



125 South Ninth Street, Suite 701
P.O. Box 1161
Philadelphia, PA 19105-1161
215-592-1513, ext. 18
215-592-1343 (FAX)
717-233-4208

James D. Crawford
PRESIDENT

Deborah Leavy
EXECUTIVE DIRECTOR

Susan Frietsche
DEPUTY DIRECTOR

**Testimony on HB 2414,
Limiting State Constitutional Protection
From Unreasonable Searches and Seizures,
Before the House Judiciary Committee
May 1, 1990**

Scott Burris, Esq.
ACLU of Pennsylvania
125 S. Ninth Street, #701
Philadelphia, PA 19107

My name is Scott Burris, and I am a staff attorney with the American Civil Liberties Union of Pennsylvania. The Pennsylvania ACLU is a nonpartisan, nonprofit organization of roughly 14,000 members whose sole purpose is the defense of the rights and freedoms guaranteed by our federal Constitution and Bill of Rights, and by our state constitution's Declaration of Rights.

I would like to thank Chairman Caltagirone and members of the House Judiciary Committee for the opportunity to testify on HB 2414. This proposed constitutional amendment would limit the power of our state constitution to protect Pennsylvania citizens against certain kinds of unreasonable searches and seizures. It constricts the privacy rights that Pennsylvania independently confers on our citizens, and cedes to the federal courts our state's power to determine how vigilantly the right to privacy will be protected here. Most significantly, the bill could well have an impact beyond the criminal context: family and marital privacy, reproductive privacy, and informational privacy are currently guaranteed by the federal Bill of Rights, but reproductive privacy in particular is under siege. Should the U.S. Supreme Court weaken the right to reproductive privacy, Pennsylvania will need the power to safeguard our privacy rights independently under our own constitution. HB 2414 throws that power away. The ACLU urges the Committee to reject this extremely dangerous proposal.

Article I, section 8 of the Pennsylvania Constitution protects the right to be free from unreasonable searches and seizures.

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

This amendment grew out of the colonial citizenry's outrage over government abuses under English rule. Article I, section 8 was adopted well before the federal Constitution and Bill of Rights and today extends broader privacy protections in a few important areas than its federal counterpart, the Fourth Amendment to the U.S. Constitution.

As you know, the federal Constitution establishes a floor of rights below which states may not sink, not a ceiling above which they cannot rise. As noted in Commonwealth v. Tate, 495 Pa. 158, 169-170, 432 A.2d 1382, 1387-1388 (1981), "It is well settled that a state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution, and that the rights so guaranteed may be more expansive than their federal counterparts."

We are proud that our state courts have interpreted our state constitution more protectively than the U.S. Supreme Court

has interpreted the Fourth Amendment. As the Pennsylvania Supreme Court noted in Commonwealth v. Sell, 470 A.2d 457, 467:

[T]he survival of the language now employed in Article I, section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.

Only rarely does the state recognize greater protection under the state constitution than under the federal Constitution.

Here are a few examples:

1. Bank records.

In Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979), the state Supreme Court recognized that Pennsylvania citizens have a right to privacy in their bank records. Just because we reveal our bank records to tellers for the limited purpose of making a transaction does not mean that our records should be open for all to see. If a law enforcement agent wants to look at our bank records, DeJohn says, that agent must obtain a warrant supported by probable cause--the same standard that must be met in order to search your home or rummage through your luggage.

This standard is eminently reasonable. Most people would agree that their bank records should be private documents, and would object strenuously if you told them they had no right to object to an unreasonable police search of their bank account records.

2. Telephone numbers.

Recent cases have recognized that Pennsylvanians have a right to privacy not only in their phone conversations, but also in the telephone numbers they call. Commonwealth v. Beauford, 327 Pa. Super. 253, 475 A.2d 783 (1984), allocatur den., 508 Pa. 319, 496 A.2d 1143 (1985), and Commonwealth v. Melilli, 521 Pa. 405, 555 A.2d 1254 (1989), both affirm that Article I, section 8 requires a warrant supported by probable cause before a pen register can be used to collect and seize a list of phone numbers called from a particular telephone. The Beauford court based its decision to protect phone numbers on "Pennsylvania's long history of affording special protection to the privacy interest inherent in a telephone call."

This constitutional interpretation is also quite reasonable. People do not expect their telephone conversations to be taped and listened to; nor do they expect that the phone numbers that they call will be secretly scrutinized. Beauford affirms what most people probably take for granted: police seizure of a list of phone numbers you have called from your telephone, when there is no probable cause to believe you have committed any crime, is unreasonable conduct from which you are protected by our constitution.

3. Automatic standing to assert privacy rights without self-incrimination.

In Commonwealth v. Sell, 470 A.2d 457 (1983), the state Supreme Court held that a defendant accused of a possessory offense has automatic standing to challenge the admissibility of evidence alleged to have been obtained through an illegal search and seizure.

The court was troubled by prosecutors playing both sides of the fence. In order to resist a suppression motion, the prosecutor would have to argue that the defendant did not possess the searched item, but in order to establish that the defendant committed a crime of possession, the prosecutor would have to argue that the defendant did possess the searched item. To resolve this conflict, the court in Sell established a rule of automatic standing to challenge illegal searches in possessory offense cases. The Sell decision establishes standing only. It does nothing more than permit the defendant to make the argument that evidence was illegally obtained; that argument can still fail. By preserving the ability to challenge illegal police conduct, the Sell decision gives Article I, section 8 vitality.

These few examples demonstrate that the Pennsylvania Supreme Court has carefully and deliberately provided greater protection of privacy than the U.S. Supreme Court. While these decisions arose in the context of criminal prosecutions, the fact is the

privacy principles they established protect the innocent as well. These principles are far from extreme; rather, we think they represent the mainstream of thought on privacy protection in this Commonwealth.

HB 2414 is a betrayal of our nation's federalist heritage. With this amendment, Pennsylvania is surrendering part of our sovereignty. The U.S. Supreme Court's increasingly cramped reading of the Fourth Amendment means that more than ever before in history, we need Article I, section 8 to continue to serve as an independent source of supplemental rights. The broad surrender of state authority that HB 2414 contemplates leaves Pennsylvanians helpless against any future curtailment of our rights by the federal courts.

Whether you agree with the state Supreme Court's decisions about bank records, phone numbers, and standing to challenge illegal searches and seizures, HB 2414 attacks not only criminal defendants' privacy rights, but the broader privacy rights of every citizen. The right to privacy is, as you know, under fire from an increasingly conservative U.S. Supreme Court. HB 2414 essentially repeals a basic state constitutional provision concerning privacy. Should the Supreme Court weaken the right to choose abortion, for example, HB 2414 could prevent the state Supreme Court from conferring that right independently under our

own constitution.

Even if you decide that you find a particular aspect of the state Supreme Court's interpretation of our Declaration of Rights so repugnant that you want to amend the state Constitution, are you really prepared to say you will never agree with any state Supreme Court interpretation of Article I, section 8? Are you willing to gamble that you will always and forever agree with every U.S. Supreme Court decision that limits Pennsylvania's privacy rights, no matter how extreme the Supreme Court might become in the future?

One final point: should HB 2414 be put to the electorate for ratification, it is hard to believe that most voters will know the full extent of the protection they will be losing. If the General Assembly wants to propose taking away constituents' privacy rights in bank records and phone numbers, it is fairer to those constituents just to say so. This amendment is completely opaque, and extremely daunting for people without a law degree or the leisure time to read the state Supreme Court's latest search and seizure cases.

For 200 years, the Declaration of Rights has helped make Pennsylvania the kind of free society to which nations throughout the world look as a model. We urge you not to amend the Declaration of Rights at all, especially not with an amendment as unlimited in scope as HB 2414. It is a terrible thing to give away

your own power to protect the privacy rights of your citizens, particularly at a time in history when the U.S. Supreme Court is toying with fundamental reproductive privacy rights. Please reject HB 2414, and keep our state Constitution independent and strong.

Thank you.