MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
January 31, 1979

Senator Lensink called the twenty-first meeting of the Senate Judiciary Committee to order in room 331 at 9:32 a.m. on the above date.

ROLL CALL:

All members present except for Senator Towe, who was excused.

CONSIDERATION OF SENATE BILL 225:

Senator Ryan, sponsor of this bill, which is an act to modify the grounds for recall of a public officer, gave an explanation of this bill. He went over the change in lines 23 through 25. There were no further proponents and no opponents.

Margaret Davis, representing the League of Women Voters stated that the League does not really support the bill, but they question why the change is made. They don't feel the language "official misconduct" is applicable. She stated that if a person is found guilty, he automatically forfeits his office, if he is found innocent, he is still in office. She felt this unnecessarily muddies the water.

There were no further proponents and no opponents.

Senator Brown questioned if it was the feeling that the terms "misfeasence and malfeasence" were not defined in the legal jargon. Senator Ryan stated that with such broad terms, conviction is questionable.

There were no further questions from the committee, and the hearing on the bill was closed.

CONSIDERATION OF HOUSE BILL 136:

Representative Daily gave an explanation of this bill, which is an act to provide a procedure for investigation of suspicious deaths in specific circumstances; requiring that a report be made to the state medical examiner; and clarifying the authority of the state medical examiner to order an autopsy or other examination. He introduced Bill Romine, who represents the Sheriff and Peace Officers' Association, and who gave a statement in support of this bill.

He also introduced Roland Pratt, who is the executive director of the Montana Funeral Directors Association, who said a few words in support of this legislation.

There were no further proponents and no opponents.

Senator Lensink questioned on page 2, line 7, if a woman of 91 years of age drops dead, it would seem that she was not in apparent good health, and would be considered a suspicious death. Representative Daily said that if a doctor signs the death certificate that it is considered alright, and that is the practice now.

Senator Lensink questioned page 2, line 10, "when the deceased was unattended by a physician" and Mr. Romaine answered that this is not manditory. He said that this would come into play when the coroner feels that there is sufficient reason to investigate, and that he has a certain amount of discretion.

Senator Brown said that he was a little concerned about "shall" on page 1, line 22.

Representative Daily explained that there are a few isolated cases where the body may have been embalmed before the physician has even seen the body, and this is what the attorney general's office is trying to get at.

Senator Turnage questioned line 18, and commented that he felt it should read communicable disease. He also commented that it looks to him as though an autopsy would have to be made on almost everyone who died.

It was explained that at the present time, the coroners do not know where they stand and this tightens it up and makes it more specific. Right now, the coroner has the same powers that this bill gives him, but this bill spells it out.

Senator Olson explained that there has been multiple autopsies done after embalming and it is not that much of a problem. It was suggested that we wait on this bill to see what the attorney general's office and to say about it. The hearing was closed on this bill.

CONSIDERATION OF HOUSE BILL 170:

Joan Mayer from the Legislative Council gave a brief explanation of this bill, which is an act to clarify that a reference to a title, chapter, part, section or subsection of the MCA is presumed to be a reference to that title, chapter, part, section or subsection as it may be amended from time to time.

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

DISPOSITION OF HOUSE BILL 170:

Senator Brown moved that House Bill 170 be concurred in. The motion carried unanimously.

CONSIDERATION OF SENATE BILL 217:

Senator Bob Brown gave an explanation of this bill, which provides an exclusive remedy under state law in the form of a cause of action for damages when there has been a violation of rights protected by the fourth amendment of the constitution of the United States, etc.

He stated that the fourth amendment protects us from unlawful search and seizure and cited the Bevins vs. 6 unknown narcotic agents case. He believes that Chief Justice Burger of the U. S. Supreme Court suggested to the legislatures that some alternative legislation be enacted to the exclusionary rule.

He introduced Judge Nelson from Great Falls, who stated that no other system (Canada, England, etc.) has the judicial exclusionary rule and gave a statement in support of this legislation.

Judge Jack D. Shanstrom, district judge in Livingston, stated that this was a long-needed change. He felt that it was not right having to suppress the evidence when you know that if the evidence is suppressed, that the guilty is going to go free. He stated that 90% of the law officers have done everything possible to go along with the law. Some small technicality in the search warrant will allow the criminal to go free. He gave an example of a search warrant issued to search a house and premises but the evidence was in the garage. The garage was attached to the house, but because there was no door between the garage and the house that this was not considered part of the house. Therefore, the stolen welder and drugs that were in the garage were not allowed as admissable evidence and the party was allowed to go free. He stated that there is case after case where the investigating officers do not know what to do about getting search warrants. He said a lawyer can pick some flaw in every one and the guilty are going free. He also stated that 50% of the criminal cases deal with suppression law.

Senator Bob Brown offered some testimony from Nat Allen, District Judge from the Fourteenth Judicial District in Roundup, which is marked Exhibit 1 in the minutes.

Harold Hanser, county attorney in Yellowstone County gave a statement in support of this bill. He cited whereby the Supreme Court has ruled that the smell of marijuana is not grounds for obtaining a search warrant and he believes that less than 1% of the people of Montana would agree with this ruling. He stated that society has rights too, and that it is time to talk about the constitutional rights of citizens to be safe and secure. He felt that the answer is simply that credible evidence should be submitted and if the evidence is secured in a malicious or negligent manner, then the officer should be controlled.

Senator Turnage read a statement from Lawrence G. Stimatz, Senator from District 43. (See Exhibit II).

Tom Honzel, representing the Montana Association of County Attorneys, gave a statement in support of this legislation.

Kent Rodebaugh, court administrator for the city of Great Falls appeared in his capacity and also as a private citizen and offered support for this bill. He stated that he felt a terrible frustration in that the criminal is being protected and society is not being protected.

Mike Meloy, representing the Montana Trial Lawyers Association gave a statement in opposition to this bill. He stated that the reason that the court adopted the rule fifty years ago was that they felt that there was a proper way to go about obtaining evidence. If evidence is obtained in the wrong way, it should not be used. He stated that this bill will not change the Supreme Court's decision on marijuana smoke. He emphasized that this bill covers only evidence obtained under illegal search and seizure and no others. He explained that under this bill, if the police commit an illegal act in obtaining a search warrant or while searching, that you could use this evidence obtained, but then the person would have the right to instigate an action against the state. He wanted to make it clear that normally the police officer is not involved - in 99% of the cases, it is the insurance agent down the road that is going to be concerned. He further stated that the critics of the exculsionary rule are really against the fourth amendment. He stated that it is the fourth amendment that guarantees the privacy of the home. He felt that if the rule is obeyed there will not be any illegal searches.

Kevin Hunt from Helena appeared as a private citizen and stated that he was very concerned about this bill and he felt that his rights to privacy are very important.

There were no further proponents and no further opponents.

In closing, Senator Brown stated that the Bevins decision in 1971 essentially challanged the states to come up with a provision changing the exclusionary rule. He felt that almost certainly it would be appealed in the Supreme Court and that the Supreme Court will finally decide if this is the valid alternative to the rule.

Senator Valkenburg questioned what would happen to all these prisoners that are in prison if the Supreme Court found this to be unconstitutional some time in the future.

Judge Nelson stated again that no other country has this, and that there is nothing wrong with being first when you are right.

Senator Steve Brown commented that we must be careful about passing laws that are unconstitutional. There was some discussion between Senator Steve Brown and Judge Nelson.

Senator Van Valkenburg wondered if there were any statistics showing how many cases have been overturned because of application of this rule. It was noted that in 75 crimnal cases, 1/3 were overturned and the majority were because of suppression of evidence because of the exclusionary rule in some form.

Senator Steve Brown stated that he felt that he would be amiss if he advised his colleagues to adopt a law that he felt was unconstitutional and he thought there was a better way to do this than by this legislation.

Judge Nelson answered by saying that although Senator Brown felt that doing away with the exclusionary rule is unconstitutional that they felt otherwise. He stated that it is not unconstitutional until the Supreme Court rules it unconstitutional.

Harold Hanser explained that Montana is unique in the United States as it is the only state applying the exculsionary rule not only in governmental actions, but Montana has applied the rule to acts of private citizens. He stated that this is the only jurisdiction in the whole world that has extended the fourth amendments to citizens and gone even further and applied the exclusionary rule. He stated that the Supreme Court has pleaded with the legislatures to pick an alternative to this rule. He asked if the members were afraid to be first and stated that someone has to be first.

Senator Lensink gave Mike Meloy an opportunity to respond to the proponents and Mr. Meloy pointed out to the committee that they are still addressing themselves to the fourth amendment. He felt that if they adopted this legislation, they were not going to address the problem. He also explained that this gives guilty people a chance to sue the state, too. He felt that the guy in prison could sue for all the time he had served in prison.

Senator O'Hara stated that he found the people in his district very distressed over the lack of law and order and they wanted something done about it.

The hearing on this bill closed.

RECONSIDERATION OF HOUSE BILL 136:

As Mike McGrath from the attorney general's office was now present, Senator Lensink reopened the hearing on this bill. Mr. McGrath stated that this bill just gave guidelines to county coroners as to when they should investigate and when they should not. He stated that often times bodies are buried before a coroner has a chance to investigate. In many

instances, they have to exhume the body and attempt to investigate then. He also stated that they are not just concerned about accidents, but they are also concerned about deaths from certain diseases.

Senator Olson stated that the problem could be solved if you could get more coroners to do autopsies, and Mr. McGrath stated that some coroners have no training whatsoever.

Senator Turnage questioned as to how long this would delay the funeral. Senator Lensink stated that they didn't want to destroy evidence any more than they wanted to suppress evidence.

There being no more questions, the meeting was adjourned at 11:12 a.m.

Everett R. Lensink

SENATOR EVERETT R. LENSINK, Chairman
Senate Judiciary Committee

Date 4/31/79

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

please sign + return to secretary!

SENATE Judiciary COMMITTEE

BILL _____ VISITORS' REGISTER DATE 1/31/

Please note bill no. (check one)

NAME	REPRESENTING	BILL #	SUPPORT	OPP
William Romine	Sheriff & Peace officers Assn	H.B.136	X	
Margaret O'Brien	League of Women Voters	SB225		X
Mike Meloy	Montana Trial Lawyers	SB217		X
Karla J. Poe	myself			
Lee Kent Rodebaugh	City of Great Falls	217	X	
Tim Mallard	Mont. Coalition of Human Serv	217		X
Tom Boyd	Montana County Attorneys	217	X	
Jack D. Haanstad	Dist Ct Judge	217	X	
Roland W Pratt	MT Funeral Directors Assoc	HB136	X	
John Bell	Sheriffs	S.217 H.136	X X	
Kvern Hunt	Myself	SB217		X

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

Proponent of SB 217

I am Senator Lawrence G. Stimatz, District 43, Butte.

I am in favor of SB 217.

I am a former deputy County attorney (1957-1960) and a former County attorney (1970-1974) of Silver Bow County.

This bill is necessary to enable evidence which is otherwise admissible to be accepted in criminal cases rather than, as is presently the case, to be rejected under the notion that it is banned by the 4th Amendment to U.S. Constitution.

The bill refers to a practice known as the "EXCLUSIONARY RULE," of evidence.

This "exclusionary rule" is a judge-made rule of evidence which originated in 1914 by the U.S. Supreme Court in the case of WEEKS vs. U.S., 232 U.S. 383, which barred the use of evidence secured through an illegal search and seizure.

The rule was first applied to States in 1961 by the case of MAPP vs OHIO, 367 U.S. 643 & that time it had been in force only in Federal Courts.

Many U.S. Supreme Court Justices had said in their dissents, and several in the majority side on the various cases, that the 4th Amendment does not require exclusion of the evidence.

does not require evidence obtained by what is termed an "illegal" search or seizure when such evidence is relevant, credible, material and otherwise admissible.

I believe the passage of this bill and its enactment into law would result in many criminals being tried and convicted, who are now going free after committing a crime.

I would urge passage of this bill.

Lawrence S. Stewart
Senator, District 43

These are the remarks of Chief Justice Burger concerning the suppression doctrine in Bivens -vs- Six Unknown Federal Narcotics Agents, found in 29 Law Ed. 2d, 619, 91 Sup. Ct. 1999. These comments are taken from the Law Edition citation, beginning on page 636:

"This case has significance far beyond its facts and its holding. For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. (citing cases) The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.

"The deterrence theory underlying the suppression doctrine, or exclusionary rule, has a certain appeal in spite of the high price society pays for such a drastic remedy. Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result:

'The criminal is to go free because the constable has blundered... A room is searched against the law, and the body of a murdered man is found...The privacy of the home has been infringed, and the murderer goes free." People v Defore, 242 NY 13; 150 NE 585.'

Going on, Chief Justice Burger says:

"Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

"From time to time members of the Court, recognizing the validity of these protests, have articulated varying alternative justifications for the suppression of important evidence in a criminal trial. Under one of these alternative theories the rule's foundation is shifted to the "sporting contest" thesis that the government must "play the game fairly" and cannot be allowed to profit from its own illegal acts. (citing cases) But the exclusionary rule does not ineluctably flow from a desire to ensure that government plays the "game according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government."

. . .

"This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our exclusionary rule."

"I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections

would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions as cases like Irvine indicate. But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and is practically ineffective in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person--such as petitioner claims to be--has been left without an effective remedy, and hence the Court finds it necessary now--55 years later--to construct a remedy of its own. (The Court in this case allowed an innocent person searched to sue the Government and recover for his damages, which had never been done before.)

"Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society--the release of countless guilty criminals. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials.

"There are several reasons for this failure. The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the suppression doctrine. Thus there is virtually nothing done to bring about a change in his practices. The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case against a criminal is either weakened or destroyed. The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than prosecutors or the public.

"The suppression doctrine vaguely assumes that law enforcement is a monolithic governmental enterprise, and, "Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing the constitutional demands in his instructions to the police." But the prosecutor who loses his case because of police misconduct is not an official in the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.

"Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appelate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not

"reasonable" amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.

"The presumed educational effect of judicial opinions is also reduced by the long time lapse--often several years--between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay. Finally, the exclusionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions--hence the rule has virtually no applicability and no effect in such situations."

. . .

"Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials."

He goes on to suggest what should be in a Congressional remedy for the suppression doctrine. He says:

"For example, Congress could enact a statute along the following lines:

(a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;

(b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;

(c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;

(d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and

(e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment."

(a) disorderly, contemptuous, or insolent behavior committed during the sitting of a court in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority;

(b) breach of the peace, noise, or other disturbance directly tending to interrupt a court's proceeding;

(c) purposely disobeying or refusing any lawful process or other mandate of a court;

(d) unlawfully refusing to be sworn as a witness in any court proceeding or, after being sworn, refusing to answer any legal and proper interrogatory;

(e) purposely publishing a false or grossly inaccurate report of a court's proceeding; or

(f) purposely failing to obey any mandate, process, or notice relative to juries issued pursuant to Title 3, chapter 15.

(2) A person convicted of the offense of criminal contempt shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-7-309 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-309.

Part 4

Official Misconduct

45-7-401. Official misconduct. (1) A public servant commits the offense of official misconduct when in his official capacity he commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;

(b) knowingly performs an act in his official capacity which he knows is forbidden by law;

(c) with the purpose to obtain advantage for himself or another, performs an act in excess of his lawful authority;

(d) solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of 2-3-203.

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The district court shall have exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from his office without pay pending final judgment. Upon final judgment of conviction he shall permanently forfeit his office. Upon acquittal he shall be reinstated in his office and shall receive all backpay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect such impeachment or removal.

History: En. 94-7-401 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 474, L. 1975; R.C.M. 1947, 94-7-401.

STANDING COMMITTEE REPORT

January 31, 19 79

MR. President:

We, your committee on Judiciary

having had under consideration House Bill No. 170

Respectfully report as follows: That House Bill No. 170

BE CONCURRED IN

~~DO PASS~~

Everett R. Lensink Chairman.

STATE PUB. CO.
Helena, Mont.