MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on January 21, 1991, at 10:00 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Robert Brown (R)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: Senators Halligan and Yellowtail

Staff Present: Valencia Lane (Legislative Council).

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

Announcements/Discussion: Chairman Pinsoneault announced that Bob Robinson, Administrator, Gambling Control Division, Department of Justice, would be presenting information relative to SB 53 prior to the regularly scheduled hearing this date.

Bob Robinson provided committee members with a summary on the Federal Indian Gaming Regulatory Act, Volume 1 from December, 1990 Indian Gaming, and a report on Casino Nights from the Gambling Control Division (Exhibits #1, 2, and 3).

Mr. Robinson said the 1988 Indian Gambling Act dealt with traditional and tribal games, bingo and non-bank card games, and then casino-style gambling, horse-racing, and banking games such as craps. He told the Committee compacts zero in on jurisdictions and that there is a lot of wrestling concerning who has jurisdiction. Mr. Robinson explained that jurisdiction depends upon where the land on which the gambling takes place is situated and who owns that land. He commented that a number of court cases are referred to in the Indian Gaming exhibit.

Mr. Robinson stated that if the tribes and regulatory authorities can't compact, it may end up in arbitration. He commented that the tribes appear to be willing to work with the Gambling Control Division to remain within state law.

Mr. Robinson advised the Committee he couldn't tell if SB 53 will open the door to shaking for a drink or a pot on Indian reservations. He stated that if the court were to interpret prize limits or the Legislature would define what a game is, there would be a better chance of regulating gaming on reservations.

Senator Grosfield asked if shaking for the pot could be for any amount on a reservation. Mr. Robinson replied that reservations can negotiate for a non-profit benefit for anything, so the pot could be for any amount.

Senator Towe stated that if there is no compact, theoretically the is no authority. He asked how the cases referred to in Indian Gaming were resolved. Mr. Robinson replied that the district court appoints a mediator who takes one or the other of proposed compacts and then either party has 60 days in which to accept or reject that compact. He added that if the compact is rejected the matter goes to the Secretary of the Interior.

HEARING ON SENATE BILL 49

Presentation and Opening Statement by Sponsor:

Senator Mignon Waterman, District 22, said she believes SB 49 strengthens the rules, making is especially grievous to sell drugs in or near schools and provides both a penalty and a fine.

Proponents' Testimony:

Edwin Hall, Administrator, Board of Crime Control, provided copies of information on Drug-free School Zones, and charts showing percentages of students who have ever tried a drug and where students have used drugs. He also provided a list of Drug Task Force Members for 1990-1991 (Exhibits #4 and 5).

Mr. Hall said the short-term goals are more focused in the area of undercover work, while long-term goals focus on education through project DARE. He said data shows there were 1360 drug arrests in 1989, and that these arrests appear to be increasing at a rate of 4.4 percent annually.

Mr. Hall explained that six percent of highschoolers use drugs during school and ten percent use them around school. He advised the Committee that training would be held soon in Portland on drug-free school zones, and that he hoped to attend as this is important to Montana.

John Connor, Montana County Attorneys Association, said a legislative subcommittee of the Drug Task Force met last March to

decide on three bills as a proposed agenda. He told the Committee SB 49 is one of those bills. Mr. Connor added that prior to this legislation being introduced, Idaho, Tennessee, and Montana were the only states without legislation for drug-free school zones.

Mr. Connor said information from the American Legislative Subcommittee Task Force on Substance Abuse was used in formulating language for this bill, along with that of other states and federal law.

Mr. Connor told the Committee that some law, such as the federal playground provisions, are to vague for Montana. He reported that some states include colleges and universities, but the 1,000 foot limit is fairly standard. Mr. Connor said there are federal cases addressing this issue in which it has been concluded that Congress had a right to address this problem and to protect children from drugs.

Mr. Connor explained that the bill addresses sales occurring in the presence of anyone 17 years of age or younger. He told the Committee penalties in some states are doubled for school drug sales. He said 46-18-201, MCA, imposes a mandatory minimum sentence and it is required that an individual must serve at least half of that time before he or she is eligible for parole.

Mr. Connor stated it is important to address the problem in concept and get publicity out as a deterrent. He said Montana is scheduled to receive $2.25 million and $2.232 million amount for the drug-free school act.

Mr. Connor reported that a 1990 white paper stressed cutting-off community sources of drugs, and determined that learning processes are undermined by use of drugs.

Bruce Moerer, Montana School Boards Association, told the Committee his association had a bill draft request in, but decided to support SB 49 instead. He said the bill is a positive step in drug education and enforcement, and that the Association wished to go on record as being as concerned as anyone else.

Judy Birch, Guidance and Pre-School Specialist, Office of Public Instruction (OPI), read from prepared testimony on behalf of the Superintendent of Public Instruction in support of the bill.

Jesse Long, Executive Directors, School Administrators in Montana, said it is important to develop community awareness programs.

Darryl Bruno, Chief, Chemical Dependency Bureau, Department of Institutions (DOI), read from prepared testimony in support of SB 49.

Phil Campbell, Montana Education Association, stated his support of the bill.

Opponents' Testimony:

There were no opponents of SB 49.

Questions from the Committee:

Senator Rye asked if most drug sales were done at school by peers, and how much good it would do to enact this Legislation. He asked if a ten-year-old child could be prosecuted under this provision. John Connor replied that the seller would be charged and pursued as a delinquent youth and would probably be put on probation. He said it is unlikely that a 16- to 18-year-old would be transferred to adult court. Mr. Connor said county attorneys do a lot of drug prosecution of mostly 18- to 20-year-olds selling drugs out of cars at or near school.

Senator Crippen asked what happened to similar legislation passed one or two sessions ago. John Connor replied that he believed Representative Bardanouve sponsored the legislation which never made it to the Senate.

Chairman Pinsoneault forewarned proponents to further define school property in the bill to eliminate problems if kids are spread out in different areas for educational purposes.

Senator Towe asked what SB 49 adds to the law. John Connor replied it increases penalties and sets mandatory minimums in 46-18-201, MCA, section 2, subsection 4 which can't be waived. He said the meat of the bill is in section one.

Closing by Sponsor:

Senator Waterman recognized the cooperation among business, schools, and law enforcement and urged the Committee to give SB 49 a do pass recommendation.

HEARING ON SENATE BILL 57

Presentation and Opening Statement by Sponsor:

Senator Joe Mazurek, District 23, presented SB 57 in the absence of Senator Yellowtail, sponsor of the bill. Senator Mazurek told the Committee SB 57 allows for the use of two-way audio/visual communication equipment in court. He said a judge has the discretion to order defendants to physically appear, so the electronic equipment is optional.

Senator Mazurek stated that section 4 of the bill is the same scenario set-up for presentation of evidence and the same safe-guards are in place. He explained that electronic equipment can also be used for arraignment, and that the bill is an effort to recognize advanced technology to save time and travel costs for counties. He commented it is particularly important as the state goes to the regional concept for jails and detention centers.

Proponents' Testimony:

Gordon Morris, Montana Association of Counties, (MACO), asked to go on record in support of SB 57.

Dennis Walker, US West Communications, said he has seen this technology being used effectively in several states.

Ed Hall, Administrator, Board of Crime Control, stated his support of SB 57, and said it is a futuristic look at problems counties face in this area.

Opponents' Testimony:

Scott Chrichton, Director, ACLU - Montana, reported that he attended a number of meetings of SJR 23, and also viewed the US West video tape, Video Justice. He said the Committee needs to look at the fundamental protection of the Bill of Rights - to counsel and to face an accuser. Mr. Chrichton said he was certain attorneys would agree on the ability to communicate privately on intimate developments in defending their clients.

Mr. Chrichton added that a fiscal note should be attached to the bill, outlining costs, since Mr. Walker testified that the more the electronic equipment is used, the less costly it is. He said the Committee should consider defendants, and the ability of judges and lawyers to do their job, and that he believes two-dimensional television does a poor job.

Chairman Pinsoneault addressed Scott Chrichton and advised him that in talking about initial appearance, he hasn't seen many judges who hold the hand of the defense during procedures. Mr. Chrichton replied that the legislation must be applied broadly to be effective, but as written is very narrow. He said he had doubts about controlling confidentiality, as has been seen in Vermont.

Questions From Committee Members:

Senator Crippen asked Senator Mazurek where in the bill defense counsel can object to procedure. Senator Mazurek asked Senator Crippen if that were not presumed by implication, and said he had no objection to adding language, but did not believe it would be required. Scott Chrichton added that the Committee probably needs to get the response of other trial or defense attorneys.

Senator Towe asked how private consultation and constant eye contact could work simultaneously with electronic equipment. Michelle Burchett, Account Executive, US West Helena, explained that in a courtroom setting experience in Oregon, changes were made to allow the judge to view two television monitors, one showing the defendant and one showing court documents. Ms. Burchett explained that at a remote location, the detainee can see the judge and the

prosecuting attorney. She said confidentiality is accomplished via a separate private line circuit, bypassing public circuits.

Chairman Pinsoneault told Ms. Burchett he would like to see how the system works. Ms. Burchett replied that the video is seven minutes in length and that she would provide it at the convenience of the Committee

Senator Towe said he believed the second line for private counsel is potential for abuse. Michelle Burchett replied that it is a private, direct line connecting those two locations, and no switch coordinates are involved.

Senator Towe asked Scott Chricton if this were the problem he as referring to. Mr. Chricton replied it was, and said his other concern is this makes an exception for people to no longer be in court.

Senator Svrcek asked if, under this scenario, defense counsel would always be in court with the judge or if they would ever be in the same room with the defendant. Senator Mazurek replied that possibilities exist either way.

Senator Svrcek asked what the system costs. Dan Walker replied that it costs between $15,000 and $20,000 per end, but prices are coming down because of rapid technology changes. He said he sees purchasing decisions as being made by local authorities.

Senator Doherty asked for information on Salem and Portland, Oregon use of electronic communication. Michelle Burchett said she would provide this information to the Committee.

Senator Doherty asked if it would save dollars to do audio and not visual communication. Ed Hall, Board of Crime Control, replied that the subcommittee was looking to improve the situation in general. Michelle Burchett replied that she believed it is required that all parties see each other.

Closing by Sponsor:

Senator Mazurek said SB 57 is purely enabling and that electronic communication is only available during early proceedings. He explained that it can't be used for guilty pleas, and stressed the need to recognize advanced technology. Senator Mazurek stated he did not know how privacy could be guaranteed in any circumstance. He added that the biggest waste of time is in judges having to travel around the state.

HEARING ON SENATE BILL 58

Presentation and Opening Statement by Sponsor:

Senator Joe Mazurek, District 23, presented SB 58 in the absence of Senator Yellowtail, sponsor of the bill. Senator Mazurek explained that SB 58 is another product of the Joint Interim Subcommittee on Adult and Juvenile Detention.

Senator Mazurek said section 1 of the bill requires local governments to be responsible for preconfinement medical costs of indigent prisoners, if a prisoner is not ultimately charged with violation of state law. He told the Committee section 2 addresses per diem costs for out-of-state persons being detained for the feds or those being returned to other jurisdictions. Senator Mazurek said the bill allows for recovery of medical costs from other jurisdictions.

Senator Mazurek stated the Committee needs to be aware that someone can be confined or detained in a state- or county-operated facility, but be brought in by other authorities. He said the Committee may need to rely on information from the Subcommittee regarding the intent of the bill.

Proponents' Testimony:

Peter Funk, Assistant Attorney General, Department of Justice, told the Committee he supported efforts to clarify medical and per diem funding costs. He explained that section 1 deals only with post-incarceration costs. Mr. Funk said pre-incarceration costs apply to person taken to medical treatment before they are taken to jail (Deaconess Hospital vs. Johnson). He stated post-sentencing costs are those occurring after sentencing, but while the person is not yet in prison (Wilson vs. Missoula County).

Mr. Funk commented that major chunks of costs are not addressed by current law, and that as Scott Chrichton said, this is an area for legislative action. Mr. Funk provided a marked-up copy of the bill draft (Exhibit #7), and said costs are split along two lines, one of which is looking to the arresting agency or law under which an individual is charged.

Mr. Funk stated that if the language "agency or authority" is used, it will be nearly impossible to come up with a fiscal note because there will be too many different interpretations. He suggested changing the language to "arresting agency" for clarification.

Chairman Pinsoneault asked if the Department of Justice were represented on the Interim Subcommittee. Mr. Funk replied it was, and apologized for not bringing the proposed language up earlier. He said the Montana Highway Patrol was paying in excess of $100,000 annually in such instances. Mr. Funk added that page 3, line 8 of

the bill, addressing "costs" is completely undefined in the bill. He said there is no way to determine or limit application of that term, and that the 1989 legislative language causes 50 different contracts, depending upon where an arrest is made.

Gordon Morris, MACO, requested that the Committee investigate the intent of the Subcommittee and then table the bill.

Jim Pomroy, Chief, Community Corrections Bureau, Department of Institutions (DOI), read from prepared testimony, and requested a $66,900 appropriation to meet expenses outlined in the bill. He requested that language either specifically exclude DOI from confinement costs or specifically include the funds to meet these costs.

Opponents' Testimony:

John Nugent, City Attorney, Missoula, provided the Committee with written testimony (Exhibit #8). He stated his concern that language in section 1, subsection 5 relating to indigency would make cities and towns responsible for all criminal defendants, because the language is so broad.

Mr. Nugent suggested that county officials could manipulate confinement to avoid medical cost responsibility, and said he was concerned about possible violation of the Drake Amendment.

Bruce McCandless, Assistant Administrator, City of Billings, said his view were mostly the same as those of Mr. Nugent.

Bill Verwolf, City Manager, Helena, said that until the state got involved in the county welfare system, that system also paid indigent health costs for prisoners.

Alec Hanson, Montana League of Cities and Towns, said the bill could be dangerous financially for small towns. He stated that a $10,000 medical bill could mean 10 mills for Thompson Falls or 30 mills for St. Ignatius.

Questions From Committee Members:

There were no questions from the Committee.

Closing by Sponsor:

Senator Mazurek made no closing comments.

HEARING ON SENATE BILL 106

Presentation and Opening Statement by Sponsor:

Senator Tom Beck, District 24, said SB 106 is a minor housekeeping bill requiring the wrecking industry to remove vehicles from highways which have been abandoned for more than 48 hours. He told the Committee that Staff Attorney, Valencia Lane, has an amendment to the bill.

Proponents' Testimony:

Myron Mackey, President, Montana Tow Truck Association, provided the Committee with copies of Stypmann vs. City & City of San Francisco (Exhibit #9). He read from prepared testimony and said the state would become ultimately liabile for vehicles owners' state constitutional rights. Mr. Mackey said he could see no cost involved, and added that the National Tow Truck Association records show that only 1 in 1,000 persons have requested a hearing.

Opponents' Testimony:

Bob Griffith, Montana Highway Patrol, said the bill changes the opportunity to remove vehicles by means other than private enterprise. He told the Committee that he believes the Patrol should retain this privilege, and added that hearings have cost the Patrol $2500 to $3000.

Bill Verwolf, City Manager, Helena, stated it is more appropriate to sue public agencies in some instances, and added that he does support the idea of public hearings.

Questions From Committee Members:

Senator Svrcek asked how a hearing could cost $3000. Bob Griffith replied that a hearing officer must be present.

Senator Mazurek asked Mr. Mackey why a lien applies to the contents of a vehicle. Mr. Mackey replied that some people get the possessions out of their vehicle and then dump the vehicle.

Senator Towe asked about the exclusive right to remove vehicles. Mr. Mackey replied that the proposed amendment addresses a city, county, or the state using its own equipment in emergency situations.

Closing by Sponsor:

Senator Beck stated SB 106 has no ties with the junk vehicle program. He said abandoned vehicles should have proper equipment to tow them.

ADJOURNMENT

Adjournment At: 12:10 p.m.

Senator Dick Pinsoneault, Chairman

Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991 Date 21 Jan 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	E		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	E		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

21 Jan 91
Exhibit 1
SB353

FEDERAL INDIAN GAMING REGULATORY ACT

(EXCERPT FROM GAMBLING CONTROL DIVISION ANNUAL REPORT)

January 21, 1991

In October 1988, Congress passed the Indian Gaming Regulatory Act (IGRA). The Act is a Congressional effort to promote economic development and provide for the regulation of gambling activities on Indian lands. IGRA applies to gambling on reservation lands and lands held in trust for the tribes by the Secretary of the Interior. Provisions of the Act establish a National Indian Gaming Commission and procedures for approving gambling activities on reservation lands.

IGRA segregates gambling activities into three classes. Class I consists of social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of or in connection with tribal ceremonies or celebrations. Class II gaming means bingo, card games that are explicitly authorized or not explicitly prohibited by state law (except house banking games), pull tabs, punch boards, tip jars, and instant bingo. Class III gaming consists of all forms of gaming that are not categorized as Class I or Class II, including but not limited to video gambling machines, house banking card games, and horse racing.

Class I gaming is allowed on the reservation and is within the exclusive regulatory jurisdiction of the Indian tribes. Class II gaming is allowed if each facility offering gambling is properly licensed and the funds from the games are properly designated to benefit the tribes. Class III gaming activities are allowed if "such activities are authorized by a tribal ordinance or resolution, located in a state that permits such gaming <u>for any purpose by any person, organization, or entity, and conducted in conformance with a tribal-state compact</u> entered into by the Indian tribe and the State". (Emphasis added) Because Montana authorizes certain types of Class III gaming activities (i.e.,

video gambling machines and horse racing), tribal-state compacts must be negotiated concerning the operation of these activities on tribal lands.

The Act suggests that the compacts include the following provisions:

(1) application of the criminal and civil laws and regulations of the Indian tribe or state that are directly related to, and necessary for, the licensing and regulation of Class III gaming activities;

(2) allocation of criminal and civil jurisdiction between the state and Indian tribe necessary for the enforcement of the laws and regulations;

(3) assessment by the state of the gaming activities in the amounts necessary to defray the costs of regulating the activities;

(4) taxation by the Indian tribe of the activities in amounts comparable to amounts assessed by the state for comparable activities;

(5) remedies for breach of contract;

(6) standards for the operation of the activities and maintenance of gaming facilities, including licensing; and

(7) any other subjects that are directly related to the operation of gaming activities.

The state has been in contact with each tribe with a reservation within the exterior boundaries of Montana. To date, no compacts have been signed. However, a compact with the Fort Peck Tribes

1/21/91
SB 53

is close to adoption. It is currently being reviewed by the Attorney General and Governor to make certain the provisions do not conflict with other existing compacts (i.e., fish and game, water resource compacts).

Negotiations with the Fort Peck tribes have led to the identification and resolution of several regulatory issues. The compact will likely serve as a guide for other state-tribal agreements in Montana.

IGRA.RJR
RJR/dcg

Exhibit 2
SB 53

Co-Publisher
and Chairman
Duane V. Burke

Co-Publisher
and Editor-in-Chief
Larry Montgomery

Editor
Lynnie Hancock

Art Director
Kathy Foster

Editorial Assistance
Judy Davidson
Jane Stokes
Lynn Koert

Sales Management
Steve Burke

Marketing Support
Amy Elbert Ellison

Circulation Manager
Delores Pinkney

Editorial Advisory Board
Manny Fierro,
Fierro, Eull & Associates
Joel Frank,
Seminole Tribe
Leonard Prescott,
Shakopee Sioux
Jerry Levine,
Levine & Associates
Tim E. Harper,
Muscogee Creek Nation
Billy Cypress,
Miccosukee Tribe
Rita Keshena,
Menominee Tribe

Copyright 1990.
All rights reserved.

Indian Gaming magazine December 1990, Vol.1, No. 1, is published by the Public Gaming Research Institute Inc. 15825 Shady Grove Road, Suite 130, Rockville, MD 20850, (301) 330-7600. Application to second class mail at second class postage rates at Rockville, MD and additional offices.
ANNUAL SUBSCRIPTION RATES: $36. Send subscription requests and address changes to *Indian Gaming* at the above address.

A BURKEMONT
CORPORATION PUBLICATION.

INDIAN GAMING

The National Magazine of the Indian Gaming Industry

December 1990 Volume 1, Number 1

On the Cover:
Tony Hope, Chairman of the National Indian Gaming Commission; Board of Directors of the National Indian Gaming Association; and the new Miccosukee Bingo Hall in Florida.

4.2
1/21/91
SB53

An Update On:

Indian Gaming Litigation Developments

BY JEROME L. LEVINE

Historically, states have often failed to place a high priority on the needs of Indian tribes within their borders. It is little wonder then, that when Indian tribes looked to gaming as a means of economic development and independence, they found the state's gaming regulations in conflict with their own concerns and priorities. The conflict was resolved to some extent through a series of cases beginning in 1981 with the *Seminole Tribe v. Butterworth* decision in Florida and culminating in the 1987 decision of the United States Supreme Court in *State of California v. Cabazon*. Those decisions analyzed whether a state's gaming laws were truly "criminal/prohibitory" in nature and thus potentially applicable to a tribe under various federal statutes that make some state criminal laws applicable in Indian country, or were merely "civil/regulatory" and thus could not be imposed upon tribal lands. *Cabazon* summarized the test as holding that a tribe, as a separate governmental entity, is not bound by a state's gaming rules so long as no violation of the state's public policy is involved. In other words, a state which permits a favorite charity to award a $250 bingo prize will not be heard to complain that it is morally offensive for an Indian tribe within its borders to award a $500 bingo prize. To paraphrase George Bernard Shaw's famous lines: We already know how the state feels about gaming; we are merely quibbling about the price.

To further reduce uncertainty between the tribes and the states, and to set some nationwide standards, in October 1988 congress passed the Indian Gaming Regulatory Act (IGRA) which is a comprehensive statutory scheme which officially recognizes Indian gaming operations as a means of promoting tribal economic development and strong tribal government. It is also designed to prevent organized crime and other corrupting influences from infiltrating Indian gaming, and to establish independent standards and the National Indian Gaming Commission to regulate the industry. The Act creates three Classes of Indian gaming: Class I, consisting of social games for small prizes, as well as gaming which is engaged in as part of tribal ceremonies or celebrations; Class II, which is comprised of bingo and related activities, certain non-banking card games and various grandfathered activities at reservations located within selected states; and Class III, which encompasses all forms of gaming which are not within Class I or Class II and requires that a tribal-state compact be reached to establish some basic ground rules.

Although the Act contemplates the availability of an Indian Gaming commission to resolve some of the issues inherent in meeting the goals of the Act, the tribes and states whose interests Congress attempted to address in light of Cabazon, wasted no time seeking the courts' guidance as to the Act's meaning and application. Despite speculation that the judiciary might dwell on supposed ambiguities or inconsistencies in the Act, which (at least went the argument) could create rather than resolve, uncertainties in this emerging industry, the decisions to date indicate that above all, courts are finding the Act to be clearly directed at its goal of supporting tribally-regulated gaming in Indian country, particularly in light of its well-documented legislative history (for example, an extensive Senate Committee report and various Congressional floor debates have been repeatedly referenced to reinforce many of the concepts embodied in the Act). Here are brief sketches of a few of the more significant Indian gaming decisions and developments to date:

• One of the first cases brought under the Act, but not decided until June of this year, was *Red Lake Band of Chippewa Indians v. Swimmer*. In that case, the Red Lake Band of Chippewa Indians and the Mescalero Apache Tribe sought to prevent IGRA from taking effect on a number of grounds, including a violation of their treaty and aboriginal right to self-government and that the Act is unconstitutional. The Federal District Court in Washington D.C. dismissed the action, noting that despite treaties or historical rights which might be to the contrary, Congress could rely on its plenary powers to pass the Act. It also found that Congress' legitimate concern about Indian gaming, particularly in view of its "special relationship" with Indian tribes, overcame any constitutional challenges.

• In the area of criminal prosecution related to gaming in Indian country, *U.S. v. Burns*, decided in 1989 by the Federal District Court for the Northern District of New York, involved several individual tribal members who were accused of illegally possessing slot machines, operating gaming tables and related activities. *Burns* sorted through a number of federal gambling criminal statutes and held that despite the IGRA grant of exclusive jurisdiction to federal courts in cases involving violations of state gambling laws "made applicable" under IGRA, several other federal criminal statutes were still operative, subject to some important exceptions. For example, the court found that Congress intended that no federal statute should prohibit gambling devices in connection with bingo or lotto, which are legal Class II games under IGRA, but that other federal laws could still be applied to gaming devices which fell outside Class II, at least, presumably, absent a tribal-state compact. The court also found that certain New York gaming laws were "criminal/prohibitory" and as such

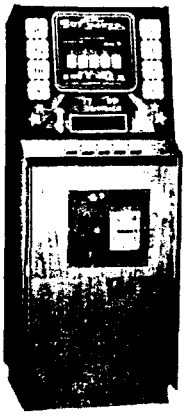
Continued on page 19

1/21/91
SB53

When it comes to equipment needs: **NOBODY DOES IT BETTER!**

20 REASONS WHY:

1. **Honesty**
2. **Integrity**
3. 10 years Manufacturing experience
4. Professional advice and guidance
5. Dedication to customer success



6. Straight forward game play
7. **On-site training**
8. Modular, easy to service equipment design
9. Expansion capability
10. **On-site installation**

For the other 10+ reasons, call Steve or Greg

1-800-426-3100

For additional information circle #113

amusementWORLD INC.

Continued from page 4

had been applicable in Indian country since 1948. The court reasoned they were therefore not "made applicable" to Indian country by IGRA and that therefore that state continued to have jurisdiction in connection with violations of state gambling laws.

• In contrast to *Burns*, in 1990 a Federal District Court for the Western District of Wisconsin, in the case of *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, held that not only were Wisconsin's gaming laws "civil/regulatory" under the *Cabazon* test and therefore could not be used for state prosecution of the two plaintiff tribes under Public Law 280, but that even if they were "criminal/prohibitory" (as New York's laws were found to be in *Burns*), such proceedings now would be preempted by the IGRA. Although not citing *Burns*, the court rejected the argument that state laws which had been applied to Indian country before IGRA were exempt from the IGRA's exclusivity requirement. To accept that argument, the court reasoned, would not lay to rest the uncertainty inherent in the process of determining which states' statutes applied to Indian country and therefore "would not advance the Congressional purpose of developing a comprehensive, national scheme for regulating ongoing gaming activities on Indian reservations throughout the country." Nevertheless, the court refused to enjoin the state from initiating criminal action if the tribes continued to engage in Class III activity until after a tribal-state compact had been negotiated.

Capital Games International

Custom Deluxe Black Jack and Poker Tables
Oak and Birch Construction
Deal Direct with Manufacturer—
For information Contact:
Tony Detore, Marketing Director
P.O. Box 472
Leslie, MI 49251
Tel: (517) 589-9350

For additional information circle #114

Three cases were decided this year which dealt with the scope of permissible gaming under the Act, one of which also addressed the requirement that a state must participate in tribal-state compact negotiations in good faith:

• In *U.S. v. Sisseton-Wahpeton Sioux Tribe*, the tribe had opened a blackjack enterprise on its South Dakota reservation in April 1988. The IGRA permits card games that were already operating on May 1, 1988, in South Dakota to be classified as Class II gaming (blackjack would normally be within Class III), "but only to the extent of the *nature and scope* of the card games that were actually operated" on that date. After May 1, 1988, the tribe increased the number of tables from 14 to 20 and expanded the hours of operation, but did not alter its $100 wager limit. The state argued that the tribe was no longer within the "nature and scope" of the game being played on May 1 because it had increased the tables and hours of operation but that in any event the games could not come within Class II because that class requires that the activity take place within a state that permits "such gaming for any purpose by any person..." South Dakota permits blackjack in one location (within the City of Deadwood), and limits bets to $5. The State contended that the difference in permitted wagers meant that "such gaming" (i.e. blackjack being played on the reservation) was not occurring elsewhere within the state. In

1/21/91
5853

overturning the lower court's decision in favor of the State, the Eighth Circuit Court of Appeals held that in restricting the grandfather clause to the nature and scope of a tribe's May 1 gaming, Congress intended only to limit changes to the character of the game in question; "new or different kinds of games" could not be adopted. Mere changes in the hours of operation or the number of customers who could be served did not affect the game's character. Secondly, the court found that the use of the term "such gaming" under the Class II provisions of the act was merely intended to apply to whether that kind of game would have been permitted under *Cabazon*. The court reasoned that to hold otherwise would be to place Class II gaming under the regulatory control of the state, in direct conflict with the Act's approach to Class II gaming. Moreover, since the Act had addressed state-imposed pot limits in connection with non-banking card games, its omission of any reference to pot limits regarding grandfathered banking games such as blackjack meant that those limits were not intended to be applied.

• The case of *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin* addressed whether two tribal games, "Big Green" and "Cash-3" were within Class II and thus subject only to tribal regulation, or were within Class III, which would require that an accord be reached with the state under a compact. Big Green is played by awarding prizes for the correct selection of four to six numbers out of 36 on a lotto play slip. The numbers can be selected by the player or randomly selected by a machine. The numbers are determined once a week by drawing balls from a bingo blower at a location where tribal bingo is played, but players may purchase play slips from remote locations. Cash-3 requires the correct selection of two to three numbers out of 10 for prizes ranging from $250 to $500, depending on the amount of the purchase. Both games are similar to lottery games played in Wisconsin and other states. The tribe contended they were Class II "lotto" games which are included in the bingo section of IGRA. The tribe argued that the word "lotto" has come to be associated with large stake, state-run lotteries, of which Congress was aware, and that the reason it was placed in the bingo section was to alleviate congressional concerns that there be no state-wide tribal lotteries in states opposed to such activities, since bingo is restricted to reservation locations. While the court opined that the tribe's position had merit, it held that lotteries are distinct from lotto and that the former were not intended to be included in Class II but instead fell within Class III. The court noted that the dictionary definition of "lotto" is "bingo" and it was in that section of the Act that the term was used. The court also referred to Senate floor debates to support its analysis.

• Another case interpreting the kind of gaming that is permissible under IGRA was *Mashantucket Pequot Tribe v. State of Connecticut*. In that case, a tribe sought to negotiate a tribal-state compact with the State of Connecticut in order to operate Class III casino-type gaming on its reservation. The state permits "Las Vegas night" casino gaming in conjunction with charity fundraising events. The state refused to negotiate on the grounds the tribe only had the right to engage in such gaming subject to "those restrictions contained in (Connecticut law)." The tribe sued the state under IGRA to compel negotiation of a tribal-state compact. The Federal District Court ordered the State to negotiate in food faith and the State appealed. The Second Circuit Court of Appeals affirmed the lower court's decision, holding that regardless of the State's views, "the IGRA plainly requires a state to enter into negotiations with a tribe upon request." The court observed that IGRA makes no exception to the compulsory negotiation rule for a state's "sincere but erroneous legal analysis." The court further determined that since casino gaming is not prohibited, it is not against the State's public policy to engage in such gaming under rules which are different than those prescribed by the State. The court stated that any differences between the state and the tribe concerning Class III rules and regulations are to be arrived at through the compact negotiating process provided by IGRA. Accordingly, the court affirmed the lower court's order that Connecticut negotiate a compact with the tribe. (Since that decision was rendered, a compact has been reached between the tribe and the state).

• Finally, the Cabazon Band of Mission Indians has commenced a "friendly litigation" against the State of California challenging the state's right to charge the tribe a "licensing fee" for the tribe's participation in off-track wagering under a tribal-state compact. Under the tribe's compact with the State, it was agreed that the state could collect the fee over the tribe's protest and that the matter would be resolved in a federal court.

The foregoing cases barely foreshadow the kinds of gaming issues which will be arising under IGRA and in the industry generally in the years to come, as the relationships among tribes, states, management contractors, the Gaming Commission and patrons are developed and refined. No doubt electronic and technological developments, marketing strategies and gaming variations will bring with them a myriad of legal issues to be addressed which we cannot yet imagine. We will be reporting them to you in *Indian Gaming* magazine as those developments occur. Meanwhile, if there are any particular issues you would like to see discussed in future articles, please pass them along. —IG

Jerome L. Levine is an attorney practicing in Los Angeles, Calf.

To advertise in
Indian Gaming magazine

Contact:
Steve Burke or
Larry Montgomery
Tel: (301) 330-7600
Fax: (301) 330-7608

EX 1 Jan 11
Exhibit 3
SB 53

STATE OF MONTANA

DEPARTMENT OF JUSTICE

GAMBLING CONTROL DIVISION

Marc Racicot
Attorney General

2687 Airport Road
Helena, MT 59620-1424

MEMORANDUM

TO: Gaming Advisory Council

FROM: Rob Smith, Legal Counsel
Gambling Control Division

ISSUE: Casino Nights and the Indian Gaming Regulatory Act

DATE: September 18, 1990

At the July Gaming Advisory Council meeting, members discussed the impact of legalizing casino nights on tribal and reservation gambling. Casino nights are defined as special fund-raising events that take place at specific dates and locations, where casino-style gambling--blackjack, craps, roulette, etc.--are conducted on a one-time only basis by charitable organizations.

The Indian Gaming Regulatory ~~Association~~ Act (IGRA) establishes three classes of gaming: Class I, social games solely for prizes of minimal value or traditional gaming as part of tribal ceremonies or celebrations (Section 4(6)); Class II, bingo or lotto, pull-tabs, punch boards, tip jars, and card games played in conformity with state law (Section 4(7)); and Class III, games that are not Class I or Class II i.e., all banking card games and most video gambling machines. Each class of Indian gaming is subject to a different type of regulation: Class I gaming is within the exclusive jurisdiction of the tribe (Section 11(1)(1)); Class II gaming is within the jurisdiction of the tribe within a state where such gaming is permitted, but must be conducted pursuant to a tribal ordinance approved by the Chairman of the National Indian Gaming Commission, (Section 11(b) and (c)); and Class III gaming must be conducted pursuant to a state-tribal compact. Thus, casino nights would be Class III gaming which would be conducted on a reservation pursuant to a state-tribal compact.

Regarding state-tribal compacts, if a tribe requests that a state negotiate a gambling compact, the state must negotiate in good faith. Under case law that was probably not affected by the IGRA, tribes may conduct without restrictions on the reservation those forms of gambling permitted within a state <u>for any purpose by any person</u>. Thus if Montana were to legalize charitable casino nights, the Indian tribes could demand negotiations

Ex. 3
1-21-91
SB 53

regarding casinos on reservations which could offer unrestricted forms of all games which had been legalized for casino nights.

It is certainly possible that the state could bargain in good faith for restrictions on casino gambling on the reservation. The state could well negotiate from the position that tribes should be subject to the same restrictions as charities. However, in light of the wording of the IGRA, and the previous cases, it is my opinion that presuming that casinos on the reservation might be limited through the negotiation process would be a position that would not be without risk. The risk would be that a federal court might find that the state's negotiating position was not taken in good faith and then force the state into a complicated mediation process that could result in expanded casino gambling on the reservation. In fact, other states which already have legal casino nights are being requested to negotiate state-tribal compacts regarding casinos on Indian reservations.

In conclusion, it is my opinion that if the Montana Legislature chooses to legalize limited casino nights for charitable organizations, there would be a significant chance that casinos offering unlimited forms of those games legalized casino nights would eventually be legal on Indian reservations in Montana.

RS/da

Exhibit 4
SB49

SB 49 Briefing
Board of Crime Control

* Title: Commonly known as drug free school zones. "An act creating the offense of criminal sale of dangerous drugs on or near school property; providing penalties; creating an affirmative defense."

* Summary: sale of dangerous drugs within 1,000 feet of a school is an offense punishable by imprisonment of not less than 2 years or more than life and possible fine up to $50,000 with parole at half term.

* Theory: Reducing the demand for drugs is salient feature of drug control strategy. Drug frees school zones are important because: 1. Many youth obtain drugs at or near schools. Preventing sales at or near schools cuts off a common source of drugs. 2. Drug use and sales near schools undercuts the credibility of drug education and prevention programs in schools. 3. All learning is diminished where drug use flourishes. 4. Youth must get and believe the message that the entire community has a stake in a drug free environment. 5. All youth have a right to feel safe and not threatened by drug sales and drug use at or near their schools.

* Data: In Montana in 1989 there were 1,360 drug related offenses reported. During the decade of the 80's drug offenses increase 4.4% per year. Surveys of drug use by students report that 29% used marijuana within the last year, 14.3% within the last 30 days. A 1988 survey completed in a Montana county reports over 50% of 8th grade students having tried marijuana, almost 205 of seniors have tried stimulants, and just under 10% of seniors tried cocaine. This same survey reports about 6% of seniors used drugs druing school, and close to 10% of seniors used drugs during school hours but off the campus. Anecdotal information reports the use of beepers and pagers to notify students of 'salesmen' near schools. A GAO report Rural Drug Abuse-Prevalence, Relation to Crime, and Programs (1990) finds drug use in Montana and all rural states to be as prevalent as in urban areas. We are not exempt.

* Other states: In September 1990, eight states did not have drug free school zone legislation. At this time it is believed that number is now two or three states. Drug free school zones started in Alaska. New Jersey is a model often used. Arizona and Florida have successful programs. Montana's legislation is similar.

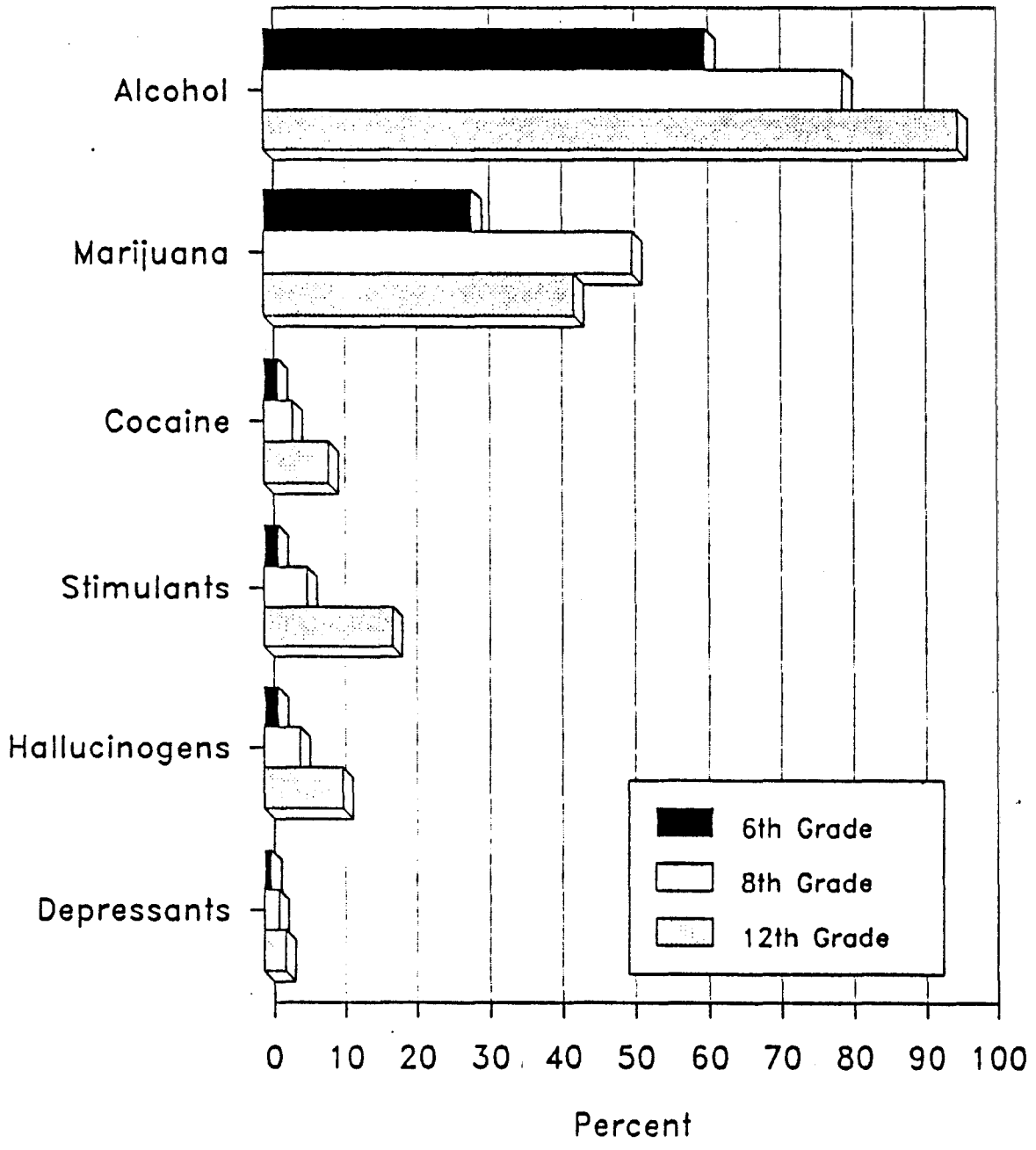
* Support: Drug free school zone legislation was requested by the 15 member Drug Strategy Task Force of the Montana Board of Crime Control. Drug free school zone legislation is endorsed by the Board. It is supported by the Office of Public Instruction, County Attorneys, and law enforcement.

* Other: Can be a vehicle for proactive law enforcement involvement with the community and the schools. It supports community/school/law enforcement partnerships.

EX. 7
1-21-91
SB 49

Figure 5

Percent of Students Who Have Ever Tried A Drug

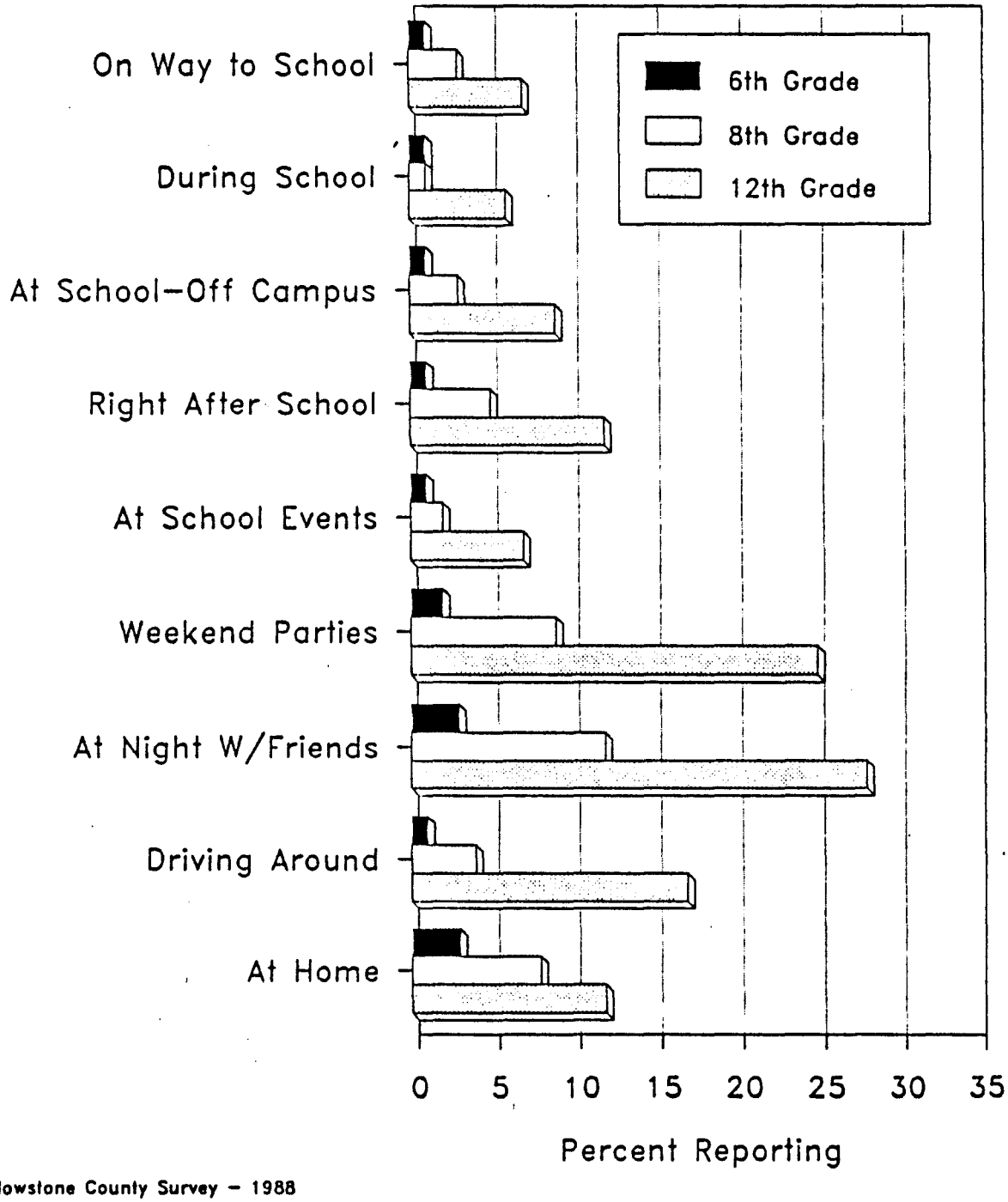


*Yellowstone County Survey – 1988

Ex. 7
1-21-91
SB49

Figure 8

Where Students Have Used Drugs



Yellowstone County Survey – 1988

21 Jan 91
Exhibit 5
SB49

SB 49

Drug Free School Zones

SB 49 is an act which establishes in Montana what are typically known as Drug Free School Zones. A Board of Crime Control Task Force known as the Drug Strategy Task Force composed of 15 persons representing law enforcement, DEA, Office of Public Instruction, drug programs, legislators, etc. and who have been responsible for outlining Montana's implementation of the National Drug Control Policy, identified three priorities for legislative action in 1991. Drug Free School Zones is one of these. The idea of Drug Free School Zones has been endorsed by the Board as important legislation in the war on drugs. All but two or three states in the Union have enacted similar Drug Free School Zone legislation.

SB 49 creates the offense of criminal sale of dangerous drugs on or near schools and provides a penalty if convicted of not less than 2 years imprisonment and the possibility of a fine not to exceed $50,000.

There are several witnesses here who can provide additional testimony on the background, philosophy and impact of the bill.

Ex. 5
1-21-91
SB 49

DRUG TASK FORCE MEMBERS
1990-1991

Marsha Armstrong
Administrative Officer
Department of Institutions
1539 Eleventh Avenue
Helena, MT 59620

Gary Carrell, Administrator
Law Enforcement Services Division
Department of Justice
303 North Roberts
Helena, MT 59620

John Connor, Jr.
Assistant Attorney General
Attorney General's Office
215 North Sanders
Helena, MT 59620

Honorable Delwyn Gage
State Senator
P.O. Box 1027
Cut Bank, MT 59427

Asst. Chief Ron Kemp
Glendive Police Department
Box 1372
Glendive, MT 59330

Ted O. Lympus
Flathead County Attorney
Flathead County Courthouse
Kalispell, MT 59901

Mike Mahoney
Deputy Warden of Treatment
Montana State Prison
500 Conley Lake Road
Deer Lodge, MT 59722-9755

Jim Oppedahl
Court Administrator
Supreme Court
215 N. Sanders, Rm. 315
Helena, MT 59620

Spencer Sartorius
Administrator, Health Enhancement Division
Office of Public Instruction
1300 Eleventh Avenue
Helena, MT 59620

Jim Seykora
Assistant U. S. Attorney
P. O. Box 1478
Billings, MT 59103

Chief Mike Shortell
Havre Police Department
520 - 4th Street
Havre, MT 59501

Honorable William Strizich
State Representative
CCCC Building
1601 - 2nd Avenue North
Great Falls, MT 59401

Honorable Mignon Waterman
State Senator
530 Hazelgreen
Helena, MT 59601

Don Wetzel
Superintendant of Schools
Harlem,
MT 59526 Don

Ben Yarborough
Resident Agent in Charge
Drug Enforcement Administration
P. O. Box 2887
Great Falls, MT 59403

Ex 6
SB 57

U S WEST Communications
Testimony before the Senate Judiciary Committee
on Senate Bill 57
January 21, 1991

U S WEST Communications would like to testify on behalf of Senate Bill 57, "An act allowing the use of two-way electronic audio-video communication in some criminal procedures."

Video teleconferencing is being used effectively in several states for prisoner arraignment and sentencing, pre-sentence and parole interviews, attorney-client conferences, psychological evaluations and parole hearings.

This bill is very well written. It addresses the majority of preliminary procedures for the courts. It enables local jurisdications to use telecommunications technology to reduce costs associated with prisoner transport and improve public safety. Used effectively, it also addresses issues of court congestion and jail overcrowding.

Judges and prosecutors as well as defendents and their legal counsel will be very well served by this legislation. U S WEST Communications supports Senate Bill 57 as written.

Exhibit #7
SB 58

Senate BILL NO. 58

INTRODUCED BY Yellowtail

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE ON ADULT AND JUVENILE DETENTION

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE PAYMENT OF CONFINEMENT COSTS BY THE AGENCY OR AUTHORITY AT WHOSE INSTANCE AN INMATE IS CONFINED; REQUIRING OUT-OF-STATE JURISDICTIONS TO PAY THE CONFINEMENT COSTS OF INMATES HELD ON THEIR BEHALF; REQUIRING CITIES AND TOWNS TO PAY CERTAIN MEDICAL COSTS OF ARRESTED PERSONS; AND AMENDING SECTIONS 7-32-2222 AND 7-32-2242, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 7-32-2222, MCA, is amended to read:

"7-32-2222. Health and safety of prisoners. (1) Each detention center must comply with state and local fire codes for correctional occupancy and with sanitation, safety, and health codes.

(2) Designated exits must permit prompt evacuation of inmates and detention center staff in an emergency.

(3) When there is good reason to believe that the inmates may be injured or endangered, the detention center administrator must remove them to a safe and convenient place and confine them there as long as necessary to avoid the danger.

(4) If in the opinion of the detention center administrator an inmate under his jurisdiction requires medication, medical services, or hospitalization, the expense must be borne by the arresting agency ~~or authority at whose instance the inmate was arrested~~ when the arresting agency ~~or authority~~ is not the county in which the inmate is confined, except that if a city or town commits a person to the detention center of the county in which the city or town is located for a reason other than detention pending trial for or detention for service of a sentence for violating an ordinance of that city or town, the expense must be paid by the county. The county attorney shall initiate proceedings to collect from the inmate any charges arising from the medical services or hospitalization for the inmate involved if he determines the inmate is financially able to pay.

(5) Notwithstanding any other provision of law, a city or town is liable for payment of medical costs incurred by a person arrested under its authority if that person is not subsequently confined in a detention center for a violation of state law."

Section 2. Section 7-32-2242, MCA, is amended to read:

"7-32-2242. Use of detention center -- payment of costs. (1) Local government, state, and federal law enforcement and correctional agencies may use any detention

INTRODUCED BILL
SB 58

Ex. 7
1-21-91
SB 58

center for the confinement of arrested persons and the punishment of offenders, under conditions imposed by law and with the consent of the governing body responsible for the detention center.

(2) If a person is ~~committed to~~ confined in a detention center by ~~a government unit~~ an arresting agency ~~or authority~~ not responsible for the operation of the detention center, the ~~committing government unit shall pay the~~ costs of holding the person in confinement ~~as agreed upon by the government unit and the detention center~~ must be paid by the arresting agency ~~or authority at whose instance the person is confined~~; except that if a city or town commits a person to the detention center of the county in which the city or town is located for a reason other than detention pending trial for or detention for service of a sentence for violating an ordinance of that city or town, the costs must be paid by the county. Payments must be made to the government unit responsible for the detention center or to the administrator operating a private detention center under an agreement provided for in 7-32-2201, upon presentation of a claim to the ~~committing government unit~~ arresting agency ~~or authority at whose instance the person is confined~~.

(3) If a person is a fugitive from justice from an out-of-state jurisdiction, the costs, including medical expenses, of holding the person in a detention center

pending extradition must be paid by the out-of-state jurisdiction."

-End-

Exhibit #8
SB58

MISSOULA
OFFICE OF THE CITY ATTORNEY
435 RYMAN • MISSOULA, MT 59802-4297 • (406) 523-4614

January 18, 1991 91-028

Senate Judiciary Committee Members
Capitol Station
Helena, Montana 59620

RE: OPPOSITION TO SB-58 IN PART REQUIRING CITIES AND TOWNS TO PAY CERTAIN MEDICAL COSTS OF ARRESTED PERSONS

Honorable Senate Judiciary Committee Members:

The purpose of this letter is to strongly oppose SB-58 in part "REQUIRING CITIES AND TOWNS TO PAY CERTAIN MEDICAL COSTS OF ARRESTED PERSONS" for the following reasons:

1. SB-58 creates new absolute financial liability for Montana's cities and towns. The phrase in section 1(5) "Notwithstanding any other provision of law" makes cities and towns in the factual situations specified responsible for medical bills for all criminal defendants whether:

A) charged with a state law violation, or
B) charged with a state parole violation, or
C) charged with a city ordinance violation,

in all instances even where:

A) the defendant has health insurance,
B) the defendant has the financial ability to pay,
C) the defendant is covered by general relief assistance (welfare).

2. SB-58 is an attempt to erode the general rule throughout most of the United States which the Montana Supreme Court adopted in Montana Deaconess Medical Center v. Johnson and the City of Great Falls, (1988) 758 P.2d 756, 758-759 when it extensively quoted and relied on the Kansas Supreme Court's decision in Wesley Medical Center v. City of Wichita, (1985), 703 P.2d 818, 824 the "nature of the crime" charged against the defendant approach for determining financial responsibility for prisoners stating in pertinent part as follows:

> . . . . We further hold that a county's liability for charges and expenses for safekeeping and maintenance of the prisoner, including medical expenses, does not depend on which police agency happens to be called to the scene of the alleged crime or whether such expenses were incurred before or after he is placed in a county jail.

AN EQUAL EMPLOYMENT OPPORTUNITY AFFIRMATIVE ACTION EMPLOYER M / F / V / H

> The controlling factor is that the prisoner was arrested and subsequently charged with violation of a state law." (Emphasis supplied).

3. SB-58 constitutes double taxation of city and town property owners for this new financial liability for the reason that city and town property taxpayers are already paying county-wide property tax assessments for the operation of the county jail, sheriff's office, and general relief assistance (welfare); all of which would be available to the county sheriff in a similar factual situation.

4. SB-58 violates the Drake Amendment in Section 1-2-112 M.C.A. pertaining to state statutes imposing new local government duties because pursuant to the Drake Amendment SB-58 "must provide a specific means to finance the activity, service, or facility other than the existing authorized mill levies or the all-purpose mill levy."

5. Pursuant to Section 1(5) of SB-58 it would be too conveniently and easily possible for county officials to control whether a person incurring medical costs prior to potential incarceration even if confined in jail thereby conveniently passing off responsibility for the medical bills onto the city or town. For example:

A) county officials could simply claim that they do not want the individual in jail because of concern about the defendant's medical condition:
B) county officials could simply determine to release the defendant on his own recognizance;
C) county officials could lower bond for defendant so he could post bond without being confined;
D) county officials could contact a friend or relative of defendant and have bond posted prior to confinement;
E) if the defendant is hospitalized county officials could arraign the defendant at the hospital and make arrangements to have the defendant not be confined in jail upon his release from jail.

6. The defendant could die at the hospital emergency room or while in the hospital without ever having been confined and cities and towns would be absolutely financially liable. In Montana Deaconess Medical Center v. Johnson and City of Great Falls, supra, defendant was charged with three felonies A) aggravated assault, aggravated kidnapping and sexual intercourse without consent. In between the

Ex. 8
1-21-91
SB 58

time of the offense and its report by the victim the defendant ingested "a quantity of prescription pills". If defendant had died at the hospital, pursuant to SB-58 the City of Great Falls would have been absolutely financially liable for the medical bills of this felony offender.

Yours truly,

Jim Nugent
City Attorney

cc: Legislation file; Jim Oberhofer

Senator Carrigan

Exhibit #7
21 Jan 91
SB 106

Richard STYPMANN et al.,
Plaintiffs-Appellees,

v.

The CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants-Appellants.

No. 74-1844.

United States Court of Appeals,
Ninth Circuit.

July 21, 1977.

Class action was brought against officials of City and County of San Francisco, garage owners and others challenging constitutionality of California Vehicle Code statute authorizing removal of privately

thereof, be unhampered by the trappings of the now demised Three-Judge Court Act. *Franks v. Bowman Transportation Co., supra*, indicates that these considerations of judicial economy are relevant in applying the mootness doctrine. (*See* 424 U.S. at p. 757, n. 9, 96 S.Ct. at p. 1260) ("Nor are there present in the instant case nonconstitutional policy considerations . . . mitigating against review by this Court at the present time. Indeed, to 'split up' the . . . case . . . would be destructive of the ends of judicial economy . . .")

owned vehicles from streets and highways without prior notice or opportunity for hearing and establishing possessory lien for towage and storage fees and San Francisco ordinance granting a hearing within five days to persons who are unable to pay the storage and towage fee and who give notice of challenging underlying traffic citation. The United States District Court for the Northern District of California, Alfonzo J. Zirpoli, J., entered a judgment in favor of the plaintiffs and the defendants appealed. The Court of Appeals, Browning, Circuit Judge, held that: (1) a three-judge district court was not required; (2) there was a sufficiently close nexus between state and challenged action of towing companies so that actions of towing companies could be fairly treated as that of state itself; (3) due process protection applies to detention of private automobiles, and (4) statute deprived private owners of automobiles due process and was not saved by ordinance.

Judgment vacated and cause remanded for modification of judgment in accordance with opinion.

1. Federal Courts ⇐991

Generally, three-judge court need not be convened to determine whether declaratory judgment should issue. 28 U.S.C.A. § 2281 (Repealed 1976).

2. Federal Courts ⇐1002

Requirement of a three-judge district court applies only when injunction restrains action of any officer of state. 28 U.S.C.A. § 2281 (Repealed 1976).

3. Federal Courts ⇐1002

Where injunction granted by federal district court in action challenging validity of California statute and ordinance related to towing of privately owned automobiles from streets and highways ran only against private towing companies, a three-judge district court was not required. 42 U.S.C.A. § 1983; West's Ann.Cal.Vehicle Code, § 22851.

4. Civil Rights ⇐13.5(4)

Under California statute relating to the towing of privately owned automobiles from streets and highways by garage owners, since police officer made initial determination that car would be towed and summoned towing company which detained vehicle and asserted lien for towing and storage charges pursuant to statutory scheme, there was sufficiently close nexus between state and challenged action of towing company to require that action of towing company be treated as that of state itself for purpose of action under statute relating to violation of constitutional right. 28 U.S.C.A. § 1343(3); § 2281 (Repealed 1976); 42 U.S.C.A. § 1983; West's Ann.Cal.Vehicle Code, § 22851.

5. Constitutional Law ⇐278(1)

Loss of use of enjoyment of an automobile deprives owner of a property interest that may be taken from it only in accordance with due process clause.

6. Automobiles ⇐363
Constitutional Law ⇐300

California statute authorizing removal of privately owned vehicles from streets and highways on order of police officer without prior notice or opportunity for hearing and establishing possessory lien for towage and storage fees without hearing before or after lien attaches deprived private automobile owners of due process as did San Francisco ordinance providing that persons unable to pay towage fees may obtain hearing on underlying traffic citation within five days of notice that he intends to challenge citation. 42 U.S.C.A. § 1983; West's Ann.Cal.Vehicle Code, § 22851.

7. Constitutional Law ⇐305(2)

Fundamental requirement of due process is opportunity to be heard at meaningful time and in a meaningful manner.

8. Searches and Seizures ⇐1

Seizure of property without prior hearing is sustained only where owner is afford-

ed a prompt post-seizure hearing at which person seizing property must at least make a showing of probable cause.

James Murray, Tiburon, Cal., Burk E. Delvanthal, Deputy City Atty., San Francisco, Cal., argued, for defendants-appellants.

David C. Moon, S. F. Neighborhood Legal Assistance Foundation, San Francisco, Cal., argued, for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of California.

Before BROWNING, ELY and ANDERSON, Circuit Judges.

BROWNING, Circuit Judge:

Appellees filed this class action under the Civil Rights Act, 42 U.S.C. § 1983, against officials of the City and County of San Francisco, California, a garage owner in San Francisco, a garage owner in Sausalito, California, and the president of the San Francisco Tow Car Association.[1] Appellees challenged the constitutionality of the provisions of the California Vehicle Code authorizing removal of privately owned vehicles from streets and highways without prior notice or opportunity for hearing, and of section 22851 establishing a possessory lien for towage and storage fees without a hearing before or after the lien attaches.[2]

In the course of the litigation, appellees abandoned their attack upon those provisions of the Vehicle Code authorizing the initial seizure and tow without a prior hearing, and confined their objection to the provision of section 22851 creating a possessory lien for towing and storage charges. Their complaint was then dismissed as to the city officials.

Also in the course of the litigation, and apparently in response to it, the City and County of San Francisco adopted an ordinance providing that a person "unable to pay" towage fees may obtain a hearing on the underlying traffic citation within five days of the time he notifies the Traffic Fines Bureau that he intends to challenge the citation and that he is financially unable to redeem his vehicle from storage. If the owner is found not guilty and the traffic citation dismissed, the vehicle is to be returned, and towing and storage charges are to be paid by the city. San Francisco Traffic Code § 160.01.

The district court granted summary judgment for appellees, striking down both section 22851 and the San Francisco ordinance, because they deprived vehicle owners of the use of their vehicles without prior notice or hearing and did not involve one of those "extraordinary situations" justifying deprivation of a property interest without prior notice and hearing. The court relied upon *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), and *Fuentes v. Shevin*, 407 U.S. 67, 90–92, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).[3] This appeal followed.

[1–3] There is no merit in appellants' suggestion that a three-judge district court was required to hear this case. *See* 28 U.S.C. § 2281.[4] Generally, a three-judge court need not be convened to determine whether a declaratory judgment should issue.[5] In this case injunctive relief was also sought and granted, but the three-judge requirement applies only when an injunction "restrain[s] the action of any officer of such State," *Hall v. Garson*, 430 F.2d 430, 433, 442 (5th Cir. 1970); *see Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 382 (2d Cir. 1973),[6] and the injunction granted by the district court runs only against private towing companies.

[4] Nor is there substance in appellants' argument that the state action required for jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 is lacking. A police officer makes the initial determination that a car will be towed and summons the towing company. The towing company tows the vehicle only at the direction of the officer. The officer designates the garage to which the vehicle will be towed. The officer notifies the owner that his vehicle has been removed, the grounds for the action, and the place of storage. The towing company detains the vehicle and asserts the lien for towing and storage charges pursuant to a statutory scheme designed solely to accomplish the state's purpose of enforcing its traffic laws. Thus, the private towing company is a "willful participant in a joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794, 86

1. The class certified by the district court consists of all persons whose vehicles are withheld from them pursuant to the lien rights and powers of sale provided in California Vehicle Code § 22851. This certification is not challenged on appeal.

2. California Vehicle Code § 22650 provides that no peace officer shall remove any unattended vehicle from a highway except as provided in the code.

Other sections of the code permit state and local officers to remove vehicles in particular circumstances. Section 22651 authorizes removal of vehicles that are obstructing traffic, reported stolen, blocking a private entrance, blocking a fire hydrant, or left four hours on a freeway, or where the driver is incapacitated by injury or illness, arrest, or the vehicle has foreign licenses and has been issued five or more notices of parking violations within five or more days, or the vehicle is unlicensed and illegally parked. Section 22652 authorizes removal under local ordinances in a number of situations including that of a vehicle left on a highway for 72 consecutive hours.

Sections 22850–56 of the code establish procedures for the removal and storage of the vehicles. Section 22850 provides that when an officer removes a vehicle he shall deliver it to a garage or place of storage designated by the governmental agency. To implement these provisions, local authorities contract with private towing companies for the removal and storage of vehicles at the direction of police officers. Section 22851, the section challenged here, provides that whenever a vehicle is removed to a designated garage, the garage keeper "shall have a lien dependent upon possession for his compensation for towage and for caring and keeping safe such vehicle." The section further provides that after 20 days if the vehicle is appraised at $200 or less, or after 60 days if valued at more than $200, the garage keeper may sell a vehicle to satisfy his lien. Section 22851 reads in full as follows:

"Whenever a vehicle has been removed to a garage under the provisions of this chapter and the keeper of the garage has received the notice or notices as provided herein, the keeper shall have a lien dependent upon possession for his compensation for towage and for caring for and keeping safe such vehicle for a period not exceeding 60 days and, if the vehicle is not recovered by the owner within said 60 days or the owner is unknown, the keeper of the garage may satisfy his lien in the manner and after giving the notices required in Sections 3071 and 3072 of the Civil Code. Notwithstanding the provisions of this section, if the vehicle is appraised at a value not exceeding two hundred dollars ($200) by a person authorized to make such appraisal, the keeper of the garage may, if the vehicle is not recovered by the owner within 20 days or the owner is unknown, satisfy his lien as provided in Section 3073 of the Civil Code or Section 22705 of this code." Cal.Veh.Code § 22851. (West Supp.1977).

3. The same analysis was applied and the same result reached in *Remm v. Landrieu*, 418 F.Supp. 542, 545–46 (E.D.La.1976); *Seals v. Nicholl*, 378 F.Supp. 172, 177–78 (N.D.Ill.1973), and *Graff v. Nicholl*, 370 F.Supp. 974, 985 (N.D. Ill.1974) (three-judge court).

4. Section 7 of Pub.L. 94-381, 90 Stat. 1119 (August 12, 1976), specifies that the repeal of § 2281 does not apply to actions, such as the present case, commenced on or before August 12, 1976.

5. *Hubel v. West Virginia Racing Comm'n*, 513 F.2d 240, 242 n.5 (4th Cir. 1975); *Age of Majority Educ. Corp. v. Preller*, 512 F.2d 1241, 1245 (4th Cir. 1975) (in banc); *Finnerty v. Cowen*, 508 F.2d 979, 985–86 (2d Cir. 1974); *see Mitchell v. Donovan*, 398 U.S. 427, 431, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970); *Wiren v. Eide*, 542 F.2d 757, 760 n.3 (9th Cir. 1976); *Mon Chi Heung Au v. Lum*, 512 F.2d 430, 431 (9th Cir. 1975).

6. Moreover, if the only question presented were the constitutionality of the San Francisco ordinance, as appellants insist, § 2281 would be inapplicable for that reason alone. The statute applies "only [to] enactments of statewide application." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 97 n.14, 95 S.Ct. 289, 294, 42 L.Ed.2d 249 (1974). Accordingly, a three-judge court is not required to consider a challenge to a local ordinance. *Board of Regents v. New Left Educ. Project*, 404 U.S. 541, 542, 92 S.Ct. 652, 30 L.Ed.2d 697 (1972); *Moody v. Flowers*, 387 U.S. 97, 101, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); *Clutchette v. Procunier*, 497 F.2d 809, 812 (9th Cir. 1974), *modified on other grounds*, 510 F.2d 613 (9th Cir. 1975), *reversed on other grounds sub nom., Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

1/21/91 SB/10

Ex. 4
1/21/91
SB 106

S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966); *see Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975); and there is a "sufficiently close nexus between the State and the challenged action of the [towing company] so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974).[7]

We turn to the merits of the constitutional claim.

[5] Appellants concede that due process protections apply to the detention of private automobiles. Loss of the use and enjoyment of a car deprives the owner of a property interest that may be taken from him only in accordance with the Due Process Clause.[8] Due process strictures must be met though the deprivation be temporary.[9]

[6] The parties disagree only as to the particular process that is due. We agree with the district court that the procedural protections afforded by the California statute and San Francisco ordinance are not constitutionally sufficient; but we reach this conclusion by a somewhat different route than that taken by the district court.

In our view this case does not present the issue of whether a hearing is required *before* the seizure occurs. The seizure depriving the car owner of use of his property occurs when the vehicle is taken under tow on the street. Appellees have elected not to contest the right of the state to seize vehicles summarily and tow them to a garage.[10] For purposes of this case, therefore, the towkeeper is in lawful possession.[11] The occasion for possible application of the "extraordinary situations" test has passed. Whether the *post*-seizure hearings available under the California statute and San Francisco ordinance satisfy due process requirements is to be determined by examining the process afforded in light of the interests of the private property owner and the government. *Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976).[12]

The private interest in the uninterrupted use of an automobile is substantial. A person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed.[13]

The public interest in removing vehicles from streets and highways in the circumstances specified in the traffic code is also substantial, though differing in the various situations in which removal is authorized. Moreover, the government has a considerable interest in imposing the cost of removal upon the vehicle owner and retaining possession of the vehicle as security for payment. But neither of these interests is at stake here. The only government interest at stake is that of avoiding the inconvenience and expense of a reasonably prompt hearing to establish probable cause for continued detention of the vehicle.[14] The fact that San Francisco has undertaken to provide a hearing in some circumstances suggests that it is neither unduly burdensome nor unduly costly to do so.[15]

Despite the greater relative weight of the private interests involved, the statute affords virtually no protection to the vehicle owner.

The vehicle may be recovered only by paying the towing and storage fees; there is no provision for obtaining its release by posting bond.[16] There is no provision that would mitigate the loss if the detention is unlawful or fraudulent.[17] The statute establishes no procedure to assure reliability of the determination that the seizure and detention are justified.[18] A police officer must authorize the tow, but he also "gathers the facts upon which the charge of ineligibility rests," and his judgment cannot be wholly neutral. *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). Moreover, no official participates in any way in assessing the storage charges or enforcing the lien. No hearing is afforded and no judicial intervention is provided by section 22851 at any stage before or after seizure unless and until the vehicle is sold to satisfy the lien. The only hearing available under any other state procedure may be long deferred, and the burden of proof is placed upon the owner of the property seized rather than upon those who have seized it.[19]

[7, 8] "The fundamental requirement of due process is the opportunity to be heard

7. The same conclusion is reached on essentially the same facts in *Tedeschi v. Blackwood*, 410 F.Supp. 34, 41 (D.Conn.1976) (three-judge court).

8. *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976); *Guzman v. Western State Bank*, 516 F.2d 125, 132 n.8 (8th Cir. 1975); *cf. Wooley v. Maynard*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 752 (1977); *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

9. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 84–86, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *United States v. Vertol H21C Reg. No. N8540*, 545 F.2d 648, 650 (9th Cir. 1976).

10. The "extraordinary situation" standard justifying immediate removal without prior notice and hearing is clearly satisfied in some circumstances (a vehicle blocking a busy street during commuting hours, for example). *See Renun v. Landrieu*, 418 F.Supp. 542, 545 (E.D.La.1976); *Tedeschi v. Blackwood* 410 F.Supp. 34, 43, 44 (D.Conn.1976) (three-judge court). In other circumstances the need for summary action is not so clear. *See id.* at 44; *Graff v. Nicholl*, 370 F.Supp. 974, 982 (N.D.Ill.1974).

11. *Cf. Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 386–87 (2d Cir. 1973) (Timbers and Lumbard, JJ., concurring).

12. *See Dixon v. Love*, — U.S. —, —, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614, 630 n.12, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Arnett v. Kennedy*, 416 U.S. 134, 167–68, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (Powell, J., concurring); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

As the Supreme Court said in *Mathews v. Eldridge*, *supra*, 424 U.S. at 335, 96 S.Ct. at 903:

> "identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

13. *See* cases cited note 8.

14. The California statutes afford a right to hearing before a vehicle is sold to satisfy a lien. *See* Cal.Civ.Code §§ 3071, 3073 (West Supp. 1977).

15. The cost of affording procedural protection is a relevant factor but is not controlling. *Mathews v. Eldridge*, 424 U.S. 319, 347–48, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

16. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 611–12, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (Powell, J., concurring.)

17. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 606, 617–19, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974).

18. The validity of the detention depends upon the legality of the tow, a question "inherently subject to factual determination and adversarial input." *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 617, 618, 94 S.Ct. 1895, 1905, 40 L.Ed.2d 406 (1974); *see Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Each named appellee claims his vehicle was illegally towed. The vehicles of two of the named appellees were towed because they were allegedly parked on a San Francisco street for more than 72 hours (*see* Cal.Veh. Code § 22652). The vehicle of another named appellee was towed for an allegedly non-towable offense: "22502—Hazard." The vehicle of the fourth appellee (intervenor MacKenzie) was towed from its parking place on a street in Sausalito because MacKenzie had been arrested and taken into custody for earlier traffic violations (*see* Cal.Veh.Code § 22651(h)). Each of the four vehicles was towed to a garage and held pursuant to § 22850 without prior or subsequent hearing. The vehicles were later restored to their owners on stipulation that the return would not affect this litigation and that the vehicles would be returned to custody if appellants prevailed.

19. Appellants state that California provides the owner with "a civil remedy sounding in negligence for negligent, erroneous interference with his property" in the event "the court in the traffic citation hearing finds the tow erroneous." Apparently appellants refer to either (1) a regular court action for recovery of the vehicle (*cf. C.I.T. Corp. v. Biltmore Garage*, 3 Cal.App.2d 757, 36 P.2d 247 (1934)), or damages for conversion (*cf. Brown v. J. E. French*

Ex. 9
11/21/91
SB 106

'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge, supra*, 424 U.S. at 333, 96 S.Ct. at 902, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). Seizure of property without prior hearing has been sustained only where the owner is afforded prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause.[20] Neither this nor any other procedural protection is afforded here that might prevent or ameliorate a temporary but substantial deprivation of the use and enjoyment of a towed private vehicle.

An early hearing, on the other hand, would provide vehicle owners the opportunity to test the factual basis of the tow and thus protect them against erroneous deprivation of the use of their vehicles. The only state interest adversely affected by requiring an early hearing—avoidance of the administrative burden and expense—is not enough in these circumstances to warrant denying such a hearing. We conclude, therefore, that section 22851 does not comply with due process requirements.

Nor is the statute saved by the San Francisco ordinance.[21] A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton, supra*, 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances,[22] held that due process required action on a petition for rescission or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Although a five-day delay is clearly excessive, the record in this case does not contain the information necessary for a more precise determination of the exact schedule that would best balance the private and public interests involved. That task should be left in the first instance to the state. *Fuentes v. Shevin, supra*, 407 U.S. at 96–97, 92 S.Ct. 1983.

Although we agree with the district court that the statute and ordinance violate the Due Process Clause, the different ground upon which we reach that conclusion requires modification of the judgment. Accordingly, the judgment is vacated and the cause remanded for further proceedings consistent with this opinion.

Co., 253 Cal.App.2d Supp. 1079, 60 Cal.Rptr. 646 (1967)), or recovery of the fees if the owner already paid them, or (2) a small claims court action if the amount involved is less than $750 and the owner so elects (*see Adams v. Dep't of Motor Vehicles*, 11 Cal.3d 146, 156, 113 Cal. Rptr. 145, 520 P.2d 961 (1974); Cal.Code Civ. Pro. § 116.2 (West Supp.1977)). A regular court action would entail considerable delay. Even a small claims court action is generally heard no earlier than 10 nor later than 40 days from the filing of the claim. Cal.Code Civ.Pro. § 116.4 (West Supp.1977). If the small claims hearing must await the traffic citation hearing, as appellants suggest, even greater delay may ensue. In addition, the greater speed of the small claims court action is available only at a cost, *e. g.*, the owner cannot be represented by an attorney. Cal.Code Civ.Pro. § 117.4 (West Supp.1977).

20. *See Dixon v. Love*, — U.S. ——, ——, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *id.* at ——, ——, 97 S.Ct. 1723 (Stevens, J., concurring); *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614, 629, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Laing v. United States*, 423 U.S. 161, 187, 96 S.Ct. 473, 46 L.Ed.2d 416 (1976) (Brennan, J., concurring); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606–08, 611–13, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (Powell, J., concurring); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665 n.2, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *Arnett v. Kennedy*, 416 U.S. 134, 170, 178, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White and Powell, JJ., concurring). *See also Carey v. Sugar*, 425 U.S. 73, 77–78, 96 S.Ct. 1208, 47 L.Ed.2d 587 (1976); *Boehning v. Indiana State Employees Ass'n*, 423 U.S. 6, 96 S.Ct. 168, 46 L.Ed.2d 148 (1975).

21. The ordinance applies only in the City and County of San Francisco. The vehicle of one of the named plaintiffs was seized in Sausalito, California (see note 18); a Sausalito garage owner is a defendant. The class certified by the district court includes vehicle owners throughout California.

The ordinance applies only to those "unable to pay" the towing fee; it provides no remedy for those able to pay.

22. In *Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976), the vehicles were seized "at border points remote from a traveler's destination." However, San Francisco emphasizes its status as a tourist center and suggests that a material portion of the vehicles towed by the city belong to nonresidents, making collection of towing fees difficult unless the vehicle can be retained. Moreover, the greater availability of facilities should make it less difficult to provide an early hearing within the city than at a border point.

A SCENARIO

continued from page 27

A.L.R., in quoting Stypmann, says that no lien exists; being unconstitutional, it is void. We lawyers know that what is void, doesn't exist. If our state statute is void, Heavenly Grace Towing had no lien. If it had no lien, it had no right to foreclose and sell your property. Yes, indeed, my honored client, I think we have a winner here," said the lawyer, smoothing his flowing locks, as a way to pay off his mortgage jumped into his subconscious.

"But look, sir, my junker probably wasn't worth more than $200 after the crash and I had no insurance. Is it worth bothering about?" was the owner's plaintive question.

"But my dear mealticket, I, er, mean, my dear client, don't you see; if this happened to you, it must have happened to hundreds more which Heavenly Grace Towing handled over the past three years. See, here is a case concerning the Los Angeles Airport where the legal principle is exactly the same. The law allowing illegally parked cars at the airport to be towed away at the owner's expense also failed to include the right to an early, simple hearing. In that case, the U.S. District Court allowed a class action and over 8,000 tows were declared illegal. All we have to do is to bring a class action case against Heavenly Grace Towing and have the court order Heavenly Grace to give us the names of all who have been wronged as you have. Thus, I'll have, say, a hundred clients, not just one. What do you say to that, my valued friend?"

"Yes, Mr. Attorney," the owner replied. "that sounds great, but I don't understand how the towing industry in this state would allow a statute to remain on the books which violates the Stypmann principles. Didn't they know of the Stypmann case?"

"Well, the fact is, my dear client, the association was warned about it. I've heard the matter discussed at a bar association meeting some months ago. The attorney for the association warned his client, but he was told that they followed the old adage which says, 'If it ain't broke, don't fix it.' All of the lawyers who discussed the matter that night in our bull session have been waiting for the day that a client walked in with the complaint you have. Before the association awakens and fixes that lousy statute, let's you and I bring our class action. Now, I'd like to treat you to a nice lunch; shall we start with a couple of martinis?"

DATE 21 January 91

COMMITTEE ON Senate Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Agnes Sowers	Institutions	SB		✓
Gordon Morris	MACo	57/58	-57-	58
Bruce W. Moerer	MSBA	49	✓	
Jean M. Terry	S.A.M.	SB 49	✓	
Ted Hoff	MBCC	49	✓	
John Connor	MT County Attys. Assn	49	✓	
[illegible]	[illegible]	49	✓	
Pam Langley	Helena District #1 Trustee	49	✓	
[illegible]	OPI	49	✓	
[illegible]	US WEST	SB 57	✓	
Phil Campbell	MEA	SB 49	✓	
Robert Olsen	Mt. Hospital Assoc.	SB 58	✓	
Peter Funk	Dept. of Justice	SB 58	✓	
Bob Fryfull	M.I.P.	SB 106		✓
BRUCE McCANDLESS	CITY OF BILLINGS	SB 58		✓