MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
January 23, 1979

The thirteenth meeting of the Senate Judiciary Committee was called to order by Senator Lensink at 10:02 a.m. in room 331 on the above date.

ROLL CALL:

All mambers were present with the exception of Senators Olson and Galt, who were excused.

CONSIDERATION OF SENATE BILL 133:

Senator Robert Watt gave an explanation of this bill, which is an act to provide a more humane method of executing a death sentence. He gave a brief history of the bill and differing ways of performing an execution. He stated that in 1963, he introduced a bill in the House to abolish the death penalty, and Montana later promptly enacted it. Senator Watt explained that he did not know exactly what carbon dioxide will do and how it would work and he would like to have the committee look into this. He felt that the air possibly could be replaced with helium.

There being no further proponents and no opponents Senator Lensink closed the hearing.

Senator Van Valkenburg was concerned as to whether changing the method of execution of a convict to a more humane method would increase the number of death sentences made in the state of Montana. Senator Watt said that this was probably so.

Senator Watt explained that generally the method of execution does not make a difference in the number of convicts sentenced. He said that statistics indicate that the death penalty is not a deterrent to crime.

Senator Brown raised the question as to whether the execution should not take place in the prison as he felt that there would be significant cost if every jail had to construct a room.

Senator Healy commented that people in Deer Lodge do not want those executions there. Senator Watt agreed that it is very demoralizing on the other prisoners.

Senator Healy questioned if Senator Watt had gone into the deadliness of carbon dioxide compared to carbon monoxide. Joan Mayer stated that carbon dioxide is not poisonous to humans --that that is what we breathe out and that this would just replace the oxygen in the room instead of creating a vacuum.

There were no further questions and Senator Lensink stated that we would consider the bill for twenty-four hours and then take action on it.

CONSIDERATION OF SENATE BILL 124:

Senator Turnage gave an explanation of this bill, which is an act to provide for the selection of a chief district judge in each judicial district with three or more judges and to permit the chief district judge to assign departments and areas of responsibility to the judges of the district. He stated that Supreme Court Justice Haswell may have taken care of this problem himself, and there may be no need for this legislation. He said he hoped that we could discuss the matter at this time and then wait to see what comes from the court.

Maggie Davis, representing the League of Women Voters, stated that they support the concept of the supreme court being unified and strengthened, but they were concerned with section 3 in that it will not rectify the situation which occurred in Yellowstone County wherein the judges reappointed themselves.

Senator Brown suggested one amendment on page 2, line 3 that the words "and with the agreement of the concerned judge," be deleted.

Senator Van Valkenburg was concerned that allowing the chief judge to assign areas of work to the other judges could cause some problems as in Billings where three existing judges have gotten together and told one judge that she is handling all matters in one area. He felt that this was disenfranchising the voter. Senator Towe explained how this situation came about. Senator Brown suggested that an amendment could be made to have the assignments on a rotation basis.

Senator Lensink suggested that it might be best to wait and see what comes out of the supreme court and then maybe we will have to discuss this bill further. He closed the hearing on this bill at 10:31 a.m.

CONSIDERATION OF HOUSE JOINT RESOLUTION 2

Joan Mayer from the Legislative Council explained the contents of this resolution, which urges the Congress of the United States to enact legislation requiring that all petitions for habeas corpus relief in a criminal case be consolidated into one appeal. She stated that the problem seems to be that the federal statute allows multiple actions by a person detained.

There was some discussion on the bill and Senator Towe suggested that maybe we should ask Representative Scully to come and defend his bill. Senator Lensink ended the hearing on this bill until such time as Representative Scully can be conferred with.

CONSIDERATION OF SENATE BILL 120:

Senator Van Valkenburg gave an explanation of this bill,

which will generally revise the laws relating to corporations and partnerships. He introduced Bob Pyfer, attorney for the Legislative Council, who explained section 10, page 13 and the repealer 35-10-507. He explained that this was brought before this committee last session and it was defeated and that it is a little different this time. He gave a handout to each senator which showed copies of the repealed section and the second part and it showed in red where the repealed section and the amended section conflicted.

There being no further proponents and no opponents, Senator Lensink closed the hearing.

There was much discussion between Senators Turnage, and Towe with Mr. Pyfer concerning causes of dissolution. Senator Turnage stated that there was a conflict in existing law and he didn't really know what to think, but he thought that maybe the only thing to do would be to test it.

Senator Van Valkenburg moved that Senate Bill 120 do pass. The motion carried unanimously.

There being no further business, the meeting adjourned at 11:15 a.m.

SENATOR EVERETT R. LENSINK, Chairman
Senate Judiciary Committee

Date 4/23/79

ROLL CALL

JUDICIARY COMMITTEE

46th LEGISLATIVE SESSION - 1979

NAME	PRESENT	ABSENT	EXCUSED
Lensink, Everett R., Chr. (R)	✓		
Olson, S. A., V. Chr. (R)			✓
Turnage, Jean A. (R)	✓		
O'Hara, Jesse A. (R)	✓		
Anderson, Mike (R)	✓		
Galt, Jack E. (R)			✓
Towe, Thomas E. (D)	✓		
Brown, Steve (D)	✓		
Van Valkenburg, Fred (D)	✓		
Healy, John E. (Jack) (D)	✓		

Each Day Attach to Minutes.

SENATE

SENATE Judiciary COMMITTEE

BILL SB 133 VISITORS' REGISTER DATE 1/23/79

SB 133, HJR-3

Please note bill no.

NAME	REPRESENTING	BILL #	(check one) SUPPORT	OPPO
Robert D. Watt	Self	133	X	
Margaret S. Davis	League of Women Voters	124		
[illegible]	[illegible]			

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term without any settlement or liquidation of the partnership affairs is prima facie evidence of a continuation of the partnership.

History: En. Sec. 23, Ch. 251, L. 1947; R.C.M. 1947, 63-306.

Part 5

Property Rights of a Partner

35-10-501. Classification of property rights of a partner. The property rights of a partner are:

(1) his rights in specific partnership property;

(2) his interest in the partnership; and

(3) his right to participate in the management.

History: En. Sec. 24, Ch. 251, L. 1947; R.C.M. 1947, 63-401.

35-10-502. Nature of a partner's rights in specific partnership property. (1) A partner is co-owner with the other partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with the other partners to possess specific partnership property for partnership purposes but has no right to possess such property for any other purpose without the consent of the other partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners or any of them or the representatives of a deceased partner cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner that partner's right in specific partnership property vests in the surviving partner or partners except where the deceased was the last surviving partner, in which case such deceased partner's right in such property vests in the deceased's legal representative. Such surviving partner or partners or the legal representative of the last surviving partner has no right to possess the partnership property for any but a partnership purpose.

(e) Provided the proceeds of a deceased partner's interest are included in the assets of the decedent's estate, such property is not subject to a lien of the surviving spouse for his or her elective share or a lien for or allowances to surviving spouses, heirs, or next of kin.

History: En. Sec. 25, Ch. 251, L. 1947; amd. Sec. 29, Ch. 535, L. 1975; R.C.M. 1947, 63-402.

35-10-503. Nature of partner's interest in the partnership. A partner's interest in the partnership is his share of the profits and surplus and the same is personal property.

History: En. Sec. 26, Ch. 251, L. 1947; R.C.M. 1947, 63-403.

35-10-504. Assignment of partner's interest. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership or

35-10-507. Execution against partner — procedure. If execution is levied upon the interest of one or more parties in the goods and property of a partnership, the same proceedings shall be had as in attachments, provided in 35-10-506.

History: En. Sec. 1219, C. Civ. Proc. 1895; re-en. Sec. 6822, Rev. C. 1907; re-en. Sec. 9425, R.C.M. 1921; re-en. Sec. 9425, R.C.M. 1935; amd. Sec. 11-165, Ch. 264, L. 1963; R.C.M. 1947, 93-5811.

Part 6

Dissolution and Winding Up

35-10-601. Dissolution defined. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

History: En. Sec. 29, Ch. 251, L. 1947; R.C.M. 1947, 63-501.

35-10-602. Partnership not terminated by dissolution. On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed.

History: En. Sec. 30, Ch. 251, L. 1947; R.C.M. 1947, 63-502.

35-10-603. Causes of dissolution. (1) Dissolution is caused, without violation of the agreement between the partners by:

(a) the termination of the definite term or particular undertaking specified in the agreement;

(b) the express will of any partner when no definite term or particular undertaking is specified;

(c) the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking;

(d) the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

(2) Dissolution is caused, in contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

(3) Dissolution is caused by any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

(4) Dissolution is caused by the death of any partner.

(5) Dissolution is caused by the bankruptcy of any partner or the partnership.

(6) Dissolution is caused by decree of court under 35-10-604.

History: En. Sec. 31, Ch. 251, L. 1947; R.C.M. 1947, 63-503.

35-10-604. Dissolution by decree of court. (1) On application by or for a partner, the court shall decree a dissolution whenever:

(a) a partner is declared seriously mentally ill in a judicial proceeding or is shown to be mentally incompetent;

(b) a partner becomes in any other way incapable of performing his part of the partnership contract;

(c) a partner has been guilty [illegible] conduct as tends to affect prejudicially the carrying on of the business;

him, it may admit him to bail. Whitfield v. Hanges, Iowa 1915, 222 F. 747, 138 C.C.A. 199.

When a Chinese person, after final hearing on habeas corpus, has been remanded to the marshal to be deported from the United States upon the vessel by which she was brought to this country, and such vessel has departed, she cannot be admitted to bail upon a recognizance that she will appear when a vessel is ready to depart. Case of the Chinese Wife, C.C.Cal. 1884, 21 F. 808, error dismissed 5 S.Ct. 431, 113 U.S. 216, 28 L.Ed. 983.

Where more than four months had elapsed since arrival at Port of New York of applicant for admission as non-quota immigrant, and applicant had not been advised of basis of her detention or nature of unconfirmed suspicions alleged to justify her detention, applicant would be enlarged, upon furnishing of bond and compliance with supervisory conditions. U. S. ex rel. Lee Till Seem v. Shaughnessy, D.C.N.Y.1952, 104 F.Supp. 819.

Complaint would not be dismissed in suit by alien to review action of officers of Immigration and Naturalization Service in setting bail and amount thereof pending final determination of alien's case, on ground that alien had a plain, speedy, and adequate remedy in a habeas corpus proceeding, since that writ is available only where there is a present, unlawful and physical restraint of one's liberty. Yanish v. Phelan, D.C.Cal.1949, 86 F.Supp. 461.

Whether one charged with treason should be admitted to bail was within court's discretion in habeas corpus proceeding, and court was required to give due weight to the evidence and to the nature and circumstances of the offense. Ex parte Monti, D.C.N.Y.1948, 79 F.Supp. 651.

District Court has authority to grant bail to alien, who has been ordered deported from the United States, pending his appeal from order discharging writ of habeas corpus. U. S. ex rel. [illegible] Watkins, D.C.N.Y.1948, 77 F.Supp. [illegible]

Alien, who was taken into custody in deportation proceeding, was not entitled in habeas corpus proceeding to [illegible] release on bail, since Attorney General's exercise of discretion in denying alien release on bail is not reviewable in district Court. United States ex rel. [illegible] liamson v. District Director of Immigration and Naturalization at Port of [illegible] D.C.N.Y.1948, 76 F.Supp. 739.

Where Attorney General had determined that relator was a dangerous enemy alien, district court, in habeas corpus proceeding, did not have power to admit relator to bail pending appeal. U. S. ex rel. Keller v. District Director of Immigration and Naturalization at the Port of [illegible] D.C.N.Y.1947, 71 F.Supp. 468.

The action of Federal District Court in granting bail in deportation cases on habeas corpus is based not upon inherent right of applicant, but the inherent power of court to control the proceedings before it and to dispose of the party as justice shall require. Principe v. Ault, D.C.Pa. 1945, 62 F.Supp. 279.

The custody of a prisoner is exercised under the direction and control of the court to which the return of writ of habeas corpus is made, and hence such court may admit to bail the prisoner, pending determination of habeas corpus proceeding. Id.

The federal District Court has no power to admit alien held for deportation to bail pending hearing on writ of habeas corpus. U. S. v. Pizzarusso, D.C.Conn.1939, 25 F. Supp. 158.

On testimony given in court on the return of habeas corpus, bail will be allowed if it is clear that a conviction of murder should not take place. U. S. v. Marshal of the District of Columbia, C.C. Ct.Dist.Col.1856, Fed.Cas.No.15,726a.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not here-

tofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

June 25, 1948, c. 646, 62 Stat. 965; Nov. 2, 1966, Pub.L. 89-711, § 1, 80 Stat. 1104.

Historical and Revision Notes

Reviser's Note. This section makes no material change in existing practice. Notwithstanding the opportunity open to litigants to abuse the writ, the courts have frequently refused to entertain successive "vexatious" applications for habeas corpus. It is derived from H.R.4232 introduced in the first session of the Seventy-ninth Congress by Chairman Hatton Sumners of the Committee on the Judiciary and referred to that Committee.

The practice of suing out successive, frivolous, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts. See Dorsey v. Gill, 1945, 148 F.2d 857, 862, in which Miller, J., notes that "petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1, 1939, and April 1944 presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions; a third, 24; a fourth, 22; a fifth, 20. One hundred nine-

STANDING COMMITTEE REPORT

January 23, 19 79

MR. President:

We, your committee on Judiciary

having had under consideration Senate Bill No. 120

Respectfully report as follows: That Senate Bill No. 120

DO PASS

Chairman.

STATE PUB. CO.
Helena, Mont.

H.C