MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 23, 2001 at 9:02 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: None.

Members Absent: None.

Staff Present: Anne Felstet, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted: HB 25, 2/2/2001; SB 222, 2/2/2001
Executive Action: HB 25; SB 25; SB 29; SB 128; SB 170

HEARING ON HB 25

Sponsor: **REP. PAUL SLITER, HD 76, KALISPELL**

Proponents: **Greg Petesch, Code Commissioner**

Opponents: **None**

Opening Statement by Sponsor:

REP. PAUL SLITER, HD 76,KALISPELL, opened on HB 25, a Code Commissioner bill. He said this piece of legislation came up every session to provide for corrections in erroneous references and defects in the statutes. He pointed out that one of the changes repealed the coal producers license tax and eliminated two references to that tax. He noted there were probably 100 small changes contained within the statutes.

Proponents' Testimony:

Greg Petesch, Code Commissioner, walked the new members of the committee through the process used to produce the bill. He said over the interim they reviewed the Code for errors or problems, then compiled a report submitted to the Legislative Council. A bill, in this case, HB 25, corrected those errors identified in the report. To ensure that changes were not made to substantive law in the Code Commissioner bill, a draft copy of the sections affecting each agency was sent to that agency for review. He then read through a bulleted list and picked out some specifics of HB 25.

Opponents' Testimony:

None

Questions by Committee:

None

Closing by Sponsor:

REP. SLITER closed on HB 25, saying it was important to keep the statutes cleaned up.

HEARING ON SB 222

Sponsor: **SEN. JERRY O'NEIL, SB 42, KALISPELL**

Proponents: **Mike Fellows, Montana Libertarian Party**
Larry Dodge, representing himself
Gary Dusseljee, representing himself

Opponents: **John Connor, Montana County Attorneys representative**

Opening Statement by Sponsor:

SEN. JERRY O'NEIL, SB 42, KALISPELL, opened on SB 222, which was tailored to change the Constitution to allow defendants in a criminal trial to tell the jury how the law applied to them. SB 222 allowed the defendant to say whether it was an intent of the law to punish the defendant for the conduct, whether the law was Constitutional, and whether the potential sentence was out of line with the crime. He said it provided defendants with the same rights before a jury that they had before a judge. He felt that by allowing judges to continue to give jury instruction and ruling on evidential matters, the bill did not take away the judges power to run the court. However, it would allow the accused the power to tell the whole story. He felt it would make juries better informed and give them autonomy over the outcome, while at the same time keeping prison population numbers down.

Proponents' Testimony:

Mike Fellows, Montana Libertarian Party, submitted his testimony in support of SB 222, **EXHIBIT(jus18a01).**

Larry Dodge, representing himself, submitted his supportive testimony along with highlights from the bill, **EXHIBIT(jus18a02).**

Gary Dusseljee, representing himself, said he had worked on the South Dakota initiative that had similar wording. He said the voters liked the concept. He had found stories of people who had been brought up on charges, but because they could not disclose the full story, they were found guilty of a crime that they really hadn't committed. He felt the people had been hurt by misapplication of the law. He said SB 222 was simply common sense and if it was presented as an initiative, then it would be accepted outright.

Opponents' Testimony:

John Connor, Montana County Attorneys representative, Chief of Special Prosecution Unit of Attorney General's Office, opposed these measures for two reasons: 1) simply not good public policy, 2) these issues attempted to address or fix something that was not broken. He felt the bill and its concepts created more confusion and greater possibility for judicial and jury error than it tried to address. He went on to address specific points from the bill and how they either caused confusion or were already in practice. He also pointed out that Legislative intent was decided by the judge because the judge was trained in construing legal issues. To refute the statement that accused people should present the same to juries as they would a judge, he said that juries purposefully didn't decide issues of law because they did not have legal training as a judge did. He noted that the word "merit" was the most troubling aspect of the bill because it allowed six or 12 people, depending on the forum, to decide, virtually without any information, the merit of the law. He juxtaposed that with the current legislative process that required two separate committees to hold hearings about the information, then for that information to pass through discussions at executive action, then more discussion on the floor of the two houses. After that it would be reviewed by the Governor. He argued this bill sought to deject the law used in the court case as well as the system used to implement it. He said it only took one juror to defeat a conviction, and if a juror was given the ability to reject the law without knowing the law or its legislative history, then the juror could hold up the entire process. He said that was not healthy for the prosecution nor the defense.

{Tape : 1; Side : B}

Beside the reasons already given, he found opposition to the vague sentencing provisions of the bill. He noted that sentencing was the prerogative of the court and they were the most complicated issue in criminal procedure. Because the sentencing provisions were vague, he felt they would be difficult to establish both now and later. He addressed another point saying this bill would do serious harm to the integrity of the jury process. He felt it was a group of people with various prejudices and backgrounds. If this group was allowed to make its own assessments of the law, rather than to follow the laws, then six or 12 different perspectives of the law would be given. They would be deciding the merit of the law without the legislative history, meaning, intent, purpose, and the construction of the law. This would do serious harm in protecting the rights of the accused and would impose a system of inequality. He argued that 12 different views of justice made it so justice could not occur because justice was synonymous with equality. In order to get that equality, the same law or same perspective of the law would

have to be used by the jurors, whose job was to decide the facts. He spoke to the notion that the bill would decrease prison populations by increasing acquittals, and alluded to the danger of not being able to discriminate between a good acquittal and a bad acquittal. However, he didn't anticipate more acquittals, but rather more hung juries. He felt that was expensive because the case would have to be retried. If the jury was allowed the ability to debate the law as well as the facts, then it increased the potential for non-unanimous verdicts. He felt the current process worked and did not need to be fixed. He said people elected legislators to decide the law, elected judges to construe the law as enacted by the legislature, enacted law enforcement officers and prosecutors to enforce the law, and they sat on juries to decide if the law was enforced correctly. This system worked to protect the rights of the defendant. He closed with a favorite observation about the jury system by a British writer, G.K. Chesterton. "Our civilization has decided that determining the guilt or innocence of men is a thing too important to be trusted to trained individuals. When it wants a library catalog or the solar system discovered or any trifle of that kind, it used its specialists. But, when it wishes anything done which is really serious, like determining guilt or innocence, it collects 12 of its ordinary citizens."

Questions from Committee Members and Responses:

SEN. MIKE HALLIGAN asked about the hung-jury issue because of the opportunity for all the jurors to give their interpretation of the law. He wanted to know if more cases would be tried more than once. **SEN. O'NEIL** didn't think there would be more hung-juries because people would have gotten all the facts. The judge would still be giving jury instruction to avoid anarchy in the court. He argued that a hung-jury might not always be so bad, but would put common sense into the court system. He pointed to the highest rate of incarceration and said the bill was a minor repair to the break in that system, rather than anarchy, to bring it closer to the center.

SEN. HALLIGAN referred to testimony by Larry Dodge that at the founding of the country, juries used to be able to decide the merit of law, but since then, laws were codified. He said the former method discriminated against people and due process issues were taken to the Supreme Court to create the codification process. He suggested that the legislature was a 150 member "jury" deciding if a criminal law should be passed. He asked whether or not the legislature could be seen as taking the place of juries and performing their task of deciding the merit of laws. **SEN. O'NEIL** agreed that the legislature did a good job generally, but some things slipped through their fingers. He

presented the example of a bill recently debated in the committee regarding videotape rentals. He noted that most people would want to point out that it was not legislative intent to incarcerate a person for not returning a video.

SEN. HALLIGAN asked about the whole story and whether the accused as well as the prosecution could divulge all information known. **SEN. O'NEIL** believed that under the current system of due process that the prosecution also had a say and the jury would want to hear both sides equally.

SEN. DUANE GRIMES asked what case prompted this piece of legislation. **SEN. O'NEIL** said there was no specific case, it was a general thing. One of the issues was the federal government imposing sentences. Also a case involving a sheep rancher defending himself, but not being allowed to argue self defense. He felt it was time to reduce the numbers in prison and this bill would give the accused more rights as well as the jury more rights.

CHAIRMAN GROSFIELD asked why apply this to criminal cases and not also to civil cases. **SEN. O'NEIL** felt it was already available to a certain degree in civil cases.

Closing by Sponsor:

SEN. O'NEIL closed on SB 222. He said it would be good public policy to empower the jury to let them know they are hearing the case rather than having them in the dark without the full story. It would be healthy. It attempted to make something that was not working perfectly a little better, not fix something that wasn't broken. He reiterated that the U.S. had the highest rate of incarceration in the world, and said we couldn't afford it. Therefore, to cut expenses, this would be a good alternative. He argued that it would not create a situation where juries acquitted a horrible criminal, but would allow them to acquit decent people who had been caught in a situation that did not strictly apply to them. The jury would have the ability to make something right.

EXECUTIVE ACTION ON HB 25

Motion/Vote: SEN. GRIMES moved that **HB 25 BE CONCURRED IN.**
Discussion: None
Motion carried 8-0, SEN. HOLDEN excused. **SEN. GRIMES** carried the bill on the Senate Floor.

{Tape : 2; Side : A}

EXECUTIVE ACTION ON SB 170

Motion: **SEN. MIKE HALLIGAN** moved **AMENDMENTS ON SB 170.**

Discussion:

SEN. MIKE HALLIGAN said a few of the changes were requested by Judge Larson. He wanted mediation struck and have alternative dispute resolution included because of the various forms to handle the cases outside of court. They fixed an internal reference in amendment #2. The judge also took the Constitutional right and put it in a policy section. In amendment #5 the court made decisions in the permanency hearing, not the state.

Valencia Lane, Legislative Staffer, also clarified what the amendments said. She began with #6 saying it clarified the language as to what the court could do. Amendments #7, #8, and #9 referenced the 12 year old.

SEN. HALLIGAN informed the committee that the old statute said if a child was younger than 12, they were not to go into guardianships, but should be adopted. However, statewide, many grandparents, aunts, and uncles, were parenting children who retained a bond with their parents. Therefore, it was not a good thing to terminate that, and they still could proceed with a guardianship with a family member. The struck language reflected those findings.

Ms. Lane said those were the substantive changes and that 41-3-413 was a very short section in existing law, and the substance of that section was not needed. That clarification was put into the repealers.

SEN. HALLIGAN clarified that the 10 day period was retained in the case of a removal of a child. If a removal was not necessary, the 20 day process could still be used to show-cause. A hearing could be used if requested. Attorneys would be appointed to parents for aggravated circumstances cases earlier. The court could not delay on that issue and wait for filing later petitions because parental rights were at risk at that point. It created an earlier hearing process. The alternative dispute resolution kept people out of court a bit more. The amendments clarified the use of Temporary Investigative Authority (TIA) because it tended to be used somewhat endlessly. It called for a 90 day investigation with a higher standard applied if more time was needed. A temporary legal custody would be the higher standard rather than probable cause. It forced the state to do

things quicker and prove its case. The bill clarified which petitions should be filed, when they were filed, who had to prove what, and when it had to be done.

SEN. GRIMES asked if amendment #4 was a significant change of policy in those permanency hearings.

SEN. HALLIGAN replied it was current law. The state had to make reasonable efforts before a child was ever removed. They also had to make reasonable efforts to reunify once a child was taken away. Also a reasonable efforts standard was applied in permanency if it was determined parents could not do it. It did not change existing law.

SEN. GRIMES questioned the wording that "the state had made reasonable efforts to prevent placement."

SEN. HALLIGAN said it should say, "prevent removal", but the placement indicated foster or state placement.

Vote: Motion **carried 7-0**, **SEN. DOHERTY**, and **SEN. HOLDEN** excused.

Discussion: (on **SB 170** as amended)

SEN. JERRY O'NEIL referred to page 17 line 29 of the bill regarding hearsay evidence by the affected child being admissible at the adjudication hearing. He argued this would change the rules of evidence to some degree. Current law allowed an excited utterance as hearsay. He presented a scenario of a social worker using leading or suggestive questioning unintentionally and using that at the hearing without the child's presence. In those cases, he wanted the social worker to be able to bring a tape recorder when the child was interviewed to provide evidence on what questions where asked and how they were asked. To open it up to any hearsay evidence would be a big mistake he thought.

SEN. HALLIGAN said it was a good point, but existing law was not being changed in the bill, despite an underlying statement. It was simply reorganized. In a probable cause hearing, hearsay evidence of a child, or anybody, was already allowed in the TIA stage. Earlier in the bill it talked about the applicability of preponderance of evidence, rules of evidence, and rules of civil procedure. It did not change the requirement to disallow hearsay evidence at the temporary legal custody stage or the termination stage. He clarified it was only in reference to the 90 day TIA hearing as stated above in line 18. It did not change the standard for any other hearings.

SEN. HALLIGAN looked up the place in statute, 41-3-403, sub c, "hearsay evidence of statements made by the affected youth is admissible at the hearing or at the contested hearing proceeding under this rule and the rules of civil procedure." It was not later repeated. He indicated they were very concerned about that and there was no change in hearsay. He explained that in a criminal action, hearsay statements could be heard from anyone to deal with the issues. In family law, it was not a probable cause, nor an adjudication of abuse and neglect based on hearsay statements, other than the ones that were not hearsay, such as the excited utterance.

SEN. O'NEIL said he didn't have a problem with hearsay use at a show-cause hearing, but he did have a problem with it at adjudication, 90 days after the show-cause hearing. He was leery of bringing out unmitigated hearsay at this stage that could remove a child from a family.

Ms. Lane pointed out that in the new section 6 of the bill on page 12, line 6, the hearsay information was allowed at the show-case hearing, as well as at the adjudicatory hearing. It would be a policy decision of the committee to decide if hearsay evidence would be allowed at both hearings. Montana Rules of Civil Procedure stated that as to rules of evidence, the legislature could make rules on the admissibility of hearsay evidence.

SEN. HALLIGAN asked for correction, but he understood that this language was not proving that a child was a youth in need of care; it was a higher standard.

Ann Gilkey, Court Assessment Program, felt that **SEN O'NEIL** was correct. It did add hearsay past the show-cause hearing. She felt the evidence currently allowed at the show-cause hearing was vital, but agreed that the committee would have to make the policy decision about allowing more evidence at the adjudicatory stage. She acknowledged that it had become practice to use hearsay evidence at the adjudication hearing.

SEN. O'NEIL suggested changing the bill. He wanted hearsay evidence given by professionals to be video or audio taped after the show-cause hearings.

CHAIRMAN GROSFIELD suggested that this change would take some time, so they would not take action on this bill until another day in order for more information to be found. He asked for other issues to also be considered in that time.

SEN. PEASE asked about the tie-in between the children on reservations that have some connections with social services

outside the reservation. He referred to the amendment just passed, page 2, line 3 asking if it related back to grandparents or aunts and uncles on the reservation.

SEN. HALLIGAN clarified that the section had moved, but that the existing law had not changed. Any agreements between the tribes and the state in terms of administering the programs remained the same. Where tribes were contracting and handling their own affairs, they would dictate how the law was administered on the reservation. State social workers would not interfere in that. Where tribes had not contracted with the state, they still used tribal social workers. This did not change the current practice, but attempted to strengthen it by mentioning the existence of the Indian Child Welfare Act, which had never been stated in this statute prior to this.

CHAIRMAN GROSFIELD inquired about the possibility of a variable time-line that considered the rural areas as well as the urban centers.

SEN. HALLIGAN said they had worked to address that issue. The rural areas had concerns about access to judges. To help that situation, telephonic hearings had been introduced. The time-frame regarding the removal of a child had been set within 10 days, unless both parties agreed to waive the time frame. If a hearing (live or telephonic) could be scheduled sooner, than that was fine. Without a removal of a child, then the current statutory rule of 20 days applied. He felt a floating time frame would not work to meet the due process requirements.

CHAIRMAN GROSFIELD asked if there was any incentive to hold the hearing before the 10 days.

SEN. HALLIGAN mentioned that the Supreme Court had adopted the rule that these cases were the top priority and they would be heard first. Many district courts also tried to use that rule of thumb. However, when criminals with Constitutional issues come up against these cases, usually the criminals in jail had priority. It could be stated in the statute that district courts ought to hear these cases first, but most of them treated them as high priority anyway.

SEN. GRIMES mentioned that people involved with the Casey Program and others were concerned about time delays and the fiscal note mentioned that 10 percent would be delayed longer. He asked if that was because of mediation. He assumed the time frames were there to help the process along.

SEN. HALLIGAN disagreed with the fiscal note and did not sign it because there would be no delays. Even using alternative dispute resolution would put the case to finality quicker.

{Tape : 2; Side : B}

Ms. Gilkey also didn't agree with the fiscal note. The alternative resolution piece would not cause delays, but would expedite the whole program. People would agree without having to go to court, an adversarial environment.

CHAIRMAN GROSFIELD said **Ms. Lane** pointed out that on lines 13 and 14 of the bill, that the courts had to give highest preference to these cases. He again asked for other issues regarding the bill.

SEN. HALLIGAN recalled that in the testimony of **Jeff Weldon from the Office of Public Instruction** there might be a problem with the sharing of school records or identifying information between school districts and social workers in these cases. **Mr. Weldon** looked into that and found that federal law did allow for only identifying information to be shared between the parties. **SEN. HALLIGAN** said therefore, that part of the bill would be OK.

CHAIRMAN GROSFIELD said further executive action would be held for one more day.

EXECUTIVE ACTION ON SB 128

DISCUSSION:

SEN. DUANE GRIMES explained that he was looking into some amendments on the bill. He had found out that the FBI had identified 80 teenagers (aged 12-17) that were in the prostitution circuit. Therefore, he was researching the possibility of a committee bill on a task force to look into the problem. Also, since it had come to light that the pimps were rather wealthy, he had **Al Smith** work on some civil remedy language that the committee may want to consider. Thirdly, because the circumstances surrounding **Ms. Smith, the lady who testified on the bill**, was that she was virtually a slave, coerced and seduced into the lifestyle and held by force, then she was manipulated by the media and paraded on an HBO special, he was considering a resolution that would ask the various entertainment industries to exercise extreme caution since so many young ladies were being recruited into this heinous lifestyle. Because of these issues, **SEN. GRIMES** asked that the bill not be passed out of committee today.

CHAIRMAN GROSFIELD agreed they would come back to the bill in a few days.

EXECUTIVE ACTION ON SB 29

Motion: **SEN. MCNUTT** moved **AMENDMENTS TO SB 29.**

Discussion:

Chuck Hunter, Department of Public Health and Human Services, reiterated that the amendments rectified some drafting oversights. The main purpose of the bill was to remove references to youth in need of care, ie. abused and neglected kids, from the youth court act and separate those two acts cleanly. In the draft of the bill, a few references were not included, the amendments brought them in with conformity with the rest of the bill.

Vote: Motion **carried 8-0, SEN. HOLDEN** excused.

Motion/Vote: **SEN. MCNUTT** moved that **SB 29 DO PASS AS AMENDED. Motion carried 8-0, SEN. HOLDEN** excused.

EXECUTIVE ACTION ON SB 25

SEN. RIC HOLDEN mentioned the amendment brought up by the proponents at the hearing to change the word "burning" to "desecration of".

Motion: **SEN. HOLDEN** moved that **SB 25 BE AMENDED** to reflect that request.

Discussion:

SEN. JERRY O'NEIL said that change made it a much more broad bill. He felt the word desecration could also mean attacking the things that were related to the flag. For instance somebody stopping a flag ceremony could be considered desecration or someone leaving it out in the rain, or improperly folding the flag could also be desecration.

SEN. HOLDEN withdrew his motion to **SB 25,** because he didn't want to get into all of that.

Motion: **SEN. HOLDEN** moved that **SB 25 DO PASS.**

Substitute Motion: **SEN. DOHERTY** made a substitute motion that **SB 25 BE TABLED.**

Discussion:

SEN. STEVE DOHERTY said the bill was an attempt to get around a Supreme Court decision that the right of free speech included the act of burning the flag; something that most people found offensive. He argued that this bill negated the essence of speech, and the essence of speech that would be protected in the country because it attempted to only protect speech of which the people approved. He countered that the essence of free speech in this country was that speech, which could be found to be personally offensive was allowed, encouraged and protected. The Supreme Court upheld that belief in their decision in Texas v. Johnson. He felt the attempt to get around that decision by tying it to "urging someone to riot", or attempting to include it in 45-8-104, incitement to riot, was a thinly veiled attempt that would fail on Constitutional grounds, both U.S. and Montana. He felt the language that would be added to the incitement to riot clause narrowed the clause that was currently in statute. The current statute would allow a county attorney, if someone burned a flag for purposes of urging someone to riot, to prosecute them because of the conduct nature of that specific section of the law. Further, the criminal incitement statute could be found in 45-8-105. Criminal incitement meant the advocacy of crime or malicious damage or injury to property or violence. He felt that was a far more specific and more narrowly drafted piece of legislation especially in light of the fact that no instances in which the statute 45-8-104 were used by county attorneys in Montana could be found. 45-8-105 had been used by county attorneys in Montana and he felt it was applicable to these kinds of instances. His motion to table was not made and should not be seen in any way to be disrespectful to the veterans, to the flag, or to this country. He believed the words of Justice Brennan in Texas v. White, in which he spoke of the resilience of the flag and watching especially the flag as it stood through the night of the bombardment that Francis Scott Key was able to memorialize in the *Star Spangled Banner*. There was an attempt to desecrate, and burn, and knock down the flag. It's resilience was the allowance of speech which could be found offensive and that was why he made the motion.

SEN. HOLDEN said the bill was a prospective piece of legislation. He argued legislation had been passed after the fact and that was not good government. Good government looked ahead. That's what the founding fathers justified in the forming of the Constitution and the Bill of Rights. All of those pieces of legislation were prospective in nature. In light of public safety, he didn't know

how anybody could argue that if they were to take a U.S. flag and burn it on Main Street, that it was not a public safety issue. Also, he was not naive enough that an astute trial attorney could not figure out a way to get the client off the hook with the incitement to riot statutes as they were currently written, if this bill was not added. He brought up the "essence". This piece of legislation was in the "essence" of respect. It was done in essence of respect for those that truly regarded this nation as free. The U.S. flag had a special meaning to those people and when the flag was burned, there was no essence of respect. He asked that the tabling motion not be supported by the committee.

SEN. JERRY O'NEIL wished he didn't have to make a vote on this particular bill because he loved the flag and hoped he was willing to die for the flag. He felt the bill was a good, noble idea. He would like to vote for it. However, one of the reasons he was proud of the flag was because the governmental system was not totalitarian.

SEN. MIKE HALLIGAN said he admired **SEN. O'NEIL** for his guts. **SEN. HALLIGAN** said that when he had first come into the Senate, he didn't have the guts to make that decision and he had regretted that vote ever since. He realized that **SEN. HOLDEN** was very sincere about the bill and it was about respect, and potentially disrespect. So, he wanted to relate it to: if a person had such little regard for the First Amendment, then what about the Second Amendment, the right to bear arms? He argued that it couldn't be both ways. If it was a right to keep and bear arms, but except. . . it eroded it. He felt this was the hardest bill to vote on, except maybe an abortion bill, but the members of this committee were chosen because they could make these hard decisions. He couldn't vote for the bill either because for as much as he believed in the flag, he thought the very strength of the country came from the ability to do extreme conduct that would potentially be something hated, disagreed with, but was not against the Constitution.

SEN. DUANE GRIMES added that decisions made in this committee could potentially be First Amendment decisions. There were some things that the nation and the state needed to judge as being cause for crime, resulting in further crime, offensive to others' dignity, and to the Constitution that was upheld in the country. He could recall a number of free speech arguments that he disagreed with, but in this case, because of the nature of the act, it could be construed as less insightful than in other cases. Since it was the nation's flag and used so frequently in the act of rioting, he would be honored to vote against the tabling motion to see the bill through.

SEN. GERALD PEASE offered his support against the tabling motion. He told that he came from a family where many went into the service. The flag meant a lot to them. His grandfather was in WWI, long before the state of Montana recognized Native Americans as citizens of the state. He lost an uncle in the Korean Conflict and had numerous family members, as well as himself in the service. To table the bill would be to go against everything he supported and stood up for when he was in the service as well as his family members.

{Tape : 3; Side : A}

CHAIRMAN LORENTS GROSFIELD changed direction and asked a question about line 12 of the bill regarding the wording. In order to indicate the desire to not be inclusive, were the words "including, but not limited to" used? Would this result in narrowing the incitement to riot act substantially?

Valencia Lane, Legislative Staffer, said the bill would not be any narrower if the language "including, but not limited to" were added.

CHAIRMAN GROSFIELD asked a second question regarding the word "urges". If somebody burned a flag downtown in protest, would it have to be proven according to the bill that it was done with the intent to urge a riot? If somebody burned a flag and a riot resulted, but they didn't have the intent to urge a riot, then there would be no crime.

Ms. Lane said that was the reason the wording "knowingly" was struck and the word "purposely" was added. The intent was to remove the mental intent of intending to cause a riot and just leave it purposely doing the act. The attempt was to take out the intent requirement.

SEN. HOLDEN said the intention of the legislation was not to prevent anybody from burning the U.S. flag if they really cared to do that. The intention of the legislation was to prohibit the act of doing that to create a riot. It was that straight forward.

CHAIRMAN GROSFIELD argued it was one thing to consciously get people to riot and another thing to do something that resulted in a riot, but was not intended to be a riot. He was confused as to how the language would work. He thought that unless it could be proven that the intent was to start a riot, than there was no crime.

SEN. HOLDEN agreed that was an accurate depiction of the legislation.

SEN. WALT McNUTT felt burning a flag with the intent to cause a riot was already covered in statute and this did not clarify anything in the law. He felt it was already covered.

SEN. HOLDEN said the bill was here because the Supreme Court ruled it was OK to burn the flag unless other conditions were present in state statutes, which Montana did not have. This specifically outlined that particular act. He reiterated that an astute trial attorney could use this act in such a way to get the client out of the predicament. Without specifically identifying that type of content, the client could be off the hook, and that was the reason for the bill.

SEN. O'NEIL said he read the bill to say it would be a punishable offense to do an act that urged, not for the actor to urge, but to do an act that urged others to riot. That would also include showing a crowd many dead babies, in the attempt to stop abortions. The act of showing those would also be illegal under this statute. The intent to start a riot would not be punishable, rather that act would. This bill changed the law on several things by putting the act in the position of prosecution and not the actor. He felt it was a dangerous changing of the law.

SEN. DOHERTY closed on his motion by addressing the comment about it being a liberal or conservative idea. He believed that limiting the power of the state when it came to individuals was an ultimately conservative position, and that was why he took his position. If it was a question of respect, he wanted it known that he usually teared up at the *National Anthem* at ball games. If it was a question of stopping the burning of flags, the sponsor had admitted that if someone found the act of burning flags offensive this bill would not stop them. He asked if the bill was needed. He argued an outbreak of flag burning could not be found in Montana in recent dates. He reiterated that the bill would not stop it if it did occur. Therefore, the bill was not needed. He did show respect to members of the armed forces. His father was a combat air pilot in WWII and winner of the Navy Cross, the 3rd highest medal given in the country and five Distinguished Flying Crosses. He was taught at an early age to honor and respect the flag. He did so by making the motion to table.

Vote: Motion **carried 5-4 with SEN. BISHOP, SEN. GRIMES, SEN. HOLDEN, and SEN. PEASE voting no.**

ADJOURNMENT

Adjournment: 10:59 A.M.

_____
SEN. LORENTS GROSFIELD, Chairman

_____
ANNE FELSTET, Secretary

LG/AFCT

EXHIBIT(jus18aad)