are essentially a ceiling on free exercise rights. The standard of review for free speech cases is the "compelling interest test" giving individuals who exercise their right to free speech the highest level of protection. See *Heffron v. Int'l Society of Krishna Consciousness*, 452 U.S. 640, 652-53 (1981) (solicitation on state fair grounds).

Thus, once the school lets the Fellowship of Christian Athletes meet after hours, it must let in other groups. This is the case regardless of the standard of free exercise law. The school cannot discriminate among groups except to the extent it needs to regulate disruptive speech. See, e.g., *Tinker v. Des Moines*, 393 U.S. 503 (1969).

In state offices, if a person, because of a religious belief, wanted to have something distasteful on his desk, could his supervisor—under this law—ask for it to be removed?

It depends. If the item was on a teacher's desk, it could probably be removed under the Establishment Clause. If the item was on a desk not open for public view, it may be protected by the employee's free speech rights.

Free speech, the prohibition of establishment of religion, and Title VII considerations all would come into play here. However, like the school example, this scenario is likely going to be considered under the Free Speech Clause. Under U.S. Supreme Court precedent, when government regulates its employees' speech, a different test applies than when government regulates its citizens' speech. It's an easier test for the government to satisfy.

If the dispute over the object on the desk could not be resolved, the state RFRA could be invoked and the courts would have to balance the state's interest with the free exercise claim through application of the "compelling interest test."



Center for Law and Religious Freedom

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Virginia E. Hartman
Executive Assistant

MEMORANDUM

To: Members of the Alaska House Standing Committee on Community
and Regional Affairs

From: Betty L. Dunkum, Esq.

Date: February 29, 2000

Re: **Religious Freedom Statute For Alaska**

For the reasons set out below, religious liberty in many states of the United States lacks adequate legal protection. As the first freedom guaranteed in the First Amendment to the U.S. Constitution, religious liberty should be fully enjoyed by Americans regardless of their state of residence. The Coalition For The Free Exercise Of Religion (presently consisting of over 70 religious faith groups and civil rights organizations) is seeking to enact federal legislation that would provide uniform legal protection in every state. However, because such a federal bill cannot cover as broad a spectrum of religious exercise as state law can, the Coalition is simultaneously assisting with legislation in states, such as Alaska, that appear committed to protecting all their residents and other persons that come within their jurisdiction.

1. Why Alaska Needs Its Own Religious Freedom Restoration Act

Prior to 1990, courts generally found an infringement of the First Amendment's clause protecting the free exercise of religion whenever a law or actions by a government official had the effect (intended or not) of substantially burdening a person's religious belief or practice. For example, pursuant to a state autopsy law, a state medical examiner could order the performance of an autopsy on a person who would have objected to the autopsy because of conflicting religious beliefs. Performance of the autopsy would substantially burden the religious freedom of the individual and his/her family. In another case, a city ordinance designating a church building as an historic landmark meant that the church could not alter its own property (*e.g.*, to expand the sanctuary or social hall or to establish a day-care ministry) without approval by the city landmark preservation board. This substantially burdened the church's collective religious freedom. Whenever courts found such a "free exercise" burden, they generally required that the government (the state medical examiner or the city, in these examples) give the religious person or body (here, the individual or the landmarked church) an exemption from the law.

The only exception to the general rule of free exercise was where the government could prove that denying religious accommodations was the least restrictive means of furthering a compelling government interest. In the historic preservation example above, the city would have

to prove that architectural preservation is a vitally important role for government and that there is no less onerous way to further this interest than to deny religious accommodations. Unlike landmark preservation cases, cities routinely met this "strict scrutiny" when churches sought exemption from fire and safety regulations applicable to their buildings.

But in 1990, the U.S. Supreme Court unexpectedly dropped the "compelling interest" test for most Free Exercise Clause claims. *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court held that the test did not apply to cases where the burden on religion was the result of a law that was generally applicable to all persons and groups. So, using the autopsy example above, the individual's family could not invoke the First Amendment to prevent the autopsy.

This 1990 turnabout by the Court so threatened religious liberty for all faiths that a national coalition of over 65 religious denominations and civil rights groups was formed. They drafted and, in 1993, Congress passed (almost unanimously) the Religious Freedom Restoration Act, which restored the "compelling interest/least restrictive means" test. RFRA required a religious exemption from any government action that substantially burdened the complainant's religious exercise.

However, in 1997, the Supreme Court held that RFRA unconstitutionally exceeded Congress' authority under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507 (1997).¹ Consequently, disparate impacts on religious liberty have no meaningful federal statutory protection against state or municipal law, policy, or practice. The First Amendment Free Exercise Clause is triggered only in the rare case where the state action intentionally discriminates against religious practice.

2. What Alaska Can Do To Restore Religious Liberty Protection

Friends of religious freedom should regularly check on the progress of our federal legislation and be ready to rally local support for a federal "RFRA II"--a bill that would uniformly (albeit less broadly) restore meaningful legal protection in every state.²

In addition, a state should enact its own RFRA, such as the Alaska Religious Freedom Protection Act, HB 387, because a state RFRA will affirm the state's commitment to protecting religious liberty. Indeed, eight states—Alabama, Arizona, Connecticut, Florida, Illinois, Rhode Island, South Carolina, and Texas—have already passed their own RFRAs, and a number of other states are in the same process.

¹ While the high court has not addressed the issue, most scholars (and the Clinton Administration) agree that RFRA still applies against federal law or federal action. See *In re Young*, 141 F.3d 854 (8th Cir. 1998), cert. denied, 119 S.Ct. 43 (1998) (mem.).

² See Religious Liberty Protection Act, H.R. 1691, 106th Cong., 1st Sess. (1999) (utilizing federal Commerce Clause and spending power, rather than Section 5 of the Fourteenth Amendment).

The RFRA Coalition urges any state considering enactment of its own law to include the following essential elements.

a) **The Compelling Interest/Least Restrictive Means Test.** State RFRA's should apply this test to any government action that places a substantial burden on a person's religious exercise.

b) **Broad Definition For The "Exercise Of Religion".** The test should be triggered when government burdens an act, or a refusal to act, that is motivated by religious belief, whether or not the burdened religious exercise is compulsory or central to a larger system of religious belief. Reference to the First Amendment and/or the state constitution's religious liberty clauses should be avoided, so as not to imply that previous case law interpreting "the exercise of religion" under those provisions is being incorporated into the bill.

c) **Universal Protection.** As an inalienable right, religious liberty should not be denied to any class of persons. The Coalition urges states not to deny the protections of a state RFRA to anyone. Religious liberty is diminished for all if it is denied to any. And once a law omits one politically unpopular group it will be all too easy to exempt others. The Coalition opposes efforts to pass a state RFRA unless it is free of exemptions for prison inmates, land use claims, civil rights ordinances, etc. In some cases, suitable language can be framed on specific issues; please contact the Coalition if such language is required.

The Alaska Religious Freedom Protection Act, HB 387, presently includes all of the above elements. Please support this bill and oppose any amendments that would create "carveouts" for any group of people.

Please tell the Center for Law and Religious Freedom (703-642-1070, x3501) how we can assist you.

HB

392

Alaska State Legislature

Representative Jim Whitaker

Session
Capitol Building, Room 13
Juneau, Alaska 99801
Phone: (907) 465-3004
Fax: (907) 465-2070



Interim
119 N. Cushman St. Suite 101
Fairbanks, AK 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

Sponsor Statement HB 392 Continuances of CINA Hearings

HB392 acknowledges that, at the 48 hour hearing during which the court determines whether a child is a "Child In Need of Aid", the parent or guardian of that child may request a continuance of up to seven days, and instructs the court to advise the parent or guardian of that right at the time of the hearing.

When the State takes action to protect the safety of a child, it is an emotionally charged and very confusing situation for a parent. Often, at the time of the first hearing, which occurs within 48 hours of the time the child is taken into custody, parents have not had an opportunity to see the allegations made against them. This legislature recognizes that parents may need time to comprehend and respond to those allegations. For this reason, HB392 ensures that parents and guardians are informed of their right to request a continuance.

FISCAL NOTE

Bill Version: CSHB 392 (HES)
 (H) Publish Date: 3/3/00

**STATE OF ALASKA
 2000 LEGISLATIVE SESSION**

Revision Date/Time (Note if correction) _____ Dept. Affected Law
 Title "An Act relating to continuances for temporary BRU Civil Division
placement hearings ... emergency custody of a minor ..." Component Human Services
 Sponsor Representative Whitaker
 Requester House HESS Committee Component No. 2208

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personnel Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 392 allows the parent of guardian of a minor to request the continuance of the temporary placement hearing for up to seven days in order to prepare a response to the allegation that the child is a child in need of aid. The bill further amends Rule 10, Alaska Child in Need of Aid Rules to parallel the statutory change.

This bill will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson *Joan M. Kasson* Phone 465-5370
 Division Attorney General's Office Date/Time 2/25/00, 4:49 PM
 Approved by Commissioner Bruce M. Botelho, Attorney General Date 2/25/00
 Agency Department of Law

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FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

No: 2

Bill Version: CSHB 392 (HES)

(H) Publish Date: 3/3/00

Revision Date/Time (Note if correction): _____

Dept. Affected: Health and Social Services

Title: Relating to continuances in temporary placement

BRU: Family and Youth Services

hearings following emergency custody.

Component: FYS Management

Sponsor: Rep. Whitaker

COMPONENT SERIAL NO. 2306

Requestor: House (HES)

See also (SN#): _____

Expenditures/Revenues:

(Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGES IN REVENUES ()						
-------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

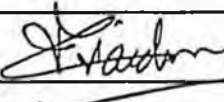
Estimate of any current year (FY2000) cost: \$0.0

POSITIONS:

FULL-TIME	0				
PART-TIME	0				
TEMPORARY	0				

ANALYSIS: (Attach a separate page if necessary)

This bill will have no fiscal impact on the Department if enacted.

Prepared by: Theresa Tanory, Director 
Division: Family and Youth Services

Phone: 465-3191
Date/Time: 2/23/00 3:06 PM

Approved by Commissioner: Karen Perdue, Commissioner 
Agency: Department of Health & Social Services

Date: 2/28/00

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Also, on page 1 at lines 1 and 7, and on page 2 at line 3, the word "placement" should be replaced with the word "custody." This more accurately reflects that the precipitating issue in the hearing is that the child has been taken into emergency custody. Placement is addressed only after probable cause for emergency custody has been found, at the end of this section.

Also, to improve the internal consistency of this statute, the words "or supervision" should be added to section 1, on page 2, at the end of line 7. This reflects more accurately that after finding probable cause, the court may either temporarily place the child with the department or may return the child to the child's parent or guardian subject to departmental supervision, as provided in AS 47.10.142 (e).

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

HB

398



ALASKA STATE LEGISLATURE
REPRESENTATIVE JOHN HARRIS
STATE CAPITOL 110, JUNEAU, ALASKA 99801-1182 (907) 465-4859

Sponsor Statement

HB 398

“An Act relating to the Alaska Life and Health Insurance Guaranty Association.”

The purpose of HB 398 is to make changes to the Alaska Life and Guaranty Association Act (AS 21.79), which provides a mechanism to protect policyholders and claimants in the event of the insolvency of a life and health insurer licensed to sell policies in Alaska.

The Alaska Life and Health Guaranty Association membership is mandatory for every life and health insurer licensed to sell policies in the state. The association, to fund certain outstanding obligations of life and health insurers that have been put into receivership, assesses its members. The Association works closely with the Director of Insurance, who is the receiver for insolvent insurers.

Alaska's current law is based on an earlier version of a national Association of Insurance Commissioners model Act. HB 398 updates Alaska statutes to bring them into close conformity with the most recent National Association of Insurance Commissioners model Act. The NAIC model Act has been updated to reflect lessons learned at a nationwide level from application of the model Act to actual insolvencies experienced since the last revision. HB 398 will allow the Alaska Guaranty Association to better meet its intended purpose of protecting Alaska policyholders and claimants. Updating the Act to comply with the latest model Act provides the added benefit of uniformity among the states in responding to insurer insolvencies.

The Alaska Life and Health Guaranty Association supports passage of HB 398.

FISCAL NOTE

No: 1

Bill Version: CSHB 398 (L&C)

(H) Publish Date: 3/6/00

**STATE OF ALASKA
2000 LEGISLATIVE SESSION**

Revision Date/Time (Note if correction) _____ Dept. Affected Community & Economic Development
 Title An Act relating to the Alaska Life and Health BRU Insurance
Insurance Guaranty Association. Component Insurance
 Sponsor Representative Harris
 Requester (H) L&C Component No. 354

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

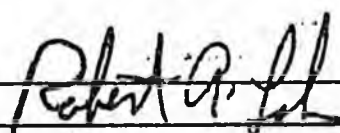
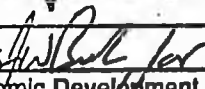
Estimate of any current year (FY2000) cost: 0.0

POSITIONS

POSITIONS	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact on this component.

Prepared by: Robert A. Lohr 
 Division Insurance
 Approved by Commissioner Deborah B. Sedwick 
 Agency Community & Economic Development

Phone 269-7900
 Date/Time 2-28-00 12:17 PM
 Date 2-28-00

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

Summary of Public Safety Testimony on HB 292 by Ken Bischoff, Director, Division of Administrative Services (465-5488)

HB 292 Does not: change who has access to criminal justice information, state or national. Requestors of this information will still require a basis authorized in law to receive this information.

HB 292 does the following:

1. Section 2 contains the language necessary to adopt the National Crime Prevention and Privacy Compact. The National Crime Prevention and Privacy Compact allows states to get national criminal history records by exchanging state records directly with other states, instead of relying on the FBI to keep duplicate records of all state criminal records. Because not all states manage to send duplicates of all their records to the FBI, exchanging records directly between states will provide more complete and timely access to criminal justice information for the purposes of licensing and employment. The Department of Public Safety will be better able to respond to employers and licensing agencies that are attempting to comply with Alaska Statutes and federal laws. Examples include:

- ✓ Alaska Bar Association (AS 08.08)
- ✓ Alaska Securities Act (AS 45.55)
- ✓ Assisted Living Homes (AS 47.33)
- ✓ Certification of Teachers (AS 14.20)
- ✓ Child Care, Child Placement and Maternity Homes (AS 07.35)
- ✓ Collection agencies (AS 08.24)
- ✓ Concealed handgun permits (AS 18.65.700)
- ✓ HUD Housing Opportunity Program (PL 104-120)
- ✓ Licensing of School Bus Drivers (AS 28.17)
- ✓ National Child Protection Act (PL 18.20)
- ✓ Regulation of Hospitals (AS 18.20)
- ✓ Security Guard Licensing (AS 18.65.410)
- ✓ Any agency that employs or licenses persons to be in authority over children or vulnerable adults (AS 12.62.160)

The Department performs approximately 20,000 of these types of checks each year.

2. Section 1 makes two house-keeping changes to AS 12.62 to provide more appropriately, all relevant information contained in a criminal history record to authorized employers and regulatory agencies. This would include arrest information without court dispositions and information beyond the ten year "unconditional discharge date" that is difficult to compute.

This change is needed to mitigate research and costs associated with filtering specific information to be able to respond to Alaska's 20,000 requests as well as national requests which will be received as a result of adoption of the compact.

3. Section 3 updates the definition of serious offense referenced by AS 12.62 regarding release of criminal justice information.

SUMMARY OF PRINCIPAL CHANGES TO THE NAIC LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION MODEL ACT

In 1997, the NAIC adopted a number of changes to the NAIC Life and Health Insurance Guaranty Association Model Act (Model Act). Taken together, these changes:

- A. Facilitate the implementation of guaranty association benefits more promptly and efficiently, thereby providing benefits to policyholders more expeditiously and at less cost.
- B. Clarify a number of provisions which could foster delay by promoting litigation.
- C. Provide additional benefits to policyholders.

In 1999, the ACLI proposed, and the NAIC subsequently adopted other amendments to the Model Act. These amendments clarified the appropriate coverage limits on equity indexed products and included a non-controversial provision noting that guaranty association coverage is not afforded to charitable gift annuities issued by entities that are not member insurers.

Amendments to the Model Act include changes in the following areas:

I. Coverage Issues

- a. A shift in the responsible guaranty association for structured settlement annuities from the state of the residence of the owner to the state of the residence of the payee. The shift mitigates possible issues regarding a guaranty association's capacity to assess and make payments to policyholders.
- b. A shift in the responsible guaranty association for unallocated annuity contracts from the state of the residence of the owner to the state of the residence of the plan sponsor.
- c. A provision allowing all guaranty associations to take action with respect to an impaired insurer.
- d. Extension of coverage to residents of foreign countries.
- e. Provisions clarifying or codifying guaranty association positions and practices, including (i) the determination of guaranty association limits, (ii) no payments to those who are offered a plan which fulfills guaranty association obligations but who decline to participate, (iii) exclusion of obligations not arising under the express written terms of the contract, (iv) the exclusion of claims covered by the PBGC, and (v) a definition of policy ownership (which excludes beneficial ownership).

- f. Exclusion of coverage of (i) synthetic GICs, (ii) economically immaterial policy guarantees, and (iii) benefits exceeding \$5,000,000 on COCI/BOLI products.

II. Fulfillment of Obligations

- a. The domiciliary Insurance Director or Commissioner and the Receivership Court may approve alternative policies and rates, thereby allowing for a nationwide rehabilitation plan.
- b. The Association may provide substitute coverage of annuities.
- c. Deferral of payments of cash values during moratorium periods (except for hardships).
- d. The Guaranty Association Board of Directors has discretion, and may exercise reasonable business judgment, to determine means to provide benefits in an economical and efficient manner.

III. Rights to Assets

- a. Provisions giving the guaranty associations rights under specified circumstances to reinsurance proceeds on claims arising after the insolvency, thereby allowing for the reinsurance to continue.
- b. Rights to a specified portion of special deposits.
- c. Rights to early access and to propose an early access plan.
- d. Clarification to subrogation rights, including a right to recover from a person that is paid amounts to which a guaranty association has subrogation rights.

IV. Assessments

- a. Guaranty association may authorize and call an assessment at different times.
- b. Clarification regarding the 2% cap with respect to two or more insurers that become insolvent or impaired in different years.
- c. Eliminates requirement that other accounts be assessed once a line of business has been subject to a 1% assessment.

V. Miscellaneous

- a. Clarifications regarding the public representatives of the board of directors.
- b. Right to organize as a corporation or other legal form.
- c. Right to request information from a person seeking coverage and from member insurers.
- d. Elimination of the liberal construction rule.

Alaska House Bill 398, a bill designed to update Chapter 79, The Alaska Life and Health Insurance Guaranty Association Act.

(Please note that references to the Model Act are to the NAIC Life and Health Insurance Guaranty Association Model Act, which is the basis for all proposed revisions to Chapter 79.)

Section 1.

Would amend the *Purpose Section of Chapter 79* to reflect non-substantive differences between current law and the NAIC Life and Health Insurance Guaranty Association Model Act. The changes, while not changing the underlying law, will help to promote uniformity and consistency.

Section 2. - Section 4.

Would amend the *Scope Section of Chapter 79* to, among other things, exclude unallocated annuities and structured settlement annuities from the general rule that coverage is provided to owners; clarify circumstances under which a guaranty association provides coverage to non-resident policyowners; clarify coverage for equity indexed products; and, change the situs of guaranty association coverage for unallocated annuities.

Section 5. - Section 6.

Would amend the *Liability Limits Section of Chapter 79* to set forth the state life and health guaranty association's liability limits for health insurance benefits, disability insurance and unallocated annuities; and, clarifies that the state life and health insurance guaranty association is responsible only for the shortfall in estate assets within covered limits and, therefore, estate assets attributable to covered policies may reduce the amounts for which the guaranty association is responsible within such covered limits.

Section 7. - Section 8

Would amend the *Construction Section of Chapter 79* to clarify that, while the chapter should be construed to effect the purposes under Section 1., it should not be construed to provide coverage where none was intended.

Section 9.

Would amend the *Association Established Section of Chapter 79* to clarify those insurance products contained in the annuity and unallocated annuity accounts of the state life and health insurance guaranty association.

Section 10. - Section 11.

Would amend the *Board of Governors Section of Chapter 79* to clarify the director's role in appointing members to serve on the Alaska Life and Health Insurance Guaranty Association Board of Directors.

Section 12. - Section 24.

Would amend the *Powers and Duties of the Association Section of Chapter 79* to include foreign insurers; permit the domiciliary insurance director and the receivership court to approve different premium rates for re-issued policies, thereby providing full and complete regulatory and judicial review of any proposed changes; and, set forth the rights of the state life and health insurance guaranty association.

Section 25. - Section 31.

Would amend the *Assessments Section of Chapter 79* to allow the state life and health insurance guaranty association's board of directors flexibility in authorizing assessments by board resolution in one year, thereby utilizing available assessment capacity before year end; require the life and health insurance guaranty association to notify member insurers of all authorized assessments that have not been called; and, sets forth further procedures for assessing member insurers.

Section 32. - Section 34.

Would amend the *Plan of Operation Section of Chapter 79* by setting forth guidelines for the adoption of a plan of operation not disapproved by the director; and, expressly permits the life and health insurance guaranty association to conduct meetings telephonically.

Section 35.

Would amend the *Prevention of Insolvencies Section of Chapter 79* by setting forth the state life and health insurance guaranty association's authority and ability to make reports to the director.

Section 36. - Section 38.

Would amend the *Miscellaneous Provision of Chapter 79* to confirm the state life and health insurance guaranty association's entitlement to the receipt of assets out of the marshalled assets available to it as credits against paid contractual obligations; and, sets forth further rights and obligations of the state life and health insurance guaranty association.

Section 39.

Would amend the *Examination of the Association, Annual Report Section of Chapter 79* to state that the state life and health insurance guaranty association shall provide a copy of the report to a member insurer upon request.

Section 40.

Would amend the *Civil Immunity Section of Chapter 79* to clarify that the association, its agents, and the director and the director's agents are not civilly liable for actions taken in carrying out their duties, including participating in one or more life and health insurance guaranty associations.

Section 41.

Would amend the *Stay of Proceedings; Default Judgement Section of Chapter 79* to conform with technical changes to the Model Act.

Section 42.

Would add a new section to *Chapter 79* regarding the prohibition on advertising the existence of the state life and health insurance guaranty association for marketing purposes.

Section 43. - Section 44.

Would amend the *Definitions Section of Chapter 79* to reflect recent changes to the Model Act, and incorporate appropriate definitions for changes made in earlier sections of the chapter.

The remaining sections of House Bill 398 reflect technical changes necessary to adopt revisions to Chapter 79.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 398(L&C)

1 Page 3, line 9, following "chapter":

2 Insert "whichever occurs first"

3 Page 27, line 20, through page 28, line 12:

4 Delete all material and insert:

5 "Sec. 21.79.170. Determination of principal place of business. The
6 principal place of business of a plan sponsor consisting of

7 (1) a single employer or an employee organization is that state in
8 which the plan sponsor exercises the direction, control, and coordination of the
9 operations of the entity, as determined by the association in its reasonable judgment
10 by considering the following factors: (A) the state in which the primary executive
11 and administrative headquarters of the entity are located; (B) the state in which the
12 principal office of the chief executive officer of the entity is located; (C) the state in
13 which the board of directors or a similar governing body of the entity conducts the
14 majority of its meetings; (D) the state in which the executive or management
15 committee of the board of directors or a similar governing body of the entity conducts
16 the majority of its meetings; (E) the state from which the management of the overall
17 operations of the entity is directed; and (F) in the case of a benefit plan sponsored by
18 affiliated companies making up a consolidated corporation, the state in which the
19 holding company or controlling affiliate has its principal place of business as
20 determined using the factors described in (A) - (E) of this paragraph; however, if
21 more than 50 percent of the participants in the benefit plan are employed in a single
22 state, that state is considered to be the principal place of business of a plan sponsor
23 that is a single employer or an employee organization;

24 (2) two or more employers or employee organizations is that state in

1 which the employers or employee organizations have the largest investment in the
2 benefit plan."

HB

401

HB 401

2029

AMENDMENT

7

OFFERED IN THE HOUSE

TO: CSHB 401(L&C)

Page 1, lines 3 - 15:

Delete all material and insert:

“Section 1. AS 11.46.482(a) is amended to read:

(a) A person commits the crime of criminal mischief in the second degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with intent to damage property of another, the person damages property another in an amount of \$500 or more;

(2) the person tampers with an oil or gas pipeline or supporting facility or an airplane or helicopter with reckless disregard for the risk of harm to or loss of the property; [OR]

(3) the person recklessly creates a risk of damage in an amount exceeding \$100,000 to property of another by the use of widely dangerous means;

(4) [*Repealed, sec. 11 ch 71 SLA 1996.*]

(5) [*Repealed, sec. 11 ch 71 SLA 1996.*]

(6) with intent to cause a substantial interruption or impairment of a service rendered to the public by another person over a computer network, the person causes substantial interruption or impairment of service to the public.”

Page 2, lines 1 - 14:

Delete all material

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS:

LABOR & COMMERCE COMMITTEE, CHAIRMAN
JUDICIARY COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
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SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT &
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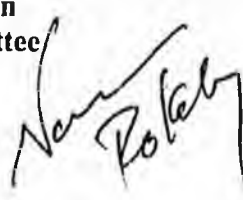
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SESSION
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JUNEAU, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

MEMORANDUM Representative Norman Rokeberg

TO: Rep. Pete Kott, Chairman
House Judiciary Committee

FROM: Rep. Norman Rokeberg 

DATE: April 3, 2000

RE: CSHB 401 (L&C)
An Act relating to computer networks and to electronic mail advertisements

Thank you for scheduling CSHB 401 (L&C) for a hearing before your committee on Friday, April 7, 2000.

Attached are:

1. CSHB 401 (L&C)
2. Three indeterminate fiscal notes
3. Sponsor Statement
4. Sectional Analysis
5. "Hackers increase attacks on Web sites", Fairbanks Daily News Miner, Feb. 10, 2000
6. "Web hackers widen attacks", Anchorage Daily News, Feb. 10, 2000
7. "Clinton meets computer experts", Juneau Empire, Feb. 15, 2000
8. "Internet attacks raise concerns about risks of growth", Peninsula Clarion, Feb. 14, 2000
9. "Catching hackers won't be easy", Peninsula Clarion, Feb. 17, 2000
10. "Expert sees rising cyber-terror risk", Alaska Journal of Commerce, March 5, 2000
11. "How the government failed to stop the worlds worst Internet attack", USA Today, March 9, 2000
12. "Hackers' Web-site assaults take toll", Seattle Times, March 12, 2000
13. "Cookies' maker chews over their fate", Anchorage Daily News, March 12, 2000
14. "Technology creator warns of its threat to mankind", Anchorage Daily News, March 13, 2000
15. "Web attacks raise concerns about growth", USA Today, Feb. 13, 2000
16. "ISP Posts Blacklist of Smurf-Friendly Networks", Inter@active Week, April 20, 1998
17. "Anti-Spam Bill Introduced to Solve a National Problem", Press Release, Senator Frank Murkowski
18. Copy of S 759, Inbox Privacy Act of 1999, 106th Congress, 1st session

CS FOR HOUSE BILL NO. 401(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered: 3/28/00

Referred: Judiciary, Finance

Sponsor(s): REPRESENTATIVE ROKEBERG

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to computer networks and to electronic mail advertisements."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. AS 11.46.480(a) is amended to read:

4 (a) A person commits the crime of criminal mischief in the first degree if,
5 having no right to do so or any reasonable ground to believe the person has such a
6 right,

7 (1) with intent to cause a substantial interruption or impairment of a
8 service rendered to the public by a utility or by an organization that [WHICH] deals
9 with emergencies involving danger to life or property, or rendered to the public by
10 another person over a computer network, the person damages or tampers with
11 property of that utility, [OR] organization, or person and causes substantial
12 interruption or impairment of service to the public;

13 (2) with intent to damage property of another by the use of widely
14 dangerous means, the person damages property of another in an amount exceeding
15 \$100,000 by the use of widely dangerous means;

1 (3) the person intentionally damages an oil or gas pipeline or
 2 supporting facility; or

3 (4) with intent to cause physical injury to another person, the person
 4 [:]

5 (A) tampers with an item that is a food, drug, or cosmetic or a
 6 container for the item; or

7 (B) delivers, dispenses, or distributes an item described in (A)
 8 of this paragraph knowing that a person has tampered with the item.

9 * Sec. 2. AS 11.46.490(7) is amended to read:

10 (7) "utility" means an enterprise, whether publicly or privately owned
 11 or operated, that [WHICH] provides gas, electric, steam, water, sewer, or
 12 communications service, and any common carrier; in this paragraph,
 13 "communications service" includes Internet service providers and the Internet
 14 and its ancillary services;

15 * Sec. 3. AS 45.50.471(b) is amended by adding a new paragraph to read:

16 (43) violating AS 45.50.479 (unsolicited electronic mail
 17 advertisements).

18 * Sec. 4. AS 45.50 is amended by adding a new section to read:

19 **Sec. 45.50.479. Provider's restriction on use of electronic mail service.** (a)

20 A registered user of an electronic mail service may not use or cause to be used the
 21 provider's service or equipment in violation of the provider's published policy
 22 prohibiting or restricting the use of its service or equipment for the initiation of
 23 unsolicited advertisements if the user has previously sent an unsolicited advertisement
 24 to 25 or more people or has previously been warned by the provider or recipient for
 25 sending unsolicited advertisements.

26 (b) A person may not, by initiating an unsolicited advertisement, use or cause
 27 to be used the service or equipment of an electronic mail service provider in violation
 28 of the provider's published policy prohibiting or restricting the use of its service or
 29 equipment to deliver unsolicited advertisements if the user has previously sent an
 30 unsolicited advertisement to 25 or more people or has previously been warned by the
 31 provider or a recipient for sending unsolicited advertisements.

1 (c) This section may not be interpreted to require an electronic mail service
2 provider to adopt a policy prohibiting or restricting the use of its service or equipment
3 for the initiation or delivery of unsolicited advertisements. This section does not limit
4 or restrict the authority of an electronic mail service provider to enforce its policies or
5 to prohibit or restrict the use of its services or equipment.

6 (d) An electronic mail service provider is considered to have published the
7 provider's policy on unsolicited advertisements if the provider

8 (1) makes the policy available on request in written form at no charge
9 to the requester; or

10 (2) displays the policy through an on-line notice on the provider's
11 Internet home page or on a page accessible through a conspicuous link on the
12 provider's Internet home page.

13 (e) In this section,

14 (1) "advertisement" means an electronic mail message, the principal
15 purpose of which is to promote, directly or indirectly, the sale or other distribution of
16 real property, goods, or services;

17 (2) "electronic mail" means a message or a file that is transmitted
18 through a local, regional, or global network, regardless of whether the message, file,
19 or other information is

20 (A) viewed;

21 (B) stored for retrieval at a later time;

22 (C) printed onto paper or other similar material; or

23 (D) filtered or screened by a computer program that is designed
24 or intended to filter or screen items of electronic mail;

25 (3) "electronic mail service provider" or "provider" means a business
26 or organization qualified to do business in the state or a governmental entity that
27 provides registered users with the ability to send or receive electronic mail;

28 (4) "initiation" of an unsolicited advertisement refers to the action by
29 the initial sender of the advertisement; it does not refer to the actions of any
30 intervening electronic mail service providers that may handle or retransmit the
31 electronic message;

- 1 (5) "network" means a network made up of one or more computers that
2 may be accessed by a modem, electronic or optical technology, or other similar means;
3 (6) "recipient" means a person who receives an item of electronic mail;
4 (7) "registered user" means an individual, corporation, or other person
5 that maintains an electronic mail address with an electronic mail service provider;
6 (8) "unsolicited advertisement" means an electronic mail advertisement
7 that is
8 (A) addressed to a recipient with whom the initiator does not
9 have an existing business or personal relationship; and
10 (B) not sent at the request of or with the express consent of the
11 recipient.

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 401

Revision Date/Time (Note if correction) 3/23/00 Dept. Affected Administration
 Title "An Act relating to computer networks and to BRU Legal and Advocacy Services
electronic mail advertisements." Component Public Defender Agency
 Sponsor Representative Rokeberg
 Requester (H) L&C Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services	*	*	*	*	*	*
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
	*	*	*	*	*	*

CHANGE IN REVENUES ()	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
	*	*	*	*	*	*

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	*	*	*	*	*	*
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached.

Prepared by: Barbara Brink, Director Phone 264-4414
 Division Public Defender Agency Date/Time _____
 Approved by Commissioner -- Robert Poe, Jr. Alison M. Seeger Date 3/23/00
 Agency Department of Administration

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FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 401

ANALYSIS CONTINUED:

This bill amends the Criminal Mischief in the First Degree statute. First degree criminal mischief is a class B felony and outlaws such things as intentionally interrupting public utility services and causing over \$100,000 damage to private property by widely dangerous means.

The amendment proposed by this bill would include damaging a computer network that provides service to the public with intent to cause a substantial interruption or impairment of a service rendered to the public in first degree criminal mischief. Also, the definition of "utility" is modified to include Internet Service Providers.

The Public Defender Agency is unable to estimate how many additional cases it would be appointed to if the bill becomes law. It is clear, however, that these will be serious cases. They will also be difficult to defend because these offenses will probably be highly technical in nature. Therefore, although we do anticipate some fiscal impact, we are not able to quantify it and are submitting an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 401

Revision Date/Time (Note if correction) _____	Dept. Affected <u>Department of Corrections</u>
Title <u>An Act relating to computer networks and to</u>	BRU <u>Administration and Operations</u>
<u>electronic mail advertisements</u>	Component <u>All</u>
Sponsor <u>Representative Rokeberg</u>	
Requester <u>House Labor and Commerce Committee</u>	Component No. <u>#0694</u>

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	***	***	***	***	***	***

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY2000) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: <u>Candy Brower, Legislative Liaison</u>	Phone <u>465-3307</u>
Division <u>Commissioner's Office</u>	Date/Time <u>3/22/00 1:42 PM</u>
Approved by: <u>Commissioner Margaret M. Pugh</u>	Date <u>3/22/00</u>
Agency <u>Dept. of Corrections</u>	

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FISCAL NOTE

**STATE OF ALASKA
2000 LEGISLATIVE SESSION
DEPARTMENT OF CORRECTIONS**

**BILL NO. HB 401
PAGE 2 of 2
DATE 3/22/00**

ANALYSIS:

If passed, this legislation would make it a B Felony (Criminal Mischief I) to intentionally cause a substantial interruption or impairment of a service rendered to the public by another person over a computer network by damaging or tampering with that person's property. This includes the Internet service providers and the Internet and its ancillary services. There has been attention in the media regarding such incidents recently, however, it is difficult to project how often this might occur and whose jurisdiction such an offender would be under. Federal jurisdiction might supersede State jurisdiction in some cases.

While it is the Department of Corrections assumption that these cybercrimes are the wave of the future, and that these offenders are likely to be first time offenders, it is difficult to estimate fiscal impact to the Department. Therefore, the Department of Corrections is submitting an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 401

Revision Date/Time (Note if correction) _____	Dept. Affected <u>Law</u>
Title <u>"An Act relating to computer networks and to electronic mail advertisements."</u>	BRU <u>Criminal Division/Civil Division</u>
Sponsor <u>Representative Rokeberg</u>	Component <u>1st-4th Jud Dist; Criminal Appeals/</u>
Requester <u>House Labor and Commerce Committee</u>	Component No. <u>2198-99,2201,03,61,79,06</u>

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2000) cost: _____

POSITIONS

POSITIONS	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 401 makes it a class B felony to intentionally and substantially interrupt or impair a service rendered to the public by another person over a computer network by damaging or tampering with that person's property. In addition, the bill adds to the Unfair Trade Practices and Consumer Protection Act restrictions on the use of a provider's electronic mail service to initiate unsolicited e-mail advertisements.

The Department of Law does not anticipate a fiscal impact on the Consumer Protection unit from the latter change. The addition of a new felony level crime will impact the department; however, it is difficult to quantify what the impact will be. We have no way of estimating how widespread this terroristic conduct is in Alaska, and how often prosecution would fall to state as opposed to federal law enforcement as this type of hacking often crosses state, and national, boundaries.

Prepared by: <u>Joan M. Kasson</u> <i>Joan M. Kasson</i>	Phone <u>465 5370</u>
Division <u>Attorney General's Office</u>	Date/Time <u>3/20/00, 9:09 AM</u>
Approved by Commissioner <u>Bruce M. Botelho</u> <i>Bruce M. Botelho</i>	Date <u>3/20/00</u>
Agency <u>Department of Law</u>	

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ALASKA STATE LEGISLATURE

House of Representatives

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Representative Norman Rokeberg

SPONSOR STATEMENT

CSHB 401 (L&C)

An Act relating to computer networks and to electronic mail advertisements
By Representative Norman Rokeberg

CSHB 401 (L&C) adds protections for consumers and internet service providers from such things as intentional disruption (e.g., a denial of service attack) or impairment of a service rendered to the public by a utility or emergency organization, or computer network, etc. Such actions would be a crime of criminal mischief in the first degree under CSHB 401 (L&C).

In the definition of "utility", CSHB 401 (L&C) adds language stating that a "communications service" includes Internet service providers and the Internet and its ancillary services.

Next CSHB 401 (L&C) provides that a user of an e-mail service may not use the provider's service in violation of any published policy of the provider (e.g., anti-spamming provisions). Additionally, the bill provides that the e-mail service provider does not have to adopt a policy prohibiting or restricting use of its services for delivery of unsolicited advertisements – in other words, if the provider wants to adopt a policy, that is fine. "Published" can be by means of written form, or display through on-line notice.

As we all move towards greater involvement with e-commerce, consumers need to know that some protections are available to them from such things as unsolicited advertisements. CSHB 401 (L&C) would provide this protection.

I would urge your support of this legislation.

ED 2:04/03/00

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS:

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Representative Norman Rokeberg

SECTIONAL ANALYSIS

CSHB 401 (L&C)

An Act relating to computer networks and to electronic mail advertisements

By Representative Norman Rokeberg

Section 1: Amends criminal law to provide that it is the crime of criminal mischief in the first degree if a person, having no right to do so, causes substantial interruption or impairment of a service rendered to the public by a utility or organization dealing with emergencies, or rendered to the public by another person over a computer network.

Section 2: Amends the definition of "utility" and the subdefinition of "communications service" to include Internet service providers, and the Internet and its ancillary services.

Section 3: Adds reference to 45.50.479 (unsolicited electronic mail advertisements) to AS 45.50.471(b).

Section 4: Adds new section concerning provider's restriction on use of electronic mail service. Includes description of the provider's policy and how it can be published. Defines "advertisement", "electronic mail", "electronic mail service provider", "provider", "initiation", "network", "recipient", "registered user", and "unsolicited advertisement".

ED 02:04/03/00

Hackers increase attacks on Web sites

Associated Press

NEW YORK—An electronic assault on some of the biggest sites in cyberspace is reigniting calls for better high-tech security by businesses and government. But even proponents of stricter measures acknowledged there was no ironclad defense.

Hackers stepped up this week's attack on Wednesday, inconveniencing millions of Internet users and unnerving Wall Street. The recently coordinated attacks spread to eWorld, ZDNet and other major sites—all of them disturbed by a barrage of messages.

Federal officials urged businesses to install protective software and take other security

precautions.

"We are committed in every way possible to tracking those who are responsible," Attorney General Janet Reno said in Washington.

Sensitive government systems were being quickly secured against potential attacks, Commerce Secretary William Daley said in a teleconference Wednesday.

"Right now there is no surefire defense, but we are trying to take some steps," he said. "First we are taking special action to ensure that all federal systems, including civilian agency systems, and those of the Defense Department, are clean of these infec-

tions, which make some systems the unwitting partner in these attacks."

Some security experts said the publicity could encourage pranksters.

"It's what these guys go after—to be known as the person or group of people who've pulled these attacks off," said Simon Perry, security business manager at Computer Associates International, a maker of business software. "Instead of graffiti on the subway wall, they've climbed up to the 40th floor of the Empire State Building and put their messages there."

The growing anxiety about the Internet's security is a major theme in the new book "See HACKERS, Page A-9

Fairbanks Daily News Miner, Feb 10, 2000, pg 1A

Fairbanks Daily News-Miner, Thursday, February 10, 2000

HACKERS BO

Continued from Page A-1
vulnerability contributed to a 258-point slide in the Dow Jones average Wednesday and halted three straight record-high closings for the Nasdaq Composite Index, which is heavy with high-tech stocks.

The hacker technique—called a "denial of service attack"—involves directing a flood of messages to computers that run Web sites. The effect is comparable to unleashing a wave of calls to tie up a city's phone lines.

The ETrade online brokerage's Web site was hit Wednesday, but "customer accounts were never compromised," spokesman Patrick DiChiro said. Less than one-fifth of its customers were affected by the clogged traffic for about 90 minutes before the company blunted the attack, he said.

ZDNet.com, a popular news site that covers technology, said its Web site was shut down for two hours and "appeared to have been the target of a denial-of-service attack."

Major sites attacked this week include eBay, Amazon.com, CNN, Buy.com and Yahoo!

Web hackers widen attacks

Message flood cripples more major sites; Wall Street jittery

By DAVID E. KALISH
The Associated Press

NEW YORK — Hackers stepped up a three-day electronic assault Wednesday against some of the most popular sites on the Web, inconveniencing millions of Internet users and unnerving Wall Street.

The apparently coordinated attacks spread to ETrade, ZDNet and other major sites Wednesday. All of them were crippled by a barrage of messages generated by hackers.

The growing anxiety about the Internet's vulnerability

"Right now there is no surefire defense, but we are trying to take some steps."

— Commerce Secretary William Daley

contributed to a 258.44 point-slide in the Dow Jones average and halted three straight record-high closings for the NASDAQ Composite Index, which is heavy with high-tech stocks.

The attacks also prompted top federal officials to reassure Americans that authorities are doing everything

they can to fight the on-line vandalism.

"We are committed in every way possible to tracking those who are responsible," Attorney General Janet Reno said in Washington.

She said the motives of the vandals are not known, "but

See Back Page, HACKERS

ADN, Sep 10, 2000, page A1

HACKERS: Businesses urged to protect themselves

they appear to be intended to interfere with and disrupt legitimate electronic commerce."

The hacker technique, called a "denial of service attack," involves directing a flood of messages to computers that run web sites. The effect is comparable to erecting human barricades to block shoppers from entering a mall or unleashing a wave of calls to tie up a city's phone lines.

Hackers could face maxi-

mum penalties of 5 to 10 years behind bars and fines up to \$250,000, or in some cases "twice the gross loss to the victim," said FBI cyber-security expert Ronald Dick.

In the latest attacks, the ETrade brokerage's web site was hit, but "customer accounts were never compromised," spokesman Patrick DiChiro said. Less than one-fifth of its customers were affected by the clogged traffic for about 90 minutes.

ZDNet.Com, which covers technology, said its site was shut down for two hours.

Microsoft's MSN.com said it was indirectly affected because of disruptions to several Internet service providers carrying its traffic. Major sites that came under attack Tuesday included eBay, Amazon, CNN and Buy.Com, all in aggressive assaults similar to one that overwhelmed Yahoo! a day earlier.

Federal officials urged

businesses to install protective software.

"Right now there is no surefire defense, but we are trying to take some steps," Commerce Secretary William Daley said. "First we are taking special action to ensure that all federal systems, including civilian agency systems, and those of the Defense Department, are clean of these infections, which make some systems the unwitting partner in these attacks."

Journal Empire, Feb 15, 2000

Clinton meets computer experts

■ *Web security sought after hacker attacks; FBI has suspects*

By **SONYA ROSS**

THE ASSOCIATED PRESS

WASHINGTON - With the FBI seeking to question several hackers about last week's Internet attacks, President Clinton today began exploring ways to lighten security on the World Wide Web but cautioned the attacks were not an "electronic Pearl Harbor."

Surrounded by technology experts and a hacker known as Mudge, Clinton said the attacks nevertheless served as a needed wake-up call. The assault was hardly so devastating that it could be compared to Japan's bombing

of Pearl Harbor, which wiped out the Pacific Fleet and drew the United States into World War II, he said.

"It's a source of concern, but I don't think we should leave here with this vast sense of insecurity," Clinton said. "We ought to leave here with a sense of confidence that this is a challenge that was entirely predictable. It's part of the price of the success of the Internet."

Clinton gathered in the White House Cabinet Room with about 20 industry representatives, national security experts and Attorney General Janet Reno. He said the goal of the meeting was to ensure that the Internet remains "open and free."

One participant, Whitfield Diffie of Sun Microsystems, set up

his laptop on the conference table, an agenda on the screen. Mudge, in a business suit with his long brown hair hanging down on his chest, sat quietly with his fingers interlocked atop his blue briefing books.

Meantime, a computer believed to have been used in last week's attacks, was seized by federal agents, Hillsboro, Ore., Police Sgt. Allen Zaugg, head of a group of officers trained for high-tech cases, said today.

The FBI is now analyzing that computer, which was seized within the last two days from a home business in the Portland, Ore., area, a federal official in Washington said, requesting anonymity. Its owner apparently was not aware the computer was used as a middleman in the attacks, this of-

ficial said.

The threat of an "electronic Pearl Harbor" was raised in March 1999 by then-Deputy Defense Secretary John Hamre, who predicted in congressional testimony that cyberterrorists would target America's commercial interests.

The initial idea of the session was to address the problem of terrorists using cyberspace. But Clinton told CNN.com on Monday that last week's attacks underscore a need for the government to focus on protecting the Internet itself.

The FBI was seeking to interview several hackers known by their Internet screen names, including one who calls himself "mafiaboy" and another who calls himself "coolio," a Justice Department official said.

Internet attacks raise concerns about risks of growth

By ANICK JEBDANUN
AP Internet Writer

NEW YORK — A swarm of recent hacking attacks highlight one emerging concern about the Internet: It may be growing too fast for security to keep up with technology.

Some security experts believe it's time to focus on making the Net safer, which could mean rebuilding much of the underlying infrastructure from scratch. After all, consumers and businesses now use the Internet for tasks unforeseen 30 years ago.

Security was an afterthought when Internet standards were developed by university thinkers and computer administrators, says Russ Cooper, who runs the NTBugtraq Web site devoted to security.

"This is now the foundation for billions of dollars worth of commerce," Cooper said. "It is inherently flawed because we don't check to see if what it's being used for is what it is intended for."

Randy Sandone of Argus Systems Group Inc. is blunter: "The Web is rotten at its core."

Yahoo!, Buy.com, eBay, ETrade and other prominent sites were paralyzed for hours at a time last week when hackers overloaded them with fake traffic.

The attacks followed several computer virus outbreaks last year — such as Melissa — which spread rapidly by taking advantage of functions that were designed to make Internet use friendlier.

And last month, a hacker stole credit card numbers from the Internet music retailer CD Universe, then released thousands of them on a Web site after the firm refused to pay \$100,000 ransom.

"I fully expect the Internet to ultimately be safe and stable," said Stephen Gorrell, program manager for Norton Internet Security software. "However, in the period of record growth, it's not surprising new holes are discovered."

The Internet's developers could not have effectively countered threats to commerce because e-businesses did not yet exist, Gorrell said.

As the Internet grows, so do the numbers of hackers and potential victims. And hackers are becoming more sophisticated, with some even developing tools to

'I fully expect the Internet to ultimately be safe and stable. However, in the period of record growth, it's not surprising new holes are discovered.'

—Stephen Gorrell, program manager
for Norton Internet Security software

automate their attacks.

Software companies, some critics say, contribute to the problems by releasing products that still have security holes.

"Each day, technology is changing," said Robert Ing, who handles electronic security for SBR International Inc. in Toronto. "There's a rush to get products out to market because it is a competitive marketplace. Sometimes, security is overlooked."

Steve Hunt, security analyst at Giga Information Group in Chicago, hopes the latest attacks will encourage companies to take security more seriously.

"We owe quite a debt of gratitude to hackers to show us where our pants have

been down," he said.

Security and Internet experts differ on how far they need to go — and that itself is a problem. Some believe in completely updating equipment and software to reduce users' anonymity and improve authentication.

In the offline world, businesses have experience with security guards and special locks. Some practices are even required by law or insurance companies.

But the Internet community has yet to agree on such standards, said Harris Miller, president of the Information Technology Association of America.

Phil Atfield, director of technical marketing at McAfee.com, said Internet secu-

rity will eventually catch up.

"The approaches are going to have to become more formal rather than ad hoc," he said. "We've been getting there incrementally. That's the way technology is evolving."

But hacking will never completely disappear, said Keith Teare, the chairman and chief executive of RealNames. Vandals broke into RealNames' computers Wednesday, and the company had to warn some 20,000 customers that their credit card numbers might have been stolen.

"For every secure environment, there will be somebody prepared to try to break in," Teare said. "If they are clever enough, they will find holes."

Greg Hawkins, chief executive of Buy.com, said the attacks on his shopping site and others raised awareness.

"This is a new frontier. It's big, it's fast, and it's growing rapidly," he said. "With that growth will come continued challenges to make sure it's a secure and effective environment. We are clearly going to have growing pains like this from time to time."

BUSINESS

Catching hackers won't be easy

FBI seeks expansion of racketeering laws against organized electronic assault

By TED BRIDIS
AP Technology Writer

WASHINGTON — The nation's top law enforcement officials acknowledged on Wednesday serious challenges finding the electronic vandals who shut down major Internet sites last week, but they also described "fast-developing leads."

They said the hackers involved were sophisticated enough to falsify their digital fingerprints. Attorney General Janet Reno said such a disguise technique "makes it difficult, and sometimes impossible, to hold the perpetrator criminally accountable."

"I would simply say that we are taking the attacks very seriously and that we will simply do everything in our power to identify those responsible and bring them to justice," Reno told a Senate panel.

FBI Director Louis J. Freeh, who also testified, said there were "fast-developing leads as we speak, and hopefully we can provide more details in coming days." He said FBI field offices in five cities have opened investigations into the attacks: Los Angeles, San Francisco, Atlanta, Boston and Seattle. More agents in other cities and overseas are also involved.

Reno and Freeh also conceded impor-

tant shortcomings coordinating the myriad government agencies and public and private experts who help investigate high-tech crimes. "We're not doing so good," admitted Freeh, adding that cooperation was improving.

The FBI also urged Congress on Wednesday to consider expanding use of federal racketeering "RICO" laws — traditionally used against the mafia and drug cartels — to apply against organized and persistent hackers. It also urged Congress to lower the \$5,000 minimum in damages that victim companies must suffer before attackers can be prosecuted under federal computer crime laws.

Freeh said lawmakers should consider "whether some of this activity, which goes beyond a single episode of fraud or hacking, gets into the realm of enterprise criminal activity."

"RICO was intended to get gangsters," said Jennifer Granick, a California lawyer who has represented hackers. "Now, it's getting a bunch of kids in black concert T-shirts."

Freeh said hackers in many of last week's attacks falsified the Internet addresses of the computers they used, "meaning that the address that appeared on the target's log was not the true address

of the system that sent the messages."

eBay Inc. disclosed new details Wednesday about the electronic assault launched against it Feb. 8, which shut down the world's largest online auction site for 90 minutes. Similar attacks disrupted other major commercial sites, including those of Yahoo!, Amazon, Buy.Com, CNN and ETrade.

eBay's lawyer, Robert Chesnut, described an "insidious, organized attack" that was "obviously well planned."

The attackers flooded eBay's site with 10 times its normal incoming data, transmitting a specific type of information identical to that used against Yahoo! on Feb. 7.

Chesnut told the Appropriations subcommittee on Commerce, Justice, State and judiciary that eBay also was attacked the evening of Feb. 9, but engineers were able to repel the second attack quickly.

The FBI is contacting several hackers, known by their online nicknames. The bureau would not say whether its agents have talked with any suspects, but it appeared some interviews have begun, hacker sources said.

The testimony from Reno and Freeh followed President Clinton's meeting

Tuesday with technology experts about ways to improve Internet security. Participants said that during the talks, industry leaders urged the government to lead by example by making its computer systems secure.

But overnight Tuesday, a hacker vandalized at least four Web sites at the Transportation Department, including the page for the agency's information officer, George Molaski.

Those attacks were first noted by Attrition.Org, a computer security Web site that records such hacks.

The computer breached by the hacker "was in the process of being fixed," Molaski said Wednesday. "Unfortunately, they got to it before we closed that door. It was a relatively simple vulnerability."

Also Wednesday, House Commerce Chairman Tom Bliley, R-Va., criticized "highly vulnerable" computers at the Environmental Protection Agency and

urging it to shut down its Internet connection immediately, citing an unreleased report by the General Accounting Office.

EPA spokesman David Cohen said the agency has no plans to disable Internet access, adding that experts there have

taken steps to strengthen security of computers with sensitive information.

Expert sees rising cyber-terror risk

By Nancy Pounds
Journal Assistant Editor



America's growing dependence on the Internet and major industry networks has put the nation at the highest risk yet for cyber-terrorism attacks, according to one technology expert.

The nation's Internet systems are more vulnerable than other countries' operations since more than half of the Internet is in the United States, he said.

Although more cyber-crime has been identified than technoterrorism, the criminals could be practicing now, said Seymour Goodman, a professor at Stanford and Georgia Tech universities. He also is director of the Consortium for Research on Information Security and Policy at Stanford.

Goodman, who has visited 80 countries to offer international public policy advice on technology, spoke Feb. 25 at the Alaska World Affairs Council luncheon at the Hilton Anchorage Hotel.

Cyberspace crimes can range from robbery to intimidation to warfare, including attacking military networks, he said.

"And the United States is a prime target since we rely on these systems," Goodman said.

Alaska's vulnerability to cyberspace attacks could climb depending on the security of systems controlling a proposed National Missile Defense System that could be built in Alaska, he said.

From his experience, Goodman has seen that many network technology systems lack needed security to fend off criminals.

"We've made ourselves more vulnerable at the same time as we're taking advantage of the efficiencies of the systems," he said.

In the last 10 years, activity in cyberspace has experienced an explosion, especially in Internet users and networks that power industries like the banking and finance sector, Goodman said.

Started 30 years ago, the Internet has grown from the six countries connected 15 years ago to 214 entities today, he said. Each year the Internet grows another 50 percent to 100 percent.

"This represents one of the most rapid infusions of technology," Goodman said.

Accompanying growth is increased efficiency and connectivity, which in turn spurs greater dependence on Internet

TECHNOLOGY

and network systems, he said.

"I would argue that what has happened in cyberspace, particularly in the last 10 years, is that we have created a new medium of great importance for a tremendous spectrum of human activity," Goodman said.

This technology-driven medium, similar to physical media of air, sea and land, is the stage for social and financial transactions on a large scale, he said.

However, the systems that make up the Internet often lack security as a main function, according to Goodman.

One of Goodman's Stanford colleagues was one of the initial Department of Defense Internet operators who says that as early Internet programmers, they did not design security into the operation, but planned to come back to it. But now the Internet is much more complex, Goodman said.

Vulnerable systems lead to more opportunities for conflict, whether it's offensive content or decaying ethics, he said. Also, from the standpoint of crime, there are increased opportunities for terrorism because terrorists can be distant from their victims, he said. "Crime out there on the Internet is growing as quickly as the Internet itself."

"Some of us think that we still need to civilize cyberspace.

Otherwise it will be like the wild West. But how do we do that? This is an international, borderless medium."

One means of defense is passive — making computers less easy to hack, he said. But without a penalty for breaking in, attackers will try until they succeed or become bored, he added.

An active defense includes collecting evidence in the difficult task of apprehending cyberspace criminals internationally, although this plan requires countries to agree on what would be considered a crime, he said.

The cost of technology crime won't be paid by industries or governments, Goodman said.

"We as individuals will pay for this if it's not fixed, or we will pay as a nation if a terrorist attack occurs," he said.



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THURSDAY MARCH 9, 2000

NEWSLINE

A QUICK READ ON THE NEWS

WALL STREET: Dow Jones Industrial average jumps 69.50 points to 9856.53; Nasdaq Index soars 49.33 points to 4897.17; 30-year Treasury bond yield climbs to 6.16%. 1-4B.
 ▶ USA TODAY Internet 100 rises 0.88 points to 189.04. 4B.
 ▶ Japan's Nikkei average is up 119 points to 19,886 midday; yen is 107.04 per dollar. Hong Kong's Hang Seng Index is 198 points to 18,149 early today.

Four killed in Memphis ambush



By A.J. Wolfe, The Commercial Appeal, via AP

Aftermath: Firefighters console one another Wednesday after arriving at a house fire and being shot at by an off-duty firefighter; four people were killed and two were injured. 4A.

OIL PRICES FALL: OPEC pledge to provide "adequate and timely oil supplies in coming months" is linked to a more than 8% drop in crude oil prices. 1B.

SOUTHWEST AIRLINES CRASH: Pilots are blamed for approaching Sunday's landing in California too fast and too steep. 3A.

FASTEST-GROWING COUNTY: Virginia's Sussex County zooms from 10,000 to more than 12,000 from 1998-99, thanks to two new prisons and 2,400 inmates. 3A.

TODAY'S DEBATE: Interest rate hikes. In USA TODAY's opinion, "Greenspan hits the brakes. Risky? Yes. But less risky than letting inflation take hold."

▶ "We are in a New Era economy that is different from the economies of the past. As a result, it requires a different monetary policy," Brian S. Wesbury says.

MONEY: Homebuyers basking in new no-down payment, 100%+ plus mortgages; experts express concern. 1B.

▶ Low-cost Linux is giving Windows a run for its money. 1B.

▶ Traffic safety officials warn about use of vans instead of buses to transport students. 1B.

▶ Miller rolling out beer in plastic bottles. 3B.

SPORTS: Tony Hawk has turned skateboarding into big bucks. Critics wonder whether that's a good deal. 3C.

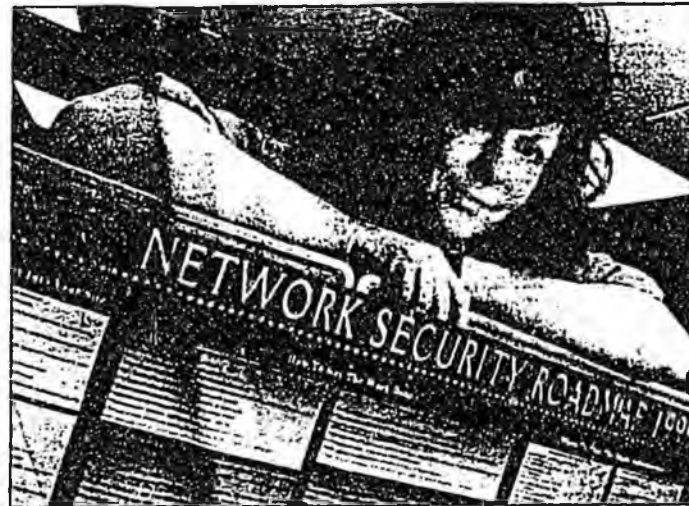
▶ Buffalo tops Boston in overtime 2-1. NHL. 13-14C.

LIFE: Marketing firms that work for drug companies teach doctors about the products, raising ethical flags. 1D.

▶ Andrew Huebner writes a haunting first novel about the Indian wars. Books, reviews, best sellers. 6-8D.

CORRECTION: Rhode Island election results were transposed in some editions Wednesday. McCain won the state over Bush 60%-38%. Super Tuesday results. 1-4A.

Written by John O. Buckley



By Tom Rouse for USA TODAY

Watched her system get buried: Susan Levy Haskell of the University of Minnesota.

How the government failed to stop the world's worst Internet attack

By M.J. Zuckerman
USA TODAY

Susan Levy Haskell arrived at her office at the University of Minnesota as usual before 8 a.m. on Monday, Aug. 16, 1999, where she watched at first curiously, then later in horror, as the university computer system came under attack from a massive yet anonymous Internet adversary.

Haskell, the university's computer security coordinator, says that as hours passed the volume of incoming malicious traffic rose from a mere annoyance to an all-consuming electronic dissonance. The Internet connection grew ever less responsive, degrading steadily until the university was cut off from the world.

"It became pretty terrifying to realize how many machines had to be involved. It seemed like hundreds."

Investigators later determined that 2,200 computer systems, including those at more than 30 universities in the United States, had become unwitting "zombies," serving a still unidentified master computer, which directed the attacks and forced the university off the Internet for two days.

In a matter of weeks after the Minnesota incident, academics and elite computer security firms began

spreading the word to clients and colleagues that this newly enhanced "denial of service" (DoS) attack was a clear and immediate danger to the Internet.

But it would take more than a month before federal officials at the National Infrastructure Protection Center (NIPC), which is responsible for national computer security matters, to learn of the incident and three more months for them to conclude that it was a threat worthy of a warning to the public.

It is now apparent that throughout the end of 1999, cyberspace was: infecting large, insufficiently secured computer systems as zombies and laying the groundwork for a series of attacks last month that rocked e-commerce.

The delayed response and limited distribution of threat information is one of several criticisms being leveled at the NIPC and its sister agencies as the investigation into the attacks progresses slowly, according to recent congressional testimony.

"It was not enough," says Jamie Gorelick, the former deputy attorney general, who from 1994 to 1997 directed the administration's creation of the current electronic defense policy.

COVER STORY

Please see COVER STORY next page ▶

COVER STORY

Agencies defend their response

Continued from 1A

She and others say the protection center failed, leaving many e-commerce firms unprepared for the attacks Feb. 8-11 that slowed the global Internet by 20% and shut down the world's most popular commercial Web sites and the FBI's home page.

"There needs to be some agile operational capacity in the government, an ability to move quickly to provide warnings," she says. "This doesn't sound at all like what we had in mind."

Michael Vatis, director of the NIPC, an interagency fusion of federal, local and international organizations based at the FBI, defends his agency's response. It says it permitted the private sector to prepare for the worst while avoiding public hysteria.

"Three years ago we wouldn't have been able to respond at all," Vatis says. "Today we have an effective resource" for investigating crimes and issuing threat alerts.

Critics say the protection center and its sister agencies have fallen short of the vision President Clinton had two years ago when he issued a plan to "create a genuine public-private partnership to protect America in the 21st century" from devastating cyberattacks. The plan called for the private sector, which owns and operates both the Internet and the infrastructure that supports it — electricity, banking and communications — to create secure information-sharing centers in which companies could anonymously share threat information, new vulnerabilities and crises data. It also created a Commerce Department coordinating center to work with those industry clearinghouses and the NIPC.

But as the administration seeks \$37 million in new spending for cybersecurity, the NIPC and its sister agencies are troubled by confusion within their own ranks as well as a lack of cooperation from companies and other government agencies:

► Other government agencies are refusing to work with the NIPC, privately pointing to the FBI's longstanding reputation for not sharing well with others. "That's something we're still working on," Vatis says.

The Pentagon is the only Cabinet-level agency represented at the NIPC. The Secret Service, Transportation Department and Treasury Department, each of which is designated to have representation at the protection center, refuse to take part. The Department of Energy, which is supposed to play a major role at the center, is not represented. The CIA, which has four slots at the center, has filled one.

"There needs to be some agile operational capacity in the government, an ability to move quickly to provide warnings. This (last incident) doesn't sound at all like what we had in mind."

— Jamle Gorelck, former deputy attorney general

► Friction and turf battles between the new cybersecurity agencies may be hampering operations. The National Coordinator for infrastructure protection and counterterrorism is Richard Clarke, a White House official, who must get clearance on a case-by-case basis before the NIPC will brief him about investigations.

Vatis says Justice Department guidelines bar the FBI from briefing anyone outside the department about ongoing cases unless the attorney general grants a waiver.

► The Internet communi-

their computer attack "zombies."

On Dec. 8, NIPC sent a note briefing FBI Director Louis Freeh for the first time. On Dec. 17, Vatis personally briefed Attorney General Janet Reno as part of an overview of preparations being made for Y2K.

By that point, several DoS attacks already had occurred, but "people weren't getting the message," Dittrich says. "CERT and NIPC were really worried. They had obviously been hearing about a lot more intrusions. They went back and recategorized a whole bunch of incident reports going back to April-May time frame, and they started telling me that this is a really big thing."

But not until the NIPC, working with Dittrich and Mitre Corp., developed a tool for identifying zombies in a system did the protection center decide to warn the public Dec. 30 and post the tool for anyone to download.

By that time, Vatis says, "someone was setting the groundwork for an attack, and that is when we decided to make a public announcement."

Electronic 'night of the living dead'

The NIPC was convinced that New Year's Eve "could be a day for people to start sending marching orders to these zombies. We were afraid that Dec. 31 might become the night of the living dead," he says.

"Thanks for giving us plenty of time to prepare," says a sarcastic Vinton Cerf, an MCI WorldCom executive who is widely regarded as a founder of the Internet. "The timing of this all was singularly unfortunate."

But the protection center gets high praise from many security firms for being the first to provide an effective tool to locate and remove the zombie infections. Vatis says far more damage would have occurred in February otherwise.

"You know, I'm sensing a little bit of doublespeak here," Vatis says. "Business is saying, 'We don't want the government telling us what to do; we can fix this ourselves.' And I agree. But then I hear people saying, 'Gosh, government didn't warn us loud enough!'"

"People have been saying for a long time that it's going to take an electronic Pearl Harbor for people to take security seriously," he says. "There's a kernel of truth there because we live in an event-driven society."



► The Internet community is demanding broader distribution of more timely threat information, beyond the security professionals with whom the NIPC typically deals. "If you are only spreading the word to specialists, then you are not getting threat information out across the board to small universities or e-tailers," says Harris Miller of the Information Technology Association of America, a leading trade association representing 11,000 corporations.

► Though some companies are warming to the idea of sharing information with the government, many complain that they remain uneasy about government efforts to police the Internet.

"Where (the federal government) is completely failing is to be a place people trust" with delicate information, says Alan Pallar of the SANS Institute, an education facility for computer system administrators that claims 100,000 members. "Ninety-eight percent of the time they won't share with the FBI because they fear having their (computers) confiscated, that their troubles will become public knowledge and that the agents will scare (clients) to death."

► The president's plan has created so many entities gathering data on Internet vulnerabilities that it is causing confusion. "Imagine living in a community where there are seven different numbers to call for 911 services," says Mark Rasch, chief counsel to Global Integrity, a leading cybersecurity firm that hosts the financial industry's information sharing center. "You need to have one number, one place, that everyone trusts."

Adds Tom Noonan, CEO of Internet Security Systems, probably the fastest-growing firm in its field and a major booster of the NIPC: "Quite frankly, I'm confused by all these different government groups."

Word spreads slowly

In the days after the University of Minnesota attack, Haskell says her 911 instinct was to notify academic colleagues or other trusted computer professionals.

One of those she contacted was David Ditrich, director of software engineering at the University of Washington in Seattle. He became the first person to track down and unlock the codes that make the attacks operate.

It was a matter of days before he realized the new attack technique required immediate action. But the wheels of government turn slowly.

Ditrich first alerted CERT, the Computer Emergency Response Team at Carnegie-Mellon University, the nation's premier clearinghouse for data on computer vulnerability. By early September, it began organizing an unprecedented international conference to examine the emerging threat.

Based on CERT's letters of invitation to the conference, a handful of high-end security firms learned of the attack technique, and in October and November the firms quietly briefed clients about the impending threat.

Though the NIPC is a sponsor of CERT and has a liaison for the emergency response team on its staff, it received its first substantial report from CERT in late October. The response team has declined to comment on the apparent delay.

The three-day CERT conference in early November adjourned with this determination: "There is essentially nothing a site can do with currently available technology to prevent becoming a victim" of a denial-of-service attack.

The only prevention, the conferees said, was for system operators to update their security precautions to prevent vandals from exploiting known system weaknesses to gain control of



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Seattle Times 12 Nov 2000

Hackers' Web-site assaults take toll

Victims and experts call randomness frightening

BY PETER LEWIS
Seattle Times technology reporter

Compared with a street mugging, an attack on a Web site lacks a certain reality. The "crime" seems thin, the consequences soft.

Tell that to Blaine Hadlock, owner of a small, Bainbridge Island-based business that got hacked last year, allegedly by a total stranger who turned out to be a computer-science student in Boston. When Hadlock finished



JIM LOTT / THE SEATTLE TIMES

Blaine Hadlock, owner of Zebra Marketing Online Services, changed his business plan after a hacker attack.

picking up the pieces, the tab exceeded \$30,000.

It is a phenomenon expected to grow worse before it improves, said Richard Power, spokesman for the Computer Security Institute, a San Francisco-based association of information security professionals.

"As the cybercrime problem grows, the smaller and medium-sized businesses will be more

targeted for fraud or malicious mischief," predicted Power, "simply because there will be more sharks in the water interested in smaller prey."

What's particularly disturbing is the apparent randomness of such attacks. Hackers can use fairly simple scanning programs to hunt for vulnerable systems.

PLEASE SEE *Hack*

D 2
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After attack, victim takes his company out of harm's way

HACKERS

CONTINUED FROM D 1

"It did not put us out of business, but it stung real bad," recounted Hadlock, whose Zebra Marketing Online Services (ZMOS) has five full-time employees and has since moved to Federal Way. "You don't lose that kind of money without it hurting you. It caused me some significant problems."

Authorities contend the hacker is a Northeastern University student named Ikenna Ifih, who in federal charges filed recently in Boston was also accused of illegally entering federal computers at the National Aeronautics and Space Administration and the Defense Department.

Last spring, investigators with the FBI and the Department of Defense kept asking Hadlock, "Why you? Why him?"

And Hadlock had a stock answer: "Ask him (the hacker)."

"I really don't know from whence he came and why. I'd love to sit with him and ask 'Why?'"

Power, with the security institute, said the public often has difficulty understanding the motive behind such stranger-on-stranger cyber attacks. "People say, 'Well, why do they do this?' And the answer they can't understand is, 'Just because,'" Power said.

He said attacks on smaller businesses are particularly damaging because the owners cannot absorb the hit like a major corporation, and they generally lack insurance to cover such losses.

Assistant U.S. Attorney Steve Schroeder of Seattle, who helped investigate the ZMOS case, agrees.

"It's the smaller systems that can't afford to spend resources on security that are going to remain vulnerable," he said. "The little mom-and-pop sites. It (a hacker attack) would bury them."

Most of the hacking incidents Schroeder is aware of in Western Washington involve stranger-on-stranger attacks. Several remain under active investigation. But another threat comes from disgruntled employees.

That's what occurred to small-business owner Bud Robinson, who runs an ice-machine rental business called Automatic Ice Makers in San Diego. Two years ago, a disgruntled programmer "just walked out one day and said 'I'm going to own you,'" Robinson recalled.

Before leaving, the employee placed some malicious code in the system — a "logic bomb" that

disabled access and caused about \$50,000 in damage. It took nearly two years for Robinson to recover, repairing the system in stages as he could afford to.

James Crowell, aka Jamie Crowell, ultimately pleaded guilty to a felony charge of recklessly damaging a protected computer. Crowell was sentenced to serve six months in a halfway house and ordered to make restitution, among other conditions.

In Hadlock's case, the intrusion influenced him to shift business models. Instead of hosting other companies' Web pages, ZMOS now acts as an "e-business facilitator," Hadlock said, meaning the company helps e-businesses figure out what their message is and provides marketing assistance.

Besides being disruptive, Hadlock said the attack caused him to realize how legally vulnerable he was as the guardian of other people's information. If a Web-hosting company is housing "hundreds or thousands or millions of dollars' worth of (intellectual-property) investment and somebody (a hacker) gets to you, guess who is on the line?" Hadlock asked rhetorically.

"So we changed after this little scenario," he said. "It led us to not being in that (Web-hosting) business."

As far as prosecutors know, ZMOS was the most seriously damaged victim. Ifih's other alleged unauthorized forays caused no disruption to the nation's defenses, no meddling with satellite control, and no improper use of personal information — including private information on about 9,000 students, faculty and alumni at Northeastern that Ifih is accused of downloading and copying.

The 28-year-old student now faces three felony counts related to unauthorized access to various computers. If convicted, he could serve up to 15 years in prison and pay a \$250,000 fine.

Ifih was charged by criminal information instead of indictment, which generally is a sign that a plea agreement is in the works.

Authorities have asserted that Ifih also went by the hacker name "DigiAlmty" and that he was responsible for defacing an Interior Department Web page. On that page, Ifih is accused of writing in part: "Yes, you guessed it right, the WAR is on. The (expletive) FBI vs. everyone who calls him/herself a true hacker."

Peter Lewis: 206-464-2217. E-mail: plewis@seattletimes.com

"People say, 'Well, why do they do this?' And the answer they can't understand is, 'Just because.'"

RICHARD POWER

Spokesman, Computer Security Institute

Anchor Daily News 12 Mar 2000

Cookies' maker chews over their fate

By THOMAS E. WEBER
The Wall Street Journal

Cookies, those tiny computer files that web sites use to track visitors, have come to symbolize the worst fears about on-line privacy. But the man who baked up the very first batch says that's just not fair.

"They're actually relatively harmless," said Lou Montulli, the computer whiz who invented cookies in 1994 and went on to be named "Sexiest Internet Mogul" by People magazine last year.

Montulli's brainchild has evolved into one of the Web's most pervasive technologies, invisibly shoring up everything from e-commerce to on-line advertising. If you spend much time on the Web, chances are you've accumulated anywhere from dozens to hundreds of cookies on your PC.

Lately Internet companies have figured out how to make them do all sorts of tricks their creator didn't foresee. On-line ad network DoubleClick has turned them into huge consumer dossiers, and now finds itself under scrutiny from consumers and the Federal Trade Commission for its efforts.

The tale of how and why the cookie came to be — and why it now arouses such fears among Internet users — is a dramatic example of how the on-line world has been shaped by the decisions of a few key people. It also shows how those decisions can morph in unintended ways as the Net evolves at breakneck speed.

In the summer of 1994, Montulli was a young college dropout at a brand-new company called Netscape. It wanted to commercialize the Internet, which meant making it possible for people to buy things on-line. The problem was, web sites made poor shopkeepers. Designed to treat all requests for information separately, sites couldn't perceive individual shoppers at the other end of the line. All they saw were flurries of

unrelated queries.

That meant you couldn't mark items as you browsed for later purchase. Instead of paying for everything at once, consumers would have been forced to buy their CDs and books one at a time. The challenge for Montulli was to get a web site to see its users as distinct individuals so that it could remember things about them.

His answer was the cookie, a tiny computer file that could be stored on a user's PC. (Programmers had long used the term to refer to an arbitrary piece of data.) With a cookie, a web server essentially says: Here, hang on to this file and show it to me the next time you ask me something. It will remind me who you are and what we've already talked about.

Netscape built cookies into the first version of its browser, making them a de facto standard for the Web. Like any good programmer, Montulli designed cookies to be flexible. "Netscape was about building the infrastructure for the Web," he said. "We tried to build things that would be useful for the entire community."

Use it they did. When web sites began to run paid advertisements, advertisers wanted to know the size of the audience. Sites counted up "hits," but couldn't tell if 10 hits represented 10 different users or one person visiting 10 times. By assigning each visitor a unique cookie, sites could discern one visitor from another and make accurate tallies.

From there, it wasn't much of a leap to use cookies to track visitors' habits, noting things like which pages they visited most frequently. DoubleClick, which sells advertising on a network of sites, figured it could charge more for ads if they were targeted based on consumer behavior.

Now DoubleClick wants to go a step further, matching up cookie data with information in traditional direct-mar-

keting data bases. Faced with a company that can potentially track where you surf and knows your mail-order shopping habits to boot, some consumers have started getting anxious. Earlier this month, DoubleClick disclosed that the FTC was examining its practices, which depend heavily on cookies.

Montulli, 29 years old, says DoubleClick and dozens of other web marketers are using cookies in ways he never intended. But he admits his design gave an unintended boost to tracking efforts. Here's why: When a web site displays a page you've requested, it can pull elements, including ads, from other sites. That allowed ad networks to put their own cookies on consumers' PCs and track them across many sites. Montulli later added to Netscape an option that lets users refuse cookies from sites other than the one they're visiting.

Efforts to reform cookies further haven't met with much success. After building cookies into Netscape Navigator, Montulli helped develop an official standard for the Internet Engineering Task Force.

The proposal calls for each cookie to include a description of its purpose so consumers could inspect their cookies and find out what they're up to.

The idea hasn't gotten very far. The fact is, it's too late to tinker with cookies now. They power practically every on-line shopping cart and every paid advertisement. In less than six years, they've become part of the fabric of the Web.

A lot has changed for Montulli in that time. Once the quintessential unkempt geek, he's now a Netscape millionaire with a steady girlfriend, a great haircut and stylish clothes. The People magazine story even compared him to hunky actor Dylan McDermott.

He's working at a buzzy start-up called Epinions.com, a shopping guide where visitors can read and post product reviews. Naturally, it uses cookies.

EXTINCTION: Exec warns of technology

Continued from Page A-1

Joy is disturbed by a suite of advances. He views as "edible" the prediction that by 2030, computers will be a billion times more powerful than they are today. He rejects the possibility that robots may exceed humans in intelligence while being able to replicate themselves.

He points to nanotechnology — the emerging science that seeks to create any desired object atom by atom — and agrees that it has the potential to allow inexpensive production of smart machines so small they could fit inside a blood vessel. Genetic technology, meanwhile, is inexorably generating the power to create new forms of life that could reproduce.

What deeply worries him is that these technologies collectively create the ability to unleash self-replicating, mutating, mechanical or biological plagues. These would be a replication attack in the "physical world" comparable to the replication attack in the virtual world that recently caused the shutdowns of major commercial web sites.

"If you can let something loose that can make more copies of itself," Joy said, "it's very difficult to recall. It is as easy as eradicating all the mosquitoes. They are everywhere and make more of themselves. If attacked, they mutate and become immune. That creates the possibility of empowering individuals for extreme evil. If we don't do anything, the risk is very high of one crazy person doing something very bad."

What further concerns him is the huge profits from any single advance that may seem beneficial in itself. "It is always hard to see the bigger impact while you are

in the vortex of a change," Joy wrote. "We have long been driven by the overwhelming desire to know that is the nature of science's quest, not stopping to notice that the progress to newer and more powerful technologies can take on a life of its own."

Finally, he argues, this threat to humanity is much greater than that of nuclear weapons because those are hard to build. By contrast, he says, these new technologies are not hard to come by. Therefore, he reasons, the problem will not be "rogue states but rogue individuals."

Joy's critique is striking because computer industry technologists, almost without exception, take a more sanguine view of the social consequences of advances. They typically argue that any negative effects will be far outweighed by the positive effect of new technologies.

Nathan Myhrvold, a physicist on leave from his job as the chief technology officer at Microsoft Corp., said in an e-mail interview: "People have made apocalyptic predictions about technology constantly for as long as there has been technology. I think it is because change frightens them. What is more, the most common form these dire predictions take is 'this next generation of stuff — wow! that is really different and really scary.'"

Asked if he thinks a technological species could expect to survive the accelerating evolution of its market-driven technologies, Joy said: "The answer is yes but not without additional care. I think it's possible but it's not a given. Survival won't come for free."

□ The New York Times contributed to this story.

Technology creator warns of its threat to mankind

ADN 13 Mar 2000

By JOEL GARREAU
The Washington Post

A respected creator of the Information Age has written an extraordinary critique of accelerating technological change in which he suggests that new technology could cause "something like extinction" of humankind within the next two generations.

The alarming prediction, intended to be provocative, is striking because it comes not from a critic of technolo-

gy but rather from a man who invented much of it: Bill Joy, chief scientist and co-founder of Sun Microsystems Inc., the leading web technology manufacturer.

Joy was an original co-chairman of a presidential commission on the future of information technology. His warning, he said in a telephone interview, is meant to be reminiscent of Albert Einstein's famous 1939 letter to President Roosevelt alerting him to

the possibility of an atomic bomb.

In a 24-page article in the April issue of Wired magazine that hits stands today, Joy says he finds himself essentially agreeing, to his horror, with a core argument of the Unabomber, Theodore Kaczynski — that advanced technology threatens humans.

"I have always believed that making software more reliable, given its many uses, will make the world a safer and better place," Joy writes in

the article, which he worked on 18 months. "If I were to come to the opposite, then I would be morally obligated to stop this work. I can imagine that such a day may come." Joy enjoys a level-headed reputation in the industry.

"Nobody is more phlegmatic than Bill," said Stewart Brand, an Internet pioneer. "He is the adult in the room."

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Web attacks raise concerns about growth

NEW YORK (AP) - A swarm of recent hacking attacks highlight one emerging concern about the Internet: It may be growing too fast for security to keep up with technology.

Some security experts believe it's time to focus on making the Net safer, which could mean rebuilding much of the underlying infrastructure from scratch. After all, consumers and businesses now use the Internet for tasks unforeseen 30 years ago.

Security was an afterthought when Internet standards were developed by university thinkers and computer administrators, says Russ Cooper, who runs the NTBugtraq Web site devoted to security.

"This is now the foundation for billions of dollars worth of commerce," Cooper said. "It is inherently flawed because we don't check to see if what it's being used for is what it is intended for."

Randy Sandone of Argus Systems Group Inc. is blunter: "The Web is rotten at its core."

Yahoo!, Buy.com, eBay, ETrade and other prominent sites were paralyzed for hours at a time last week when hackers overloaded them with fake traffic.

The attacks followed several computer virus outbreaks last year - such as Melissa - which spread rapidly by taking advantage of functions that were designed to make Internet use friendlier.

And last month, a hacker stole credit card numbers from the Internet music retailer CD Universe, then released thousands of them on a Web site after the firm refused to pay \$100,000 ransom.

"I fully expect the Internet to ultimately be safe and stable," said Stephen Gorrell, program manager for Norton Internet Security

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software. "However, in the period of record growth, it's not surprising new holes are discovered."

The Internet's developers could not have effectively countered threats to commerce because e-businesses did not yet exist, Gorrell said.

As the Internet grows, so do the numbers of hackers and potential victims. And hackers are becoming more sophisticated, with some even developing tools to automate their attacks.

Software companies, some critics say, contribute to the problems by releasing products that still have security holes.

"Each day, technology is changing," said Robert Ing, who handles electronic security for SBR International Inc. in Toronto. "There's a rush to get products out to market because it is a competitive marketplace. Sometimes, security is overlooked."

Steve Hunt, security analyst at Giga Information Group in Chicago, hopes the latest attacks will encourage companies to take security more seriously.

"We owe quite a debt of gratitude to hackers to show us where our pants have been down," he said.

Security and Internet experts differ on how far they need to go - and that itself is a problem. Some believe in completely updating equipment and software to reduce users' anonymity and improve authentication.

In the offline world, businesses have experience with security guards and special locks. Some practices are even required by law or insurance companies.

But the Internet community has yet to agree on such standards, said Harris Miller, president of the Information Technology Association of America.

Phil Attfield, director of technical marketing at McAfee.com, said Internet security will eventually catch up.

"The approaches are going to have to become more formal rather than ad hoc," he said. "We've been getting there incrementally. That's the way technology is evolving."

But hacking will never completely disappear, said Keith Teare, the chairman and chief executive of RealNames. Vandals broke into RealNames' computers Wednesday, and the company had to warn some 20,000 customers that their credit card numbers might have been stolen.

"For every secure environment, there will be somebody prepared to try to break in," Teare said. "If they are clever enough, they will find holes."

Greg Hawkins, chief executive of Buy.com, said the attacks on his shopping site and others raised awareness.

"This is a new frontier. It's big, it's fast, and it's growing rapidly," he said. "With that growth will come continued challenges to make sure it's a secure and effective environment. We are clearly going to have growing pains like this from time to time."

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Inter@ctive Week

April 20, 1998

ISP Posts Blacklist Of Smurf-Friendly Networks

By *Randy Barrett*

One Chicago-based Internet service provider is blocking more than 40 Internet networks from its access system, until they stop allowing hackers to use bandwidth for "smurf" attacks.

Macro Computer Solutions Inc. (www.mcs.net) owner Karl Denninger posted a notice April 11 on the North American Network Operators Group e-mail list stating he was fed up with smurf attacks and would no longer exchange traffic with networks that originated the assaults.

"I'm going to start posting the blacklist here weekly in the hopes that peer pressure will cause people to clean up their acts," Denninger wrote.

Denninger listed the Internet Protocol addresses -- but not names -- of 30 networks and has added 12 more since. Most are larger Internet providers and academic networks, he said.

For network administrators, being a collaborator in a smurf attack means doing nothing at all. The attacks are often aimed at Internet Relay Chat servers or the Internet service providers (ISPs) that host them. Johnny Hacker typically gets mad at Betty Hacker during a chat session and tries to knock her offline by burning down her provider. All the assault requires is a basic Internet account.

Here's how it works: Johnny Hacker sends a stream of diagnostic "ping" messages to a second-party network's host servers. Many of those servers are set to automatically respond, but Johnny places a false return address and those responses stream to a third-party ISP that is really the target of the assault. So a single ping stream is amplified hundreds or thousands of times and clogs the target network's bandwidth -- particularly smaller providers using a single T1 (1.5-million-bit-per-second) line.

The fix is simple, Denninger said: Networks must turn off the "directed broadcast forwarding" function in their routers, and the ping responses will never be sent.

"Some of them honestly don't know about it. My response is, I'll deny you access to my network until you get your act together," he said.

Denninger's smurf amplifier blacklist is getting some support from network

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administrators, but it is unclear whether any are using it to block errant networks or might be compiling their own rogues' gallery.

Jason Weisberger, chief of network operations at SoftAware Inc. in Marina del Rey, Calif., said he's not interested because a blacklist limits his own customers' connectivity. "Punitive filtering, while a good short-term fix, can create problems farther out," he said.

Denninger has been similarly zealous about the Enhanced Domain Name System (www.edns.net), an alternative to InterNIC, which splintered last fall and is now in limbo.

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