

JUDICIARY COMMITTEE

January 27, 1977

The regularly scheduled meeting of the House Judiciary Committee convened at 8:00 A. M. with all members present. Representative Colburn excused. Chairman John Scully presided.

Bills scheduled for hearing were House Joint Resolution #32 and House Bills #121 and 367.

Chairman Scully announced that House Bill #121 would not be heard. The sponsor asked that it be held back temporarily.

REPRESENTATIVE KENNERLY, SPONSOR House Joint Resolution #32 opened the hearing, stating that the reason for this resolution was because the Indian religion in its various forms has been made unlawful. The tribal members have been told that they cannot practice Indian religion. He stated that they should be allowed their tribal customs, the use of feather headdress and robes.

He said that the new Montana constitution did recognize the religion, the culture and traditions of its Indians. This is the only state that has done this. We are looking for some support from the state of Montana so that we can go to the Congress and convince them that they should be free to practice their own religion as they wish to do, without interference or harassment.

We do pay taxes in Montana and the state should take more initiative on the part of the Indians. The Indian contributes much to the state. He commented that when the names of the members of the Historical Society were read on the floor of the House of Representatives, not one Indian was listed. This is not right because the Indians have formed a great part of the history of this state. We have to get back to recognition of culture.

PROPOSER, LLOYD OLD COYOTE, Crow Reservation, representing the History and Culture Commission, relating to historical things. He passed out copies of their position (attached). He explained the basis for their religion, that they sometimes use symbols and media but the worship is granted through nature. It is character-building and perpetuates their cultural practices. Their bi-lingual, bi-cultural background should be preserved because they can practice their own religion and still be a Christian. He came to seek support from the legislature in perpetuation of their cultural practices so they can practice them with harassment.

PROPOSER, DALE OLD HORN, spoke in behalf of the resolution. He is a student at MSU, studying toward his doctorate. There are not many states that have taken the kind of language and incorporated it into the constitution, as Montana has done. The reason this resolution is so necessary is because the Indian people have been subjected to a lot of suppression and harassment. There was a basic lack of understanding of the term, religion. It is not so

different that it would make an Indian person vary from the Christian religion. The Indian people are on the verge of becoming a cultural artifact. In order to prevent that, you must take action and help him preserve and perpetuate those things that he believes in. He quoted from President Nixon's statement in 1970, to Congress, reaffirming the commitment for all of the Federal Government. In that message, the President expressed the principles of self-determination and consultation for the Indian. For the first time in history, this places a responsibility upon Indian leadership to articulate what that leadership desired the Indian destiny to be and to provide the basis for consultation.

There are some areas of growth where Indian people have been handicapped. Some Indians are not proud of being Indians. This culture does deserve protection and does deserve recognition.

REPRESENTATIVE KENNERLY closed on the resolution. He asked the committee to give this resolution much thought and consideration.

Representative Keyser: Are you asking that we be in opposition to the federal regulation on eagle feathers?

Representative Kennerly: No, there is no way this legislature can overturn federal law. Most Indians already have eagle feathers. Some of the headresses have been handed down from generation to generation. This is harassment when they indict an Indian for having feathers that were handed down. The Indians do not want to kill the eagles any more than a white man does. Sometimes an eagle is hit by lightning or dies for some other reason and the law says they cannot have the feathers. This is wrong.

Mr. Old Coyote: We have worked out a workable permit system with the Federal Government, so this is no longer a problem.

Representative Roth asked about the use of peote. There was some discussion about tribal use, for their religious ceremonies, etc.

Mr. Old Coyote asked to explain how the Indian conceives a force. In Christianity you worship a man's life, his birth, death, etc. In the Indian religion, the Indian utilizes all forms of nature. The pattern is through nature and peote is the tangible thing. The site can be anywhere and his philosophy is such that some are gifted with dreams, and that sort of thing. The cycles all have meaning. With us you might arise with the birds and rejoice with them. In 1957 a bill passed, so peote is already taken care of. There is no problem there. Many of the Indian setbacks came from the missionaries. We have a reputation to live down. Peote religion is flexible but at the same time compatible. In the sundance they go without food and water for three days. It is a sacrifice so that people they care about can live in harmony with nature and this type of thing.

Mr. Old Horn: Perhaps I can add some to that, only speaking for the Corw society. I have some understanding of the Cheyenne. We would go up to their sundances when I was a child. It is used

as a sacrament, and there are many ways that it could be abused. Even the religion of this country has been abused. The majority of the crows do practice the use of peote, but at the same time they are Christian. There are no misgivings on the part of the people who understand about peote. We do not become discriminatory about who can practice our religion. Anyone who is interested can attend our ceremonies and is made welcome.

Representative Roth asked, are you asking through this resolution to use peote.

Mr. Old Horn: Yes, the Federal law says that Indian people can use peote for sacramental purposes. Your faith is in your own hands. He also stated that a lot of this denial of their culture could be misunderstood.

There was general discussion about the Federal Government's discouragement of the Indian religion.

Mr. Old Coyote: All we are asking is peace of mind in what we want to do in regards to a supreme being.

Chairman Scully: Just to satisfy my curiosity, how many types of religions are there?

Dale Old Horn: Basically there are four that are shared by the Northern Plains Indians.

1. Sundance, which is sacrifice.
2. Pipe religion, asks a favor from the powers.
3. Sweat Lodge, sacrifice of personal comfort.
4. The use of personal and sacred bundles, for healing, wisdom and guidance.

In addition, there are others used by various tribes, such as the sacred tobacco seeds, etc. There are 10 or 20 expressions of a basic religion. Mr. Old Horn talked about the bi-lingual language.

Discussion followed about the abuse of the peote and Mr. Old Horn said it is the hippies that are using it, as an hallucinatory drug and not the Indians.

Hearing closed on House Joint Resolution #32.

HEARING OPENED ON HOUSE BILL #367.

REPRESENTATIVE CARROLL SOUTH, SPONSOR, could not attend the hearing. JERRY LEWENDORF introduced the bill. This defines an action for bad faith prosecution, establishing defenses in such an action, and provides for nonliability of the defendant's attorney and provides for punitive damages. He said it defines the elements of the tort of bad faith prosecution, whether civil or criminal or administrative. The institution of such proceedings, the termina-

tion of such proceedings, bad faith in instituting the proceedings, want of probable cause for the proceedings and the suffering of injury or damage by the plaintiff as a result of such proceedings.

He said there are three instances subject to bad faith prosecution, and went on to explain them. He talked of the liability of the attorney and that an attorney is not liable for the bad faith prosecution of his client unless it appears that he knew or should have known the client had no just claim or cause. He explained the section on punitive damages and how they may be recovered.

He explained the four defenses:

1. Maintaining an action for malicious prosecution.
2. An action for malicious prosecution, with counsel, after a full and fair statement, the prosecution was instituted in reliance in good faith on such advice.
3. Plaintiff's actual guilt or liability of the acts charged against him in the original proceedings.
4. Judgment of the plaintiff's conviction in a prior criminal proceeding which is ordinarily a complete defense to his action for malicious prosecution based on that proceeding.

Then he explained what malice is and explained bad faith for malice. He went on to talk about the high cost of insurance premiums, and that some people think that the doctor pays the cost, but the patient pays the premium, through increased costs in patient care. Only 16 cents of the premium dollar goes back to the injured patient. We hope that if we can discourage some suits that are brought without merit we can reduce the amount of dollars needed to support this system. He talked about the legal encyclopedia of law as it exists throughout the country. What we are doing is giving the attorney the same responsibility that everybody else has in the tort system.

PROPOSER H. S. HANSON, Montana Technical Association. This is a group of architects and engineers. If this bill will bring the attorney more into the forefront and make them responsible, we will support it. He said that 80 cents of every dollar goes to feed the legal system.

PROPOSER SENATOR GLEN DRAKE, American Insurance Corporation. I am in favor of the theory of this bill, but we believe there are many mechanical problems in this bill. This bill combines both civil and criminal as a basis. This has caused much confusion in the bill.

The bill should define which is the defendant and who is the plaintiff. What is the action for the bad faith prosecution. It should be defined. In section 3, paragraph (c) some of the language must be missing. This makes no sense at all. When you confuse criminal and civil here, in the question of bad faith, you only have confusion. I think this bill needs some real work from several viewpoints.

OPPONENT TOM DOWLING, Trial Lawyers Association. I think you have some real problems in the criminal area. I feel the same as Senator Drake, especially with the philosophy of the bill. This bill changes the philosophy of the tort system, as it is now. If we are going to tinker with the tort system, lets really tinker with it. I am only asking that you consider the other side.

OPPONENT GREG MORGAN, State Bar Association. This is just one of the bills that will come up before us. The problem that I see with it is that it goes too far. It takes that further step. I feel that we should have a chance to file a claim against someone if we feel we have been wronged. That is what the courts were developed for. Some of the elements of this bill are presently contained in Montana law, common law, which has developed as the need arose. I question that we want to codify the law that is forming to meet a need. About section 2, #5, (for the probable cause) what does this mean? It has to be decided in every single instance.

OPPONENT W. A. MURFITT, State Bar of Montana. We spent the last year and one-half with the Medical Association, trying to iron out some of the problems which they have.

The rights of the citizen are being encroached upon. In section 2, the purpose of this bill is to discourage people from making any kind of claim against the medical profession, but it is getting out of hand. Take the arbitration feature of it. Look at the many instances where contracts contain arbitration clauses. I would only say there are several sections that have been commented on and I would ask you to consider the ramifications of this bill.

OPPONENT TOM HONZEL. He made reference to the United States Supreme Court cases. Indler vs Packman, 1976. Take a look at that case. The prosecution does have immunity. I don't think you should support this bill.

OPPONENT MIKE McGRATH, Attorney General's Office. I oppose the bill for the same reasons. Take Montana case 33-1242, to reaffirm the common law prosecutorial immunity.

JERRY LEWENDORF closed the hearing by discussing the comments of the opponents. You will be able to understand it after you read it. I don't see what they mean when they say it is not defined clearly. He talked about the defense costs. The doctors feel that they are paying for a system and not for injured patients. There is no remedy in the Montana statutes. We are concerned about the fact that your action has to show some merit before you bring it.

Representative Ramirez. What about reasonable liability on the part of the attorney. He could be liable for punitive damages.

Mr. Neeley. It could be amended so that conclusion could not be drawn.

There was discussion between Representative Ramirez and Mr. Hanson about statistics and the insurance figures, etc.

Representative Eudaily. Does the legal profession carry malpractice insurance and how does it compare with medical insurance?

Answer: Yes, but it has jumped, although not as much as medical malpractice insurance.

Representative Eudaily. Is there any protection for any other profession?

Answer: It has the same protection for everybody.

Hearing closed on House Bill #367, because of the pending Water Sub-Committee Hearing, the Judiciary meeting was adjourned at 10:15.

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Rep. John Scully, Chairman

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Mary Ellen Connelly, secretary.

MEC/dm