

JUDICIARY COMMITTEE

January 31, 1977

The regularly scheduled meeting of the House Judiciary Committee was called to order by Chairman Scully at 8:00 a.m. in room 436 of the Capitol Building, Helena, Montana on Monday. All members were present with the exception of Representatives Dussault and Kennerly.

SCHEDULED FOR HEARING WERE HOUSE BILLS #77, 456, 464, 475, 355, 477 and 374.

The hearing opened on House Bill #477.

REPRESENTATIVE HUENNEKENS, DISTRICT #68:

This bill will provide that the department of natural resources and conservation rather than the applicant for a weather modification permit shall publish the notice of intention. If you will notice on page 1, the permit process, it is a matter of time requirement. Before undertaking any weather modification and control activities, the applicant for a permit would file with the department a notice of intention. He would be confined to the time and area limits set forth in the notice of intention, unless modified by the board.

There were no other proponents, no opponents and no questions from the committee.

The hearing closed on House Bill #477.

THE HEARING OPENED ON HOUSE BILL #475:

REPRESENTATIVE HUENNEKENS, DISTRICT #68:

This is the Montana Privacy Act. I would like to introduce Senator Towe, who will speak in behalf of the bill.

PROPONENT, SENATOR TOWE, DISTRICT #26:

Before I get to the meat of the bill I would like to present some background material. Anglo-American jurisprudence has been traced back to the 16th century. He discussed the right of privacy, the fight for rights. He discussed the fact that Oliver Wendell Holmes thought that wiretapping is a dirty business. The Senator then went on to discuss the various ways our privacy might be invaded, such as wiretapping, tape recordings, pick-up microphones, etc. He noted that President Nixon had authorized the auditing and inspection of thousands of farmers income tax returns. The Montana Law Review has published an article of mine about the growing awareness of privacy in America, a copy of which is presented to the committee. In 1972 the new constitution would include the concept of privacy. I have three bills dealing with the subject but with different aspects of it. However, it is somewhat similar to bills that have been introduced before. If I may, I would like to go over some of the provisions with you. We will go through the scope of the bill. I will explain

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what right of privacy includes;

1. privacy of the home and other private places
2. privacy of communications
3. privacy of the mind and
4. privacy of the marriage and family.

You will note on page 2, line 20, it is unlawful for any person, including any agent or employee of any governmental unit, to enter a home or other private place for any purpose.

On page 11, there is no protection between parent and minor child in the United States. Other countries have this but not here. If we don't act and do something fairly quickly, it may be too late. He explained one type of snooping, known as mail cover, how it works. He went on to give examples of the sophisticated types of listening and surveillance equipment that is becoming available and could be used, such as interception of brain signals, etc.

I would like to introduce Mr. Wade DaHood, who will speak for the bill.

PROPONENT, WADE DaHOOD:

I want to extend my appreciation to the committee for letting me come before you and speak. I think it is a privilege. This is not ultra-liberal legislation, it doesn't represent something new in society. This is to make sure of our right of privacy. The right of privacy includes lots of things. Government has to serve and protect. I was a member of the constitutional convention. They did not go into it cold, there were months of hearings and material, and studies that were presented to the members of the convention. A profound analysis had been presented.

I was chairman of the section to study the bill of rights and Senator Blaylock was the vice-chairman. Section 10, article 2, the declaration of the bill of rights is very simple. He quoted that the right of privacy is essential to the well-being of a free society and shall not be infringed upon without a compelling state effort. Thus, our committee was compelled to prepare a civil rights proposal. Read the rationale and underlying philosophy. It is hoped that the legislature will have occasion to study this thoroughly. You are going to provide a guideline and particularly those who have a high office. The basis of the right of privacy is the right to be let alone. He asked of the committee, ask yourself, do I want these rights for myself and my family. The answer is "yes".

PROPONENT, SENATOR BLAYLOCK, DISTRICT #35:

I served on the bill of rights committee for the constitutional convention. We all are concerned for the right of privacy. Sooner or later it comes down to the rights of each individual. Think of Watergate. These were not bad men, they felt the goal was good, but

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they were carried away with how to obtain their goal. As they got deeper and deeper into it they could not see where it would end. Sometimes it happens in Montana, too. In my home town of Laurel, during World War I, in the section of our town that was primarily German and they spoke German, the order came down, "You will not conduct any services in German", needless of the fact some could not speak anything but German and the minister said they could not, the order came back that they would have the service in English, whether or not they understood it, did not matter. As a teacher, I feel that my relationship with my student is privileged, just as a doctor and patient, or a lawyer and his client. But if I were told otherwise, and did not respect the privacy of my students I could not do a good job. I urge your support of this bill.

REPRESENTATIVE TEAGUE took over the meeting, as Chariman Scully had to attend another meeting, to carry a bill.

PROPONENT, DOROTHY ECK:

I was a delegate to the constitutional convention. This was a section I was very much concerned about. What we put in the constitution was very simple. We wanted it simple. The balance that needs to be drawn is a difficult balance to draw, but I think that this time it is done. This bill is the least controversial. The other area that I was concerned with was the public's right to know. It has to be balanced with the public right to know. That has been thoroughly discussed during the last 4 years since Watergate. I urge you to support this bill.

PROPONENT, JAMES W. ZION, PRESIDENT OF THE AMERICAN CIVIL LIBERTIES UNION:

I would just like to mention how frightening it is to be the subject of a wiretapping. I attended a meeting in which we found we were under surveillance and found out later that it was a mistake, and that the army had a tip that there was a riot in the planning and they were taking steps for riot-prevention. Although this is a very thick piece of legislation, it is really very simple. This is a codification of those common law principles that have been developed.

OPPONENT, MIKE VOELLER, MONTANA PRESS ASSOCIATION and OWNER OF THE INDEPENDENT RECORD:

The more we read this bill the more we shake and wonder how this balance is coming about, the right of privacy and the public's right to know. What about the citizen band radio. How would you keep that private? It seems to me that if you pass this legislation, you will be using a sledgehammer to kill a fly.

OPPONENT, SAM GILLULY, MONTANA PRESS ASSOCIATION:

It would be difficult to forecast what this effect might be on the press of Montana and as a result, on the people's right to know.

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We are fearful that the right to know might suffer. He presented a copy of testimony to the committee. (attached)

GREGG L. McCURDY, MONTANA ASSOCIATION OF COUNTIES:
I would like the committee to amend page 26, line 12, subsection (e), (shall not apply to duly elected or appointed public officials or employees when such transcription or recording is done in the performance of official duty; nor to persons speaking at public meetings or persons given warning of such recording.) I would like to have this reinstated.

SENATOR TOWE:

In closing, I understand the concern of the press and I think that they should be protected. We have accommodated other news media and we can accommodate them too. I do think it is important that we get something done. I think this does strike that balance between the news media and the right of privacy.

REPRESENTATIVE HAND:

I don't understand what you meant by the mail cover.

SENATOR TOWE:

It is simply taking down all the information on the outside of the envelope. You can find out an awful lot of information about an individual in this way, over a very short period of time.

REPRESENTATIVE CONROY:

You said you had two other bills dealing with this same subject, is that right?

SENATOR TOWE:

Yes, Senate Bill #67 deals with computers and the other one deals with the criminal justice system, commonly known as the omnibus bill. The committee amendment was put into House Bill #475.

REPRESENTATIVE KEYSER:

What about radio communications? And what about line 15, page 20, section 12? Do you mean they could not come into a meeting and sit and observe?

SENATOR TOWE:

Yes, that is what we want to prevent, unless there is probable cause, if at the meeting, they are hatching a crime or planning a subversive action, etc.

REPRESENTATIVE HAND:

Are there actually this much, are there this many cases of people being walked upon?

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SENATOR TOWE:

Yes, not necessarily in Montana, but look at the examples I gave the committee.

After some general discussion the hearing closed on House Bill #475.

THE HEARING OPENED ON HOUSE BILL #374:

REPRESENTATIVE RAMIREZ, DISTRICT #64:

This bill is concerned with medical malpractice. It authorizes a voluntary, contractual arbitration of disputes arising from injury or death caused by professional negligence of a health care or other professional or hospital and provides for a "positive option" on the part of the patient. The patient could subsequently withdraw from the agreement. I think there is a problem and as a result of that problem people are paying a high cost for insurance. He then went on to explain in greater detail how it would work, how it would affect people, etc.

It was noted that Representative Gould had been prepared to answer questions on House Bill #355, which had been heard on the preceeding week. As there were no questions from the committee he left the hearing. The three bills are in sub-committee and they had been waiting for this particular bill, which was one of three. The other two had been in the committee and this one was now here also. Chairman Scully told the sub-committee they could now go ahead with the study and present their findings to the full committee at a later date.

CHAIRMAN SCULLY then directed the committee's attention to the hearing on House Bill #374. REPRESENTATIVE RAMIREZ commented that there are physicians that are being chased out of practice. We are losing physicians when we need them. When a claim is made against a physician there should be a way to determine if it has any merit. There are a lot of claims that have no merit. Consequently, it affects them tremendously and they certainly must have less time to devote to their practice and the care of their patients. The problem is, who is going to bear that loss. Is it going to be the person injured, is it going to be the doctor, or will it be passed on to the patient, or through some tax program or otherwise. Keep in mind, how is this claim going to be determined. Is there some better way to do what we are now doing? This bill simply provides an alternative. We need a way of determining a malpractice claim. Traditionally we have used the jury system. The jury system is the best way for everyday facts but when it comes to technical facts a legitimate question arises as to whether that is the best way to make that decision. In that case, there is a question whether a jury is the best vehicle for making the determination. A jury trial will take twice as long to try a case. This is not taking away the jury determination in all instances. If someone wants a jury trial they can have it.

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The alternative decision is made by 3 people, a lawyer, a physician or member of the medical or health field and a lay person. The selection procedure provides so that they are fair and impartial and they will make the judgment. This is a less expensive, faster way of determining the claim. I do want everyone to know that I will be asking that the bill be amended, to strike section 23, page 20 and sections 30 and 31, pages 23 and 24. There are 35 states that have arbitration features. In a quote from the American Bar, he said, "This is not necessarily the final word, we are open to suggestions".

PROPONENT, DR. RICHARD NELSON, BILLINGS PHYSICIAN:

I support this bill. He quoted from a speech by Chief Justice Warren Burger, on April 6, 1976, in which he said that with the cost of rising insurance, a reappraisal is in order. New ways must be found. This is a high priority. Unquote. The Montana Medical Association agrees, arbitration has 5 advantages. 1. speedy settlement, 2. the proceeding is more efficient and convenient, 3. we feel that arbitration would bring a higher degree of sophistication, 4. less publicity, 5. fewer appeals from this process. I think that sums up our basic philosophic decision.

PROPONENT, RICHARD SEBO, LAWYER FROM BILLINGS:

We have studied the proposals of the doctors, and originally I opposed the bill but taking out the sections might do it. I am not in strict opposition to the bill, and if it could be guaranteed that it would be voluntary, it would be much better. I think the biggest problem are law suits that don't have any basis. The question I have, is this the vehicle to use to get rid of those kinds of cases. If it is voluntary it might work. He talked about examples of cases in which a doctor might not treat a patient unless the patient agrees to sign the agreement. If someone is going to waive the contract right to a jury trial it should be purely voluntary on their part. I think there needs to be some kind of a disciplinary procedure if they want a patient to sign and it is not voluntary. He gave examples, such as the emergency room of a hospital, etc. It might work, if it were a voluntary procedure.

In talking about less court costs he said, I personally can't say that this would be reduced with all the discovery that will have to go on. It would probably be speedier. It would go faster, but something that bothers me, how would you select the arbitrator? It bothers me that the people who would be arbitrating these would be the people that don't have anything to do but sit on these panels. This committee has got to realize we have to get rid of the cases that shouldn't be filed. If some of these problems are cleared up I think that it might be a workable thing. It should be reviewed by the next legislature. Also, you should have challenges, on the third person, the lay person. In the selection of the 3rd person it looks like it might take a lot longer to select than the people on the jury.

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PROPONENT, CHAD SMITH, MONTANA HOSPITAL ASSOCIATION:

I am in support of the bill. I am very close to the medical malpractice problem. Right now hospital premiums range from \$20,000 to \$100,000. The hospitals are torn. Their constant problems are to try to keep hospital costs down. At the same time they do want to make sure that there is a degree of protection. They are not interested in seeing the cost of a premium go so high that they cannot afford to keep it. We want to maintain a hospital malpractice premium that they can afford to pay. We ask that the committee support this bill.

PROPONENT, JOHN McMAHON, MONTANA MEDICAL ASSOCIATION:

We expect and want to be compensated the same way as any other negligence. We want to stop the cases of non-negligence suits. We have to educate the public to the fact that everybody makes mistakes. In some cases, a doctor might be involved because of not telling a patient something. He gave examples of some of the cases he was familiar with in which just that very thing had happened. I feel that both parties are giving up a right, one of which can change his mind in 60 days but the other cannot. We would like to keep as many physicians as possible in the patient care program. (copy of testimony attached)

PROPONENT, GERALD NEELY, MONTANA MEDICAL ASSOCIATION:

I would like to give a brief overview of this bill. This is a very definite and voluntary arbitration agreement. It is available to all professionals, not just doctors. 35 states already feature arbitration in some form. We would appreciate any constructive suggestions. The more particularized they are the better. You have a right to a jury trial. The provision is even more restrictive, you waive it but you can change your mind. If you go through this bill you will see that there are built-in time limitations. They have available to them all the methods of discovery. There are procedures set up as to how the arbitrator will be picked. There is a provision to strike an individual that is not acceptable. There will be probably some comment as to the legality of this but if properly drawn it does survive constitutional inquiry.

OPPONENT, GREG MORGAN:

I represent the state bar of Montana, and we would adopt the comments of the state bar association. We want to see that the doctors stay in business. We would be in favor of reducing publicity. One of the bills problems, as we see it, is with the waiver. I think that is one of the basic problems we see. The patient is giving up the right to have a trial by jury. To have his peers determine if there is injury and if so, how much. The determination of liability is a complex one, but a jury does not have a difficult time grasping how much that person has been damaged. The mandatory panel will take care of the trial by jury.

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OPPONENT, WALTER MURFITT, STATE BAR:

We have met on many occasions with the doctors as well as the lawyers. As a result, we have a package of bills. I think, after having studied these bills with a great deal of concern, at no time has anyone made the statement that the premiums will either stabilize or they will be reduced. If we could have that type of guarantee I would feel much better about it. There are some really serious problems with this bill. There have to be some penalties or some sanctions imposed in the case of the refusal to treat people if they do not sign. I think that has to be corrected. I think the 60 day period of limitation should run after the treatment. The other problem is the cost. In section 6, it mentions that there will be no cost to the claimant and it then provides in another section that this will be administered under the fund established under the insurance code. This is not clear. Then again in section 14 it talks about costs and mileage, etc.

Furthermore, I do frankly object that a minor child is bound by this arbitration procedure and I think that is wrong. The appeal positions are basically non-existent. There is no possibility for judicial review except under those three things I have outlined. I have to address myself to the comment that this will be a more informal procedure. Possibly the time will be reduced but in terms of selecting a jury, you may take a day or you may take two days. This might take just as long. I do not believe that this is that kind of a vehicle. I think it ought to be the object of some serious study.

OPPONENT, TOM DOWLING, TRIAL LAWYERS:

Philosophically I disagree with this bill. What this bill does is eliminate the jury. You have three people who are the judge, jury and independent investigator. I disagree that this bill is for all professional people, this bill is aimed at the medical profession alone. I am a member of the American Arbitration Association, so I am familiar with the arbitration system. I question whether this is voluntary. I am a great believer in a jury. They are there to try fact or issues of fact. They are independent of any result or outcome of their decisions. In this bill you have one group very interested in the outcome. What about pressure on the arbitration board? Why 60 days? What about the defendant? Why not give him the same allowance as the claimant? I am concerned about section 5, page 12. When there is a potential claim that can demand arbitration, you have an informal procedure without the safeguards. Who is the judge, or are they all three the judge? Also, I ask, what is a neutral expert? In Montana you can get a case to trial in 6 months. Will this be any faster? I agree that striking sections 23, 30 & 31 may improve the bill.

OPPONENT, BILL LEAPHART:

In section 2, the definition of professional people, I think it is perfectly obvious that this bill is not representing any other

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profession. This is aimed at the medical field only. There hasn't been one piece of testimony that there will be a premium change. Not any one of this package of bills is going to give any doctor any relief from any of these high premiums. Look at page 17. Look at page 18, section 5. Finally, this bill does not accomplish anything of what the aim is. We want any legitimate claimant to get his award. This whole package is trying to change the tort system. There is nothing in this bill that can stop a frivolous claim. This is a front, attempting to change the tort system by utilizing the doctors as front men.

REPRESENTATIVE RAMIREZ:

I am not a front man for any insurance company and that is not a fair or legitimate comment. I think there is a great deal of good that can be done by this bill. Some of these rates have increased by 6 or 700 %. Some of these claims have been dismissed. Lets work out the bugs, lets see if it is a viable alternative. The patient is going to benefit if we can hold medical costs down. Many claimants will benefit. I agree that this should be voluntary and I appreciate the suggestions and it can be amended so that it is made voluntary. Specific language would be welcome. Another thing that has been talked about, in three years we can see if it is working. In other states that have tried it it has worked. It is beneficial to the claimant to have a claim decided in less time. If we can speed that up then that is a benefit to him. There are some problems as far as the provisions for assessment of cost to a claimant, but that is something that can come out. The final comment I want to make, the provision on periodic payment relates only to existing law. I ask you, can you have a fair and just determination of this nature before a jury? I think it is a hit or miss proposition in technical cases. This bill is to try and have an alternative course that may be fair. I am working for a way to have a fair and impartial settlement of a claim. There is now a legitimate division of opinion as to whether the jury is a fair way.

REPRESENTATIVE SCULLY:

About the arbitration agreement, it should not be and cannot be a condition of treatment.

REPRESENTATIVE HAND:

What is the difference between liability and damages.

MR. MORGAN:

Proximate cause. He gave an example of the doctor taking off the wrong arm and then having to remove the other arm which was the one needing care in the first place and thus losing the use of both arms. Do you want this arbitration panel to determine how much you have been damaged?

REPRESENTATIVE SCULLY:

Mr. Neely, wouldn't you say, the really important thing is the contract arrangement between the doctor and patient? It was agreed this was so.

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REPRESENTATIVE CONROY:

On the 60 day limitation, would that preclude you from any other chance to file a claim. General discussion followed about the 60 day limitation, how it would work and how it would affect the claimant.

REPRESENTATIVE COURTNEY asked Mr. Neely. What are the statistics? Are the increased rates due to actual Montana cases or is it because of the national level?

MR. NEELY:

It is a combination of national and statewide data.

Discussion about page 24, section 31.

MR. NEELY:

We could strengthen the language and would be more than glad to do that, so that it is strictly voluntary.

REPRESENTATIVE EUDAILY:

On page 2, line 22, what does this mean, strictly voluntary, if offered.

MR. NEELY:

Some would, and some wouldn't and there is no way of knowing, if it is extremely widespread.

After some discussion the hearing closed on House Bill #374.

THE HEARING OPENED ON HOUSE BILL #77:

REPRESENTATIVE BARRETT, DISTRICT #48:

This is not a recodification bill although it does eliminate obsolete language. It is a general revision of the laws relating to administrative procedure. It was suggested that the APA be eliminated, but the committee feels that this is not the solution.

REPRESENTATIVE BARRETT introduced MR. TIPPEY, of the Administrative Code Committee who he said would explain the bill more fully and in greater detail. He started with page 1, section 1 and proceeded to go through the bill with the section by section analysis. (copy attached)

He mentioned there are 400 code sections which delegate the authority. He explained the register, what the yellow sheets are for and the white sheets and the set of instructions, which every month are sent out by the secretary of state.

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PROPONENT, D. ROBERT LOHN, STAFF ATTORNEY-GOVERNOR'S OFFICE:
Generally speaking, we find no problems with the bill. There are a couple of minor modifications. The Department of Interior asks that it be extended to juveniles. The Department of Administration asked that I explain the impact the changes will have on them. We would like to have a definition of the rules. Such as, who pays for a telephone line and similar situations. A final thing that I would like to suggest is that the code commission leave the general powers with the secretary of state, Mr. Murray. We feel he is doing a good job.

PROPONENT, GENE PHILLIPS, PACIFIC POWER & LIGHT CO:
I think there should be an amendment. Section 82-4211. I think there should be hearings and appoint an examiner, a judge with the same qualifications as a district judge. On the whole I support this bill.

PROPONENT, CORBIN HOWARD, STAFF ATTORNEY-SUPERINTENDENT OF PUBLIC INSTRUCTION:
I would like to describe the effect this would have on this office. He presented the committee with copies of prepared testimony, (copy attached). I urge you not to include them in the boards and agencies affected by this bill.

OPPONENT, HARRIETT MELOG, BOARD OF PUBLIC EDUCATION:
We are asking you, would this then exclude the Board of Education? Our opposition to inclusion under the administrative procedure act is based simply on practicality. The Board of Public Education is a policy-making body. She presented a copy of her statement to the committee. (copy attached)

REPRESENTATIVE BURNETT:
I think we are on the right track with this committee. It would give us a much better watch-dog control.

REPRESENTATIVE HOLMES:
Could the sections be included so they would not have to go through the hearing process?

MR. TIPPEY:
We finally got a compiled record which will make the difference.

The hearing closed on House Bill #77.

THE HEARING OPENED ON HOUSE BILL #464:

REPRESENTATIVE HARPER, DISTRICT #30:
The bill would establish a full-time board of pardons, and provide for the transition from the old to the new board, and provide the

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training for board members and provide compensation for board members. With the burden of the increased prison population and the heavy decisions it has put more burden on the Board of Pardons. This bill would give the time and training and expertise needed by the board.

PROPONENT, CHUCK O'REILLY, MONTANA JUSTICE PROJECT:

He talked about the part-time board and the limited amount of time that can be spent on the hearings and that the need in Montana for a full-time Board of Pardons is essential. With the increase in prison population, then the consequences of parole are so great that there should be a full-time board. When we have 1,380 arrests, one must question whether they will become permanent residents.

PROPONENT, WARDEN CRIST:

Historically parole boards have always been part-time but we need a full-time board because we find them to be the most efficient. The Board of Pardons now has two full-time employees and would only need one addition. The board could spend more time meeting with the individual who will be paroled. In addition to the regular hearings at the various institutions they would have to hold hearings at other places. Some of our law enforcement personnel would have a future with the board. Young people should be able to aspire to a position on the board. As of now, they are off to other places and other states.

OPPONENT, ED JASMINE, BOARD OF PARDONS:

I am opposed to a full-time board. Now let me say, that I am not talking about continuing my term on the board. I would like to talk about a couple of things. We don't mind the long hours. You would have to pay each member at least \$5,000 a year. They would have to have an office and staff and a car at a cost of \$25,000 a year. I submit they would have to have money to attend these various meetings and they would have to attend training sessions. Last year they had one in London and one in Puerto Rico. What would the cost of that be? There would not be enough work to keep a full-time board occupied. Another advantage of our board is that we are in constant contact with our communities. One of the important things to me was that I had the input of the community. I was exposed to the community about what is happening in the prison. There was a lot of talk about professionalism. What is a professional? Are you professional legislators? No one has those answers. I think the parole board is responsive to the citizens of Montana. 1/2 to 1/3 of the people in prison are there for some drug or alcohol-related background. Without the possibility of parole what might happen to them?

REPRESENTATIVE KEYSER:

What if we abolish the parole board altogether?

MR. JASMINE:

One of the things about the prison, one of the advantages is the award for good conduct. Without it there would be no possibility of getting out before your time was up and consequently could cause all kinds of problems, without an incentive to behave.

OPPONENT, HANK BURGESS, BOARD OF PARDONS:

I am also opposed to a full-time board.

There was general discussion and the hearing closed on House Bill 464.

CHAIRMAN SCULLY announced the testimony would have to be limited from now on because of the increasing press of business before the committee. He also stated that the medical malpractice bills would be held until they were also received and no action would be taken until they could all be handled together in order to see if one bill might have an adverse effect upon another bill.

The meeting adjourned at 12:30.



JOHN P. SCULLY, CHAIRMAN



Mary Ellen Connelly, Secretary