MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **VICE CHAIRMAN AL BISHOP**, on January 16, 1995, at 10:00 AM

ROLL CALL

Members Present:

Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: Sen. Bruce D. Crippen

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

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

Committee Business Summary:
Hearing: SB 81, SB 77, SB 143
Executive Action: None.

HEARING ON SB 81

Opening Statement by Sponsor:

SENATOR JOHN HERTEL, Senate District 47, Moore, presented SB 81, which is an act deleting the substantial hardship wording from 46-8-111. This substantial hardship statute is being abused today. The purpose of this bill is not to hold a person in jail for a long period of time to determine if he is financially able to provide for legal counsel. County officials feel they are being strapped to the court costs due to this provision.

Proponents' Testimony:

Vern Petersen, Fergus County Commissioner and also representing MACO, stated the resolution creating this bill came from Fergus County and went through the MACO organization. The word "substantial" is very hard to interpret. They feel there has been significant abuse of this constitutional right and that deleting the word "substantial" does not compromise the constitutional right to court-appointed counsel. In 1987, Fergus County paid $29,970 for indigent defense. In 1994, the population of Fergus County declined by 100 people and they spent $85,005 on indigent defense. The district judge felt that if they could strike the language there would be a better chance of making those responsible pay their way.

Gordon Morris, Director of the Association of Counties, stated Resolution 94-14, **EXHIBIT 1,** was adopted by the entire membership of the association.

Mary Ellerd, Montana Juvenile Probation Officers Association, testified they are in favor of the bill, however, they question what impact there would be on court-appointed counsel for juvenile offenders.

Charles R. Brooks, Yellowstone County Commissioner, spoke in support of SB 81.

Opponents' Testimony: None.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR STEVE DOHERTY, in referencing the $85,000 which Fergus County spent on indigent defense, asked what amount would have been saved if this bill had been passed. **Vern Peterson** stated that information would be very difficult to get. **SENATOR DOHERTY** questioned what amount might be saved statewide by this bill. **Vern Peterson** stated he did not have a dollar amount. **SENATOR DOHERTY** asked whether it would be up to the judge's discretion to determine if the individual submitting the sworn financial statement is truly indigent. **Vern Petersen** stated that is true. **SENATOR DOHERTY** further questioned whether the judge would be able to consider circumstances such as personal or family necessities in making the indigency determination. **Vern Petersen** stated that he would.

SENATOR SUE BARTLETT questioned the effect this might have on appointing counsel for juvenile offenders. **Gordon Morris** stated that youth are covered under the Youth Court Act which is separate.

SENATOR LORENTS GROSFIELD asked if there were other counties where the expense for indigent defense had tripled within a year

his handout, No. 2, an article from the American Bar Association Commission on Nonlawyer Practice, pages 7 & 8, he stated that from their own study, about 80% of the needs of the people to use the legal system are not being met. About 26 to 38 percent of the people who have a legal problem take no action because they do not have any trust in the system or they can't afford it. The courts stack the odds against pro se individuals. He referred to No. 3 and 4 of his handout, which deal with the political aspects of opinions handed down by the Supreme Court. We have powerful organizations of attorneys exercising control over the Supreme Court and other parts of the government. The legal profession has ties and is living off the private sector. **CHAIRMAN BISHOP** asked **Mr. Steele** to address the bill. He was asked to address the question of why the commission would be a better way of governing the admission of members to the bar than the Supreme Court when the commission itself is going to be governed by two district judges and one attorney. There would still be attorneys in charge of the commission. **Mr. Steele** stated that right now we have an unbroken chain. If the policing powers were in this independent commission it would break this chain.

Fred Happel, Montanans for Better Government, announced their support of SB 77.

Paul Bifu, Montanans for Due Process, stated they feel this bill is a first step in removing from the jurisdiction of the Supreme Court control over attorneys in this state. He was admitted to law school in 1988. One of the requirements of getting into law school was that the applicant was possessed of good moral character which was shown through recommendations from persons who personally knew the applicant. He was told shortly before graduating that he was to assume the burden of proving to the committee that he was possessed with the requisite moral character to be a lawyer. The problem is that the committee on character and fitness has the power to keep anyone with the wrong political persuasions from representing people in Montana. If someone comes to Montanans for Due Process and asks for assistance and they give them assistance, they are supposedly in violation of the law. The Supreme Court says they have the power to censor his speech when it comes to anything they call the practice of law. The bill that is being introduced today is a first step in removing that power from the Supreme Court. The legislature does not claim an inherent power to regulate electricians or plumbers in the way that the Supreme Court regulates lawyers.

Jess Quinn supports SB 77. He has found it hard to find attorneys who will work outside of the "status quo". He feels a commission like this would be beneficial to the people.

Fred Hammel stated he supports SB 77. We have a divorce rate in Montana of 59%. Lawyers are getting very rich.

Sam Grenz stated he has been caught up in the workers'

or two. **Gordon Morris** stated that the most dramatic increase is in Fergus County. The indigent defense cost along with all of the other district court costs are running in excess of $3.5 million statewide. **SENATOR GROSFIELD** questioned how often a defendant gets turned down for a determination of indigency. **Gordon Morris** said he did not know. He feels the opportunity for prevailing upon the court is ample and that no one is deprived of their constitutional right to representation.

SENATOR MIKE HALLIGAN remarked that he wanted to make sure the record was clear regarding whether a judge would still consider the personal and family necessity. **SENATOR HALLIGAN** asked **Mr. Morris** if it was his intent the record should reflect this consideration. **Mr. Morris** said he agreed with that. **SENATOR HALLIGAN** remarked that in the case of juveniles, they would be covered by the Youth Court. **Mr. Morris** stated that was correct.

SENATOR DOHERTY asked if there were any concrete examples of people who had money and were allowed court-appointed counsel. **Vern Petersen** answered that he did not have an example of large bank accounts, however, he felt that resources other than cash, such as boats and four wheelers, should be considered. **SENATOR DOHERTY** questioned whether the county attorney was aware that a supposedly indigent individual who was able to pay had not disclosed everything on his/her financial disclosure form. **Vern Petersen** answered that they have contacted their county attorney and they have had some success but it is still the judge's call. If they could get rid of the word "substantial" it would give the judge a better handle on what he could or couldn't do.

Closing by Sponsor:

SENATOR HERTEL stated he felt it was time to place some requirements on the shoulders of those responsible.

HEARING ON SB 77

Opening Statement by Sponsor:

SENATOR CASEY EMERSON, Senate District 14, Bozeman, presented SB 77. See written testimony, **EXHIBIT 2.** He expects whoever makes the rules to enforce them. If that doesn't happen, the bill will need to be amended to add "and enforcement".

Proponents' Testimony:

Bob Steele, Montanans for Due Process, stated their approach has been a historical approach. He handed out a research project to the committee. **EXHIBIT 3** In the years he has practiced as a CPA he has had many dealings with attorneys. They have all been bad. He feels attorneys are unethical, greedy and incompetent. He graduated from the University of Montana School of Law and applied for admission to the bar. He was not granted admission. He was told that he could reapply within a year. In referring to

compensation system for the past ten years. In ten years his case has gone to trial 36 times. He is a pro se litigant. He has sought help of an attorney, however, no one will take his case because it is not politically correct.

{Tape: 1; Side: B}

Jerry O'Neill spoke for a group of citizens in Montana who have been poorly served by the judicial system. Most of them have very little money and need representation for unpopular causes. According to the State Bar of Montana, the October 1994 issue of "Montana Lawyer" stated that four out of five people with a simple legal problem go unassisted. The January 1993 issue of the "Montana Lawyer" stated that each poor person has an average of three to four simple legal problems per year and that fewer than 20% of these people receive help with their problems. **Mr. O'Neill** provided the committee with a handout, **EXHIBIT 4**

Opponents' Testimony: None.

Russell Hill, Montana Trial Lawyers, testified that the bill addresses a real problem. There is an inability of most common Montanans to get attorneys. There is a legitimate argument about the proper role of licensing attorneys versus certifying attorneys as in the medical profession. MTLA is convinced that this bill would be subject to constitutional challenge. This bill so fundamentally affects the separation of powers in the Supreme Court and the court systems ability to govern the officers before it that it would conflict with other separation of powers and due process provisions in the constitution. This legislation would allow the legislature to regulate judges.

Robert Phillips, President of the State Bar of Montana, stated they oppose SB 77. The first problem with the bill is staffing. Currently the regulation of the practice of law in Montana is governed by three different committees or commissions. The Judicial Standards Commission would need at least two FTE staff people. An attorney in Montana must understand that any breach of the ethical rules before the court not only will have an effect on the commission on practice but misrepresenting something to the judge will have an effect on the case they have before that judge. The way this bill is written the Montana Supreme Court could still have the power to make rules governing the practice before all the courts. That is inconsistent with the second section which would give the authority of the practice of law to the Judicial Standards Commission. It is important that people with poor character not be licensed to practice law.

Ward Shanahan appeared in opposition to this bill. There are no facts to show that admission to the bar, which has been proposed by this bill, will improve the quality of the legal profession.

The quantity may improve. There are approximately 3400 lawyers in Montana. The proponents propose we need more lawyers in Montana doing more things. What about misconduct? His law firm has been in Montana for 108 years. He is proud of what he does. He was involved in setting up the Montana Legal Services Association which serves poor people to provide equal justice under the law.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR JABS asked if there was a fiscal note. **SENATOR EMERSON** stated there was not. **SENATOR JABS** questioned how many lawyers are admitted to the bar every year. **SENATOR EMERSON** answered he did know. The bill was to carry on the separation of powers of the government.

SENATOR HALLIGAN stated there will be enforcement costs. **SENATOR EMERSON** stated that there were lawyers on the Supreme Court who took their time to form the rules and make judgments. There should be no real difference in cost by transferring to this committee. **SENATOR HALLIGAN** stated the legislature does not license plumbers and carpenters. Each profession has that authority. You are taking one profession and having the legislature make changes every two years.

Closing by Sponsor:

SENATOR EMERSON stated that all of the opponents spoke about things not brought up by the bill. Right now we have fingers of the Supreme Court in the other two branches of government. The bill creates a better separation of powers. The only thing that was transferred out was the admission to the bar and the conduct of the lawyers.

Additional handout **EXHIBIT 5**

HEARING ON SB 143

Opening Statement by Sponsor:

SENATOR LARRY BAER, Senate District 38, Bigfork, stated that since the constitution was adopted, the federal government has been growing more powerful. The concern is for the cost of federal mandates on states, counties and municipalities which, at the same time, diminishing our constitutional rights. Most Montanans are greatly concerned about federal centralization and desperately seek some way to halt the trend. The Constitution was not created by the states, but by the people. The Constitution was not ratified by the state legislatures, but by popular conventions of people elected for that purpose in each state. Government is the agency through which the people exercise their sovereign power. Only certain specified and

enumerated powers were to be exercised by the federal government. The 10th amendment to the United States by the Constitution provides: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people". Clearly by the Constitution people divided power between the states and the federal government by listing the powers of the federal government and leaving the rest to the states. State officials who refuse to protect citizens against federal intrusions are simply not living up to their responsibilities. When this bill was drafted, the word "shall" was used making rejection of any federal directive not within the enumerated powers mandatory. He now feels that government discretion allowing for gradual phase out of federal dependency is the best approach. An amendment has been added which covers the procedural means by which undesirable and illegal mandates would be rejected by the state of Montana.

Proponents' Testimony:

Leo Giacometto, Governor's Office, stated that this bill gives the people of Montana the right to reject federal mandates that they do not find acceptable for the state. The governor supports this proposal.

Betty Natelson presented the testimony of Robert Natelson. **EXHIBIT 6.**

Fred Happel, Montanans for Better Government, they recommend a do pass as amended.

A. M. Elwell, Northwest Montana Arms Collectors, they recommend this bill do pass.

John Rice, Montanans for Better Government, they support SB 143.
Henry Brours, Montanans for Property Rights, they support SB 143. They agree with Mr. Natelson to use the word "shall" instead of "to allow".

Bob Watne, Flathead County Commissioner, spoke in support of SB 143. The biggest complaints he has heard are high taxes and federal government interference. Federal mandates are breaking our counties.

Jess Quinn supports SB 143. He also would like to see stronger wording added. We need to downsize the government. We cannot accept any more federal mandates.

Richard Mauzey supports SB 143.

Fred Hammel supports SB 143.

Bob Davies supports SB 143 and submitted his written testimony. **EXHIBIT 7**

Raymond Babb supports SB 143. When a government gets so big that it gives you everything you want, it can also get big enough to take everything you have.

Bob Balyeat, Regional Representative for Montanans for Better Government, supports SB 143.

Jim Wick supports SB 143.

Opponents' Testimony:

Pam Egan, Executive Director of the Montana Family Union, stated that there are some problems with the way the bill is written. The citizens of the state of Montana already enjoy 10th amendment protections. No place in this bill are any specific violations listed. This is a serious charge. SB 143 says that the federal government was created by the people specifically to be an agent of the state. She believes that is a misinterpretation of the constitution. An opinion of Chief Justice Marshall stated that, "The government proceeds directly from the people, is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and their posterity.' The government of the Union...is emphatically and truly a government of the people. In form and substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit." The language in SB 143 implies to voters of the state of Montana that they either support the constitution in the first case or reject the constitution in the second case. Montana Family Union strongly urges opposition to SB 143.

Jim Jensen, Executive Director of Montana Environmental Information Center, opposes SB 143. There are things in the Montana Constitution that we hold dear as Montanans including the right to a clean and healthy environment and the right to know what our government is doing by having access to public records. In protecting our air, the Federal Air Quality Act and the Montana Air Quality Act are enforced by the state, $1.299 million federal dollars will be spent in fiscal year 1996 and $90,000 of state general fund. For water quality protection, $4,938,000 comes from the federal government, $394,000 comes from the general fund. In the environmental remediation division of the Department of Health, $2.95 million comes from the federal government and not one cent from the general fund. The Department of State Lands received $287,880 in general fund and $5,764,000 federal dollars. The bill has been offered with broad generalities and no specifics but would prevent environmental protection.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR DOHERTY questioned whether there were an specific examples of unconstitutional mandates within the last two to four years that the state has not responded to adequately. **SENATOR BAER** answered he could stand there all day and give examples, the Brady bill, the crime bill, assault weapons ban, etc. **SENATOR DOHERTY** stated it is a serious charge that is being made against our governor by not contesting, as would be his duty, any of those unconstitutional mandates. If our governor is not contesting unconstitutional mandates, he is not fulfilling his oath of office. **SENATOR BAER** stated he had never made a statement that the governor is not doing his job. **SENATOR DOHERTY** stated the language of the amendment is very voluminous. He suggested the amendment read that the state has the power to reject unconstitutional federal mandates and state officials have the duty to do so. **SENATOR BAER** felt the language in the amendment is precise and to the point and to make it more brief would dilute its intent.

SENATOR GROSFIELD referred to the general fund contributions to our state budgets and stated that there were more contributions by the state to the budgets than just the general fund portion. **JIM JENSEN** affirmed the state special revenue fund in the Air Quality Division is $2,483,961. Water quality is $3,196,586.

SENATOR RIC HOLDEN asked **Pam Egan** if her organization was part of the AFL-CIO and if they believed in federal mandates. She stated they are the associate membership program of the AFL-CIO and that they believed in the 10th amendment of the U.S. Constitution.

SENATOR HALLIGAN suggested that there are areas where the federal government has a legitimate and proper role, such as controlling air traffic, trucking, and other interstate commerce. **SENATOR BAER** stated that the Interstate Commerce Clause is one of the enumerated powers within the constitution where the federal government has total control over the states. It would not be infringed by this bill.

SENATOR BARTLETT asked if **SENATOR BAER** would identify the full document which he quoted from in his opening statement. **SENATOR BAER** stated his opening statement was based on many treatises written by many people.

Closing by Sponsor: **SENATOR BAER** offered no further remarks on closing.

Additional handout **EXHIBIT 8**

ADJOURNMENT

Adjournment: The meeting adjourned at 12:00 p.m.

Al Bishop

SENATOR AL BISHOP, Vice Chairman

Judy J. Keintz

JUDY J. KEINTZ, Secretary

AB/jjk

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MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 1-16-95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN			✓
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
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EXHIBIT NO. 1
DATE 1/16/95
BILL NO. SB 81

MONTANA
ASSOCIATION OF
COUNTIES

2711 Airport Road
Helena, Montana 59601
(406) 442-5209
FAX (406) 442-5238

RESOLUTION 94-14

DISTRICT COURT COSTS AND COURTS OF LIMITED JURISDICTION

WHEREAS, appointed council and indigent defense costs continue to rise; and

WHEREAS, revenue continue to decline to fund these budgets.

THEREFORE, BE IT RESOLVED that MACo draft legislation to change the statutes to read as follows:

46-8-111. Eligibility for court-appointed counsel--determination of indigence. (1) The court shall make a determination of indigence. (2) In applying for court-appointed counsel, a defendant shall submit a sworn financial statement demonstrating financial inability to obtain legal representation. The statement is not admissible in a civil or criminal action except when offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false swearing.

SUBMITTED BY: Districts 6 & 7

PRIORITY: HIGH

ADOPTED: ANNUAL CONVENTION
SEPTEMBER 21, 1994

TESTIMONY
SENATE BILL 77

MR. CHAIRMAN AND MEMBERS OF THE JUDICIAL COMMITTEE--I AM SENATOR CASEY EMERSON HERE TO INTRODUCE SENATE BILL 77. THIS BILL IS A REFERENDUM FOR AMENDING THE CONSTITUTION.

ARTICLE VII, SECT. 2, OF THE CONSTITUTION LISTS SOME OF THE DUTIES AND JURISDICTIONS OF THE SUPREME COURT. PART 3 SAYS: IT MAY MAKE RULES GOVERNING APPEALATE PROCEDURES AND PRACTICES, AND PROCEDURES FOR ALL OTHER COURTS AND, "ADMISSION TO THE BAR AND THE CONDUCT OF ITS MEMBERS."

THIS IS THE PART, MAKING RULES GOVERNING ADMISSION TO THE BAR AND THE CONDUCT OF ITS MEMBERS, THAT WILL BE CHANGED BY THIS BILL.

IT WILL REMOVE THIS, RIGHT OF THE JURISDICTION, AND PLACE THIS JURISDICTION IN THE "JUDICIAL STANDARDS COMMISSION".

WHY, "ONE OF THE BASIC IDEAS AND BELIEF OF BOTH THE U.S. CONSTITUTION AND THE STATE CONSTITUTION WAS A BELIEF THAT THE 3 BRANCHES OF GOVERNMENT WOULD AND SHOULD BE SUCH THAT THERE WOULD BE A "SEPARATION OF POWER".

THE "SEPARATION OF POWER" WAS TO HELP INSURE THAT THE GOVERNMENT WOULD NOT INFRINGE ON THE RIGHTS OF THE PEOPLE. THE "SEPARATION OF POWER" WOULD INHIBIT ANY BRANCH FROM TAKING TOO MUCH POWER AND THEN CONTROLLING THE GOVERNMENT AND THE CITIZENS. THIS "SEPARATION OF POWER" BECAME ALMOST SACRED.

WE ALL REALIZE THAT THE "SEPARATION OF POWERS" IS NOT A COMPLETE SEPARATION. FOR INSTANCE THE LEGISLATURE AND THE EXECUTIVE CONTROL THE MONEY AND THE PAY FOR THE JUDICIAL SYSTEM.

THE GOVERNOR HAS A LEVER ON THE OTHER TWO SYSTEMS THROUGH HIS VETO POWER. THE SUPREME COURT (JUDICIAL SYSTEM) DOES OVERRULE BOTH THE LEGISLATIVE BRANCH AND EXECUTIVE IN DECLARING LAWS UNCONSTITUTIONAL--HOWEVER THE DESIRED SITUATION IS TO HAVE THE SEPARATION OF POWER AS COMPLETE AS POSSIBLE. THERE WAS A BIG MISTAKE MADE IN THE 1972 MONTANA CONSTITUTION WHERE THE SUPREME COURT, THE HEAD OF THE JUDICIAL DEPARTMENT, WAS GIVEN THE POWER TO MAKE RULES GOVERNING THE ADMISSION TO THE BAR AND THE CONDUCT OF ITS MEMBERS.

THAT IS A GROSS ERROR BECAUSE THAT PUTS THE FINGER OF THE SUPREME COURT ON THE EXECUTIVE BRANCH WHEN THE GOVERNOR IS A LAWYER OR MEMBER OF THE BAR AND ON THE LEGISLATIVE BRANCH WITH THE MEMBERS WHO HAPPEN TO BE LAWYERS OR MEMBERS OF THE BAR.

AS I POINTED OUT EARLIER THERE IS SOME CONTROL BETWEEN THE 3 BRANCHES BUT NOWHERE DOES THE CONTROL EXTEND TO INDIVIDUAL MEMBERS, IT EXTENDS ONLY TO GROUPS OF CITIZENS.

BUT IN THIS CASE A LAWYER -JOE- MAY VERY WELL COME UP FOR JUDGEMENT AND CONTROL BY THE SUPREME COURT AS AN INDIVIDUAL. THIS CONTROL OF THE LEGISLATOR OR EXECUTIVE MEMBER DUE TO GOVERNING THE CONTROL AND CONDUCT OF THE MEMBERS OF THE BAR MAKES A SITUATION THAT THE SEPARATION OF POWERS WAS SUPPOSED TO PREVENT.

IN ORDER TO BREAK THE STRINGS OR TENTACLES OF THE SUPREME COURT WHERE THEY REACH INTO THE OTHER TWO BRANCHES I SUGGEST WE MOVE THE POWER OF THE ADMISSION TO THE BAR AND THE CONDUCT OF ITS MEMBERS INTO THE JUDICIAL STANDARDS COMMISSION. THIS COMMISSION

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IS MANDATED IN THE CONSTITUTION. IT WAS TO BE SET UP BY THE LEGISLATURE BUT NOT CONTROLLED BY THE LEGISLATURE AND NOT THE EXECUTIVE. IT WAS TO HAVE 5 MEMBERS:

2 JUDGES--APPOINTED BY THE SUPREME COURT

1 LAWYER--APPOINTED BY THE BAR ASSOCIATION

2 LAYMAN--APPOINTED BY THE GOVERNOR

THIS IS AN INDEPENDENT COMMISSION THAT CONSTITUTIONALLY WAS TO HELP THE SUPREME COURT BY INVESTIGATION COMPLAINTS AND MAKING THEIR OWN RULES IMPLEMENTING THIS SECTION. THEY WERE TO SUBPOENA WITNESSES AND DOCUMENTS AND MAKE RECOMMENDATIONS TO THE SUPREME COURT.

SO I RECOMMEND THAT THE PROCESS OF MAKING RULES GOVERNING ADMISSION TO THE BAR AND CONDUCT OF ITS MEMBERS BE PUT IN THIS COMMITTEE.

THIS COMMITTEE IS, BY APPOINTMENT OF ITS MEMBERS AND STRUCTURED BY THE LEGISLATURE, BALANCED AND ONE STEP REMOVED FROM ALL BRANCHES THEREBY MAKING SEPARATION OF POWERS MUCH MORE COMPLETE.

THE WAY THE CONSTITUTION WAS ORIGINALLY SET UP WAS DEFINITELY WRONG AND SHOULD HAVE BEEN CHANGED EARLIER--IT WASN'T SO IT MUST BE CHANGED NOW. "IT IS REALLY THE RIGHT THING TO DO"

THAT IS MY MAJOR REASON FOR THIS BILL--THERE ARE 3 MORE MINOR REASONS:

1. THE SUPREME COURT CLAIMS TO BE OVERLOADED WITH WORK--WE JUST ACTED ON A BILL TO KEEP THE 2 EXTRA MEMBERS THAT WERE GIVEN TO THE SUPREME COURT A FEW

YEARS AGO.

SO TAKING THIS DUTY, THE MAKING OF RULES GOVERNING ADMISSION TO THE BAR AND CONDUCT OF ITS MEMBERS WILL HELP THE SUPREME COURT BY GIVING IT MORE TIME FOR ITS REALLY OFFICIAL DUTIES.

2. WHEN THERE IS A PROBLEM BETWEEN CLIENTS AND LAWYERS, SOMETIMES THIS GOES TO THE JUDICIAL STANDARDS COMMISSION AND THROUGH TO THE SUPREME COURT.

TO THE DETRIMENT OF THE BOTH THE CLIENT AND THE LAWYER MANY OF THESE CASES TAKE A LONG TIME. JUSTICE DELAYED IS JUSTICE DENIED. BY ELIMINATED A STEP FROM THE COMMISSION TO THE SUPREME COURT WE WILL SPEED UP THIS PROCESS.

3. THE NEXT REASON IT MORE VAGUE AND MAYBE ARGUMENTATIVE. I'LL USE THE EXAMPLE OF THE LADY WHO SPILLED MCDONALD'S COFFEE ON HER LAP, SUED MCDONALDS AND WAS AWARDED OVER $3 MILLION AND THEN THIS WAS REDUCED BY A JUDGE TO ABOUT 3/4 MILLION DOLLARS. THAT NEWS OR ACTIVITY MAKES THE CITIZENS SEE RED.

THEY GET DISGUSTED WITH THE JUDICIAL DEPARTMENT AND THE LAWYER BECAUSE THEY KNOW THAT A LAWYER AND THE SYSTEM HELPED GET THAT JUDGEMENT WHICH IS OUT OF LINE, AND THE LAWYERS ALSO GET A BIG FEE FOR THIS. THIS TOTAL ACT IS BAD BAD BAD.

THE CITIZENS ALSO GET DISGUSTED WITH THE POLITICIANS FOR

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PASSING LAWS MAKING THIS POSSIBLE AND/OR NOT CORRECTING THE SITUATION SINCE THIS TYPE OF ACTION HAS BEEN GOING ON FOR YEARS.

THEY SUSPECT SOME TYPE OF CROOKED ARRANGEMENT, OR A GOOD OLD BOY ARRANGEMENT OR A LACK OF CONCERN OR CARING BY BOTH THE LAWYERS AND POLITICIANS. THIS LAW MAY BY THE SEPARATION OF POWERS HELP IN A SMALL WAY TO DISSIPATE SOME OF THIS ILL FEELING OF THE CITIZENS ABOUT LAWYERS AND POLITICIANS. WE KNOW THIS IS TRUE BECAUSE THE POLLS THAT MEASURED THE TRUST OF LAWYERS AND THE POLITICIAN AND THE USED CAR SALESMAN GIVES THE 3 GROUPS ABOUT THE LOWEST RATE OF ANYBODY, ABOUT 11-13% TRUST THESE THREE GROUPS, AND THAT NEEDS TO BE CORRECTED. THIS LAW MAY HELP IN A SMALL WAY.

SB 77

EXHIBIT NO. 3
DATE 1/16/95
BILL NO. SB 77

MONTANANS FOR DUE PROCESS

RESEARCH PROJECT

Prepared by:

Robert G. Steele, JD, CPA

Prepared for:

THE JUDICIARY COMMITTEE OF THE MONTANA SENATE

Contents:

1. *Controlling Lawyers By Bar Associations and Courts*: 5 Harv.CivLib L.R.(1970).

2. Excerpts from: *Nonlawyer Practice in the United States: Summary of the Factual Record Before the Commission* by American Bar Association, Commission on Nonlawyer Practice in the United States, April 1994.

3. Article from *Missoulian*, New justices bring youth, moderation, to court, October 25, 1994.

4. Excerpt from *Palmer v. Farmers Insurance*, 261 Mont. 91, Dissenting opinion by Justice Trieweiler.

5. Excerpts from *Montana Constitutional Convention*, Verbatim Transcript, delegates Holland, Pemberton, and Cate.

6. *In re Petition for the Unification of the Montana Bar*, 156 Mont. 515 (1971).

7. *Application of Mont. Bar Ass'n. President*, 163 Mont. 523 (1974).

8. Excerpts from *Lathrop v. Donohue*, 367 U.S. 820, Dissenting opinions by Justices Black and Douglas.

(comb-bound)

SB 77
JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 1/16/95
BILL NO. SB 77

WHY THE RULEMAKING AUTHORITY REGARDING APPELLATE PROCEDURE, PRACTICE AND PROCEDURE FOR ALL OTHER COURTS, ADMISSION TO THE BAR AND THE CONDUCT OF ITS MEMBERS SHOULD BE MOVED FROM THE SUPREME COURT TO THE JUDICIAL STANDARDS COMMISSION

1. The present system is not serving those of limited means to achieve access to the court system in Montana. Our court system is much more capable of answering the needs of the attorneys than it is of meeting the needs of the public.

2. According to an add by the *State Bar of Montana Pro Bono Project*, which appeared in the October 1994 issue of *The Montana Lawyer*,

> (F)our out of five poor people with a civil legal problem go unassisted. Children are hungry. Families have lost their sources of support. Some are losing their homes.

3. Sherry Matteucci, former President of the Montana Bar Association, and currently the United States Attorney for Montana stated in the January 1993 issue of *The Montana Lawyer*:

> The American Bar Association estimates that each poor person has an average of three to four civil legal problems per year. Fewer than 20 percent of these people receive help with any of them. Not the battered spouse incidents, the unpaid child support, the wrongful evictions, the cancelled utility services in winter or the public assistance screw-ups. Not to mention the thousands of people, not nationally but in our own state, who need a divorce and can't get it.

4. The Montana Supreme Court, in its legislative capacity, is routinely passing legislation which affects the public's access to the courts of Montana. The Court is passing these laws with virtually no input from the general public. While the Court publishes its actions in *The Montana Lawyer* to let the Montana Bar Association know what it is doing, hardly any of this information ever appears in the general press.

5. Not considering that the public is poorly served by the present monopoly, without any public participation in its legislative function, the Montana Supreme Court continues to further the monopoly of the Montana Bar Association.

6. Much of the legislation formulated and passed by the Montana Supreme Court appears intended to strengthen the Montana Bar Association's monopoly over the

provision of the services which enable us to have access to our court system.
compare lobbyist w/ attorney

7. According to the law that is currently on the books, our Legislature determined that if an applicant has studied law for two years, they should be allowed to take the bar examination. The Supreme Court does not allow this, only permitting students that have graduated from accredited law schools to take the bar examination.

8. Similar to how it was first enacted in 1871, Section 25-31-601 of Montana Codes Annotated states that:

> **Parties in justice's court may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney.**

To me this states that in lower courts, such as Justice and City courts, parties are free to have who ever they want to help them. But the Montana Supreme Court refuses to allow this breach of the Montana Bar Association's monopoly.

In Sparks v Johnson, 826 P2d 928 (Mont 1992) the Court redefined this statute by stating that it only allows practice before courts of limited jurisdiction by lay people as is specifically authorized by statute or court rule. This representation does not extend to criminal proceedings. You can not have your father help you with a speeding ticket in Justice Court unless the Court allows you special consideration. You can not have any that has gained knowledge about helping in Justice Court by appearing there on a regular basis help you unless that person is a licensed attorney. According to the Supreme Court, this section provides for a one-time only grant of the privilege in Justice Court civil cases to enable a friend or relative to assist and speak on behalf of a party at one proceeding. Recurring representation by some one other than a licensed attorney constitutes the unauthorized practice of law. Sparks v. Johnson, __M__, 826 P2d 928, 49 St. Rep. 124 (1992).

9. Article VII, Section 9, of the Montana Constitution, states that a supreme court justice or district court judge must be admitted to the practice of law in Montana for at least five years prior to the date of appointment or election to the bench. I believe experienced legislators and others should be allowed to take the bar examination, thus preparing themselves to be judges in the future. I believe the future of our judicial branch demands that there is some other source of judicial candidates than law schools which have been accredited by the American Bar Association.

10. The Montana Supreme Court recently passed legislation making it illegal for attorneys to associate with non-attorneys in Professional Corporations. This will have the effect of preventing attorneys to go into business with non-attorneys, such as Certified Public Accountants, Patent Agents and Title Agents.

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11. Another example was when the Montana Supreme Court recently legislated that it shall cost $100.00 to exercise one's right to disqualify a judge. No matter what you believe about this legislation, I expect that you agree with me that the public deserved to participate in the process prior to the Court enacting it.

12. Currently the Court is working on legislation that would forbid paralegals from helping poor people with their legal needs unless the paralegal does it under the umbrella of a licensed attorney.

13. These actions restrict the Public's access to a variety of options for the provision of legal services.They also show an arrogant attitude by the Montana Supreme Court and the Montana legal profession.

14. The Montana Supreme Court is not serious about protecting the Public's access to the courts of Montana. Instead, it appears to only be interested in protecting the monopoly of the Montana Bar Association.

15. Unlike when laws are passed in the Legislature, the general public has little, or no, input into this Court passed legislation. The bill before you today would help to change this situaiton.

16. I believe that the power to create legislation concerning our courts should be placed with the legislature instead of with the court system itself. Since it might not be politically possible to accomplish this, another good place for this power would be with the Judicial Standards Commission where the public has some input into their court system. The fox should not be responsible for guarding the henhouse.

17. Until and unless the power to legislate regarding matters concerning the court system is returned to the Legislature, we need a method to keep an eye on the Supreme Court's exercise of this legislative function and report to the public. The Judicial Standards Commission might be that method.

January 15, 1995

EXHIBIT NO. 5

DATE 1/16/95

BILL NO. SB 77

DEAR SENATOR EMERSON:

PLEASE READ THIS LETTER TO THE SENATE JUDICIARY COMMITTEE REVIEWING THE MONTANA SUPREME COURT'S AUTHORITY IN LICENSING ATTORNEYS.

IT IS TIME TO DISINVOLVE THE MONTANA SUPREME COURT FROM BEING THE OVERSEER OF ATTORNEY LICENSING. ITS INVOLVEMENT CERTAINLY GIVES THE APPEARANCE OF A CONFLICT OF INTEREST. FURTHER, IT GIVES A NON-GOVERNMENTAL ENTITY (AMERICAN BAR ASSOCIATION) governmental control over who will or will not be allowed to be a part of their elite group. This is analogous to putting the fox in charge of the hen house.

It is impossible to attend a law school without meeting the criteria established by the A.B.A. If one doesn't meet their idea of what an attorney should be, then they don't get into their membership. (This reminds me of the master race concept Hitler professed.) By what authority does the A.B.A. get to deprive the citizens of being represented by whomever they want in whatever situation they desire representation? And how can the A.B.A. restrain people from entering the attorney trade or profession? In my opinion, attorney licensing should be more like licensing real estate agents where a test of capability determines one's eligibility for licensure.

As long as the Montana Supreme Court continues to give the A.B.A. full backing to be the sole determinate for attorney licensing, we will never attain the civil freedoms guaranteed by the Constitution. By moving this power from the high court, we will at least be able to redress our grievances. Something we don't have now as it is.

Thank you.

J. Wm. Calanta, Box 1763, Whitefish, MT 59937

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 1/16/95
BILL NO. 143

TESTIMONY
OF
ROBERT G. NATELSON[1]

ON SENATE BILL 143

Mr. Chairman; Members of the Committee

Due to a prior commitment I am unable to be with you today, so I am asking my wife, Betty Natelson, to read my testimony aloud.

* * * *

My name is Rob Natelson. I am Chairman of Montanans for Better Government, a statewide civic group primarily concerned with reform of Montana state government.

I am also Professor of Law at the University of Montana, where I have taught since 1987. One of my regular teaching assignments at the Law School is a course on the history and original intent of the United States Constitution.

For several years now -- beginning long before it became popular to do so -- I have been speaking and writing on Tenth Amendment and federalism issues, emphasizing the need to restore our federal government to its proper constitutional boundaries. After years of toiling alone in the wilderness, I'm understandably gratified by public interest in these issues and by the growing recognition that our system of constitutional federalism must be restored or our states will not be able to perform effectively and our liberties may even be lost.

In keeping with a worldwide trend toward decentralized decision making, the process of restoring state powers is going forward. It is proceeding on several levels. At the top, the U.S. Congress probably will pass a weak anti-mandate law this year.

At the bottom, ordinary Americans are engaging in public education and political activism, toward the goal of restraining an overgrown federal government.

And in the middle, state lawmakers and governors are striving to protect the powers of their states and the rights of their citizens.

The founders themselves believed that in the face of federal overreaching, the most important activity would be that activity in the middle -- at the state level. In fact, in the FEDERALIST PAPERS, both Madison and Hamilton discussed this very subject at some length.

Because of time limitations, I cannot detail here the arguments of the founders, nor can I list all of the methods that governors and lawmakers in other states are using to reassert the Tenth Amendment. However, much of that information is contained in a legislative briefing

[1] Professor of Law, University of Montana and Chairman, Montanans for Better Government. The opinions expressed are those of the author and not necessarily those of any other person or institution.

paper I wrote last year called RECLAIMING THE CONSTITUTION: PROTECTING MONTANA WITH THE TENTH AMENDMENT. I have given that paper to Rep. Aubyn Curtiss, who chairs the federal-state relations committee over on the House side. I am also providing you a copy today -- although on short notice I was unable to collect the voluminous exhibits that accompany it. I can provide them on request.

Suffice to say here that we have learned that in the area of federalism there are two equal and opposite extremes that state officials must avoid. At one extreme are violent, unrealistic, or unconstitutional measures such as secession, impounding federal funds, or interfering with federal peace officers. At the other extreme is the course followed by state lawmakers for so many years previous -- mere submission, either entirely without objections or with purely *pro forma* objections.

The prudent course lies in the middle: intelligent, well-grounded, peaceful, and effective reassertion of state powers and citizens' rights. Examples of this approach are outlined in the briefing paper just mentioned, and which I am providing to you.

I believe that Senate Bill 143 is a middle course sort of measure that will have positive effects. As a proposed constitutional amendment, it will trigger a referendum campaign, which will serve a valuable public education purpose. Senate Bill 143 is worded so as to offer state officials solid legal ground for resisting federal intrusions. And as part of the state constitution, it reinforces an explicit provision in the federal constitution.

Of course, Senate Bill 143 is not a complete answer. I hope you will consider also some of the courses followed by other states and outlined in the briefing paper. But Senate Bill 143 represents a good start toward reclaiming Montana's powers and Montanans' rights.

I propose two amendments to Senate Bill 143:

1. To conform the statement of intent to the actual constitutional history, lines 13-15 on the first page should be amended to read:

> WHEREAS, the 10th amendment reflects the fact that the people created the federal government for strictly limited purposes and the states for general governmental purposes; and. . .

2. I was disappointed to see that this bill has been weakened from its original drafting request. Sen. Baer's drafting request *required* state officials to reject unconstitutional federal actions; this newer version merely *permits* them to do so. This is a bad change, for some state officials may interpret it as a license *not* to protect our rights under the 10th amendment. It is not clear who would want to weaken Sen. Baer's draft this way, but I expect we'll find out soon. In any event, I'm sure it would not be acceptable to Montanans to give state officials license to ignore their implied duties under the 10th amendment.

Thus, the following words should be inserted after the word "right" on line 10, p.2.:

", and Montana state officials have the duty,"

Thank you for your attention.

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RECLAIMING THE CONSTITUTION:

PROTECTING MONTANA WITH THE TENTH AMENDMENT

by

Robert G. Natelson[1]

I.
NATURE OF THE PROBLEM

Over most of the period since the Constitution was adopted, the federal government has been growing more powerful relative to the state governments. The trend has been particularly marked since 1942, when in the case of *Wickard v. Filburn*[2] the U.S. Supreme Court abdicated most of its responsibility to enforce Constitutional limits on Congressional powers.

Opposition to the centralizing trend has been sporadic, and not terribly effective. Even during the administrations of Presidents supposedly committed to reversing it, the growth of federal power has been inexorable.[3] Part of the problem has been that too often advocates have cited states' rights simply to advance single issues -- such as resistance to integration or to federal land use practices. Once the single issue is resolved (usually by federal action), everyone seems to forget about states' rights.

During the decade of the 1990s, there has been renewed concern about the reach of federal power and its intrusion into the rights of states and individuals. This time, however, the opposition is unlikely to simply go away.

The initial trigger for concern has been the cost of federal mandates on lower levels of government. This is not a single issue, but rather a summary of the central government's recurrent practice of imposing costs on states, counties, and municipalities whenever it can get away with it.

By any measure, those costs have been and will be enormous. For example, one study concludes that "the costs to the states and localities of complying with the federal Clean Water

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[1]Professor of Law, University of Montana and Chairman, Montanans for Better Government. The author teaches a course in "Intellectual Origins of the U.S. Constitution" at the Law School. The opinions expressed are those of the author and not necessarily those of any other person or institution.

[2] 317 U.S. 111 (1942).

[3] For a recent survey of the growth of the federal government, see Glen O. Robinson, AMERICAN BUREAUCRACY 9-17 (1991).

Act in the 1990s could reach $200 billion" -- and that's just one federal program.[4]

Adding to the problem of mandates imposed on lower levels of government has been a pattern of federal imposition of mandates on firms and individuals. The cost here is partly financial, but also implicated are unpopular restrictions on property rights, the right to keep and bear arms, the right to associate, and other hallmarks of American liberty.

The trend toward centralization of power in Washington has been made even more unpalatable by the fact that it is running counter to a much newer worldwide movement toward *decentralized* decision making. This newer trend -- brought on by revolutions in technology, demographics, and knowledge -- has been manifested by extensive privatization, "consumer empowerment" over remaining government services, and a radical "devolution" of power to local units. Perhaps the most striking examples of "devolution" has been the breakup of the Soviet Union and Yugoslavia into their constituent republics.

In the United States, the trend toward decentralization has been manifested in activities to restore the Tenth Amendment -- the provision in the U.S. Constitution that repeats what should be obvious from the structure of the rest of the document: The federal government is one of enumerated powers; if the Constitution doesn't bestow the power, the federal government doesn't have it.

Many, if not most, Montanans are gravely concerned about federal centralization, and would like to find some why to reverse -- or at least halt -- the trend. Advocates for public schools, for example, now understand that educational quality is harmed by centralization, of which federal mandates are one kind. State and local officials are worried about the fiscal impact of mandates. Social commentators have noted the destructive results of federal welfare programs. Health care reformers have observed the inflationary impact of the "third party payor" systems imposed by Medicare and Medicaid. Those who make their living from the land have been harmed by federal environmental and land use mandates. Gun owners feel their rights slipping away. And most federal taxpayers now believe they do not get good value from their federal tax dollar.

This paper will outline some of the options that Montana state government may pursue in reclaiming from the federal government state powers and the rights of Montana citizens. As indicated herein, many of these options already are being pursued by officials of other states.

II.
CONSTITUTIONAL BASIS OF LIMITED POWERS

Not all of the options for restoring the federal government to its constitutional limits are equally viable. Some, such as secession or armed resistance, are patently foolish. Others are not well grounded in constitutional theory, and as such have no hope of commanding

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[4] Andrew J. Cowin, *How Washington Boosts State and Local Budget Deficits* (Heritage Foundation 1992). See also Steven D. Gold, *The Federal Role in State Fiscal Stress* 12-13 (Center for the Study of the States 1992).

support in the courts or among the citizenry at large. To distinguish the good options from the bad, therefore, we first must understand the basic legal theories underpinning the Constitution.

The current U.S. Constitution is actually the second organizing document for the United States. The first was the Articles of Confederation, the document under which our country operated from shortly after independence until the ratification of the present Constitution in 1789.

In form, the Articles of Confederation was a treaty (Latin: *foedus*) creating a league (*confoederatio*) among otherwise sovereign states. Each state granted certain powers to the central government, but retained most of the essential attributes of sovereignty, including the right to veto changes in the Articles. Under the Confederation, Congress had the power to operate directly on individuals in a few cases (e.g., foreign trade), but in most important ways (especially taxation) it could operate only through the states.

The theory behind the Constitution is markedly different. The Constitution was not wholly created by the states (as states-righters sometimes claim)[5] but by the *people*. That is why the initial three words of the document are "We the People," and why the framers deleted from the Preamble all references to separate states. Moreover, the constitution was not ratified by the state legislatures (as the Articles had been), but by popular conventions elected for the purpose in each state. The ratification procedure has led some to suggest that the constitution was a compact not among 13 different state governments but a hybrid document, established by the people acting through 13 separate political societies.

In republican theory -- subscribed to by virtually all the founders -- legitimate government originated in the people. Government was the agency through which the people exercised their sovereign power. It was customary for the people to divide that power horizontally -- e.g., between Parliament and the King. By ratifying the U.S. Constitution, the people divided power both horizontally (e.g., between President and Congress), but also vertically: between states and federal government. Under the scheme of the Constitution, most sovereign authority was to be exercised by the states. Only certain enumerated powers were to be exercised by the federal government. As James Madison, the secretary to the constitutional convention, noted,

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extent to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of

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[5] See, e.g., "Tenth Amendment - State Sovereignty Resolution," adopted by Colorado and Michigan.

the State.[6]

Note, however, that *within its sphere* the federal government is the agent of the *people*, not of the states, and its power over citizens is direct. Neither the states nor any of its agents (including the county sheriffs) have any authority to interfere. This fact also is not understood by many advocates of state and local "sovereignty" -- such as the Colorado lawmaker who argues that the state can impound federal tax dollars.[7]

The strictly limited nature of federal powers is clear from the history of the debates over whether to ratify the Constitution. Opponents of ratification, now called "anti-Federalists," advanced many reasons for their opposition, but one of the most important was that the words of the proposed Constitution could be stretched to render the central government far more powerful than intended. Thus, one of the most cogent anti-federalists (who wrote under the pseudonym "Brutus"[8]) argued that the Constitution could be read to give Congress the power to "pass any law which they may think proper."[9] In particular, he said, the Congressional taxing power would

> lead to the passing a vast number of laws which may affect the personal rights of the citizens of the states, expose their property to fines and confiscation, and put their lives in jeopardy: it opens a door to the appointment of a swarm of revenue and excise officers to pray [*sic*] upon the homes of the industrious part of the community, eat up their substance, and riot on the spoils of the country.

And in discussing the "necessary and proper" clause, Brutus maintained that it "would totally destroy all the powers of the individual states."

To secure ratification, friends of the Constitution had to re-assure voters that such fears were groundless. In THE FEDERALIST PAPERS, for example, Hamilton and Madison stressed that the Constitution granted to the federal government only strictly limited powers, as in Paper No. 45 quoted above. Similarly, Hamilton argued in No. 17 that the federal government would not have power over "the supervision of agriculture and of other concerns of a similar nature." Hence, even Hamilton, who *personally* had favored a highly centralized national system conceded that the Constitution created only a federal government of strictly limited powers.

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[6] Federalist No. 45.

[7] Rep. Charles Duke, *Implementing the "Tenth Amendment - State Sovereignty Resolution* (undated).

[8] Virtually the entire ratification debate was carried out under pseudonyms. Many of these pseudonyms were borrowed from the history of the Roman Republic. Madison, Hamilton, and Jay wrote the Federalist Papers under the name "Publius." Some believe "Brutus" to have been Robert Yates, who represented New York at the Constitutional Convention, but then opposed ratification.

[9] The quotations here are from Brutus, Essay V, in Herbert J. Storing (ed.), THE ANTI-FEDERALIST (1985).

The advocates of the Constitution intended citizens to rely on these representations, and ultimately they did so rely. In fact, citizens insisted that these and other representations be added to the document itself. The result was the first ten amendments to the Constitution -- the Bill of Rights -- which was almost wholly concerned with adding explicit limitations to the power of the central government. One of these was the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

During the ratification debates, the only serious argument against including a Bill of Rights was that listing specific prohibitions on Congress might lead some to conclude that Congress could exercise power not enumerated but not specifically prohibited. So the Ninth Amendment was added:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

In summary: By the Constitution, the people divided power between the states and federal government, listing the powers of the latter and leaving the rest with the states. Within its relatively narrow sphere, the federal government was to be the agent of the people and to act independently of the states. Outside that sphere were the rights of states and people. Advocates of ratification reassured citizens that the federal government was strictly limited. They agreed to clarify the document further on that score, and subsequently did so through the Bill of Rights -- including the Tenth Amendment. They had no way of knowing that in a nearly two centuries later the people's trust would be betrayed.

III.
THE FRAMERS' VIEW OF HOW TO RESPOND TO AN OVERREACHING FEDERAL GOVERNMENT

For the reasons set forth in Part I, Montanans and other Americans increasingly are demanding that we shift the balance of power away from Washington, D.C. and toward the states and the people. The question is, How do we proceed?

Interestingly enough, two of the framers provided us with a blueprint. Madison provides part of that blueprint in Federalist No. 46. But a more complete version appears in No. 28, written by Hamilton:

> It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the

community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

One can identify three central points in this passage. First, the duty of reclaiming state power rests with state officials -- not primarily with local officials or private citizens. By implication, state officials who refuse to protect citizens against federal intrusions are simply not living up to their responsibilities.

Second, state officials should act in conjunction with other states -- not as Lone Rangers. (Madison reinforces this point in No. 46.)

And third, opponents of federal overreaching should prepare a "regular plan of opposition" -- a systematic plan for trimming back federal intrusion.

IV.
OPTIONS FOR STATE OFFICIALS COMMITTED TO PROTECTING THE TENTH AMENDMENT

All throughout America, officials of other states have begun to meet their constitutional responsibilities to rein in a runaway federal government. They have acted in conjunction with other states. And they have been formulating "regular plan[s] of opposition." Following are some suggestions for Montana officials based in part on these activities and in part on new ideas.

It must be noted at the outset, however, that **this is a long-term problem.** It did not originate with the Clinton Administration, and will not end when that administration does. Many of the proposals set forth below are investments designed to obtain **long-term results.**

Referenced documents are appended to this paper.

A. Petitioning for redress of grievances.

One obvious place to begin with the petition for redress of grievances, a device specifically protected by the First Amendment.

1. **Resolutions.** Colorado and Michigan have adopted Rep. Duke's Tenth Amendment Resolution, passed in Colorado as H.J.R. 94-1035. The resolution calls on the federal government to "cease and desist, effective immediately, mandates that are beyond the scope of its constitutionally delegated powers." If adopted in Montana, however, the resolution should be amended to delete inaccurate language about the federal government being created by the states or being an agent of the states. A similar petition is contained in Oklahoma's H.R. 1047 requesting Congress to cease engagement of U.S. troops under United Nations Command.

2. **Mandate Consultation Acts.** Several states, including Alabama and South Dakota, have adopted resolutions demanding that their congressional delegations appear regularly before the state legislature to justify voting for unfunded mandates. The American

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Legislative Exchange Council has proposed a model act, appended to this paper.

B. Alerting and educating the public.

1. **Resolutions and Initiatives.** Resolutions can serve to alert and educate the public as well as petition. Wallowa County, Oregon is proposing an initiative on the subject, also attached.

2. **Executive Orders.** Executive order 37(94), issued by Governor George Allen of Virginia serves educational purposes as well as many other purposes.

3. **Education in the schools.** "Politically correct" curricula may denigrate the role of the Constitution and distort its meaning. Children need to learn that the federal government is one of limited, not plenary, powers.

4. **Standing Committees.** Governor Allen's Executive Order 37(94) provides for the creation of a standing Advisory Council, whose mission includes public education.

C. Mobilizing Public Support.

All of the foregoing devices -- as well as speeches by state officials -- can serve to mobilize public support.

D. Administrative changes.

Governor Allen's Executive Order 37(94) sets forth a detailed structure for administratively identifying and responding to federal interference. It can serve as a starting point for similar change in Montana.

E. Interstate Cooperation.

Governors' groups, such as the National Governor's Conference and the Western Governors Association are coordinating state activity. Ohio's Republican Governor George Voinovich and Rhode Island's Democratic Governor Bruce Sundlun head a National Governor's Conference task force on federalism. The National Conference of State Legislatures is involved in similar work.

Among ideas being considered are (1) a Conference of the States, promoted by Utah's Republican Governor Mike Leavitt and Nebraska's Democratic Governor Ben Nelson, and/or (2) constitutional amendments that would give the states more power.[10]

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[10] William Claiborne, *Governor's Push for Greater Power*, Washington Post, p. A-19, 8/29/94.

F. Non-cooperation.

The founders recognized non-cooperation as an important state tool in resisting federal overreaching.[11] States have several options to consider in addition to normal bureaucratic "foot dragging."

1. **Litigation.** In *New York v. United States,*[12] New York's Democratic Governor Cuomo secured invalidation of an unfunded mandate imposed by the federal government on his state. Officials using this case as a precedent have had several other more recent successes.[13] Arizona's Republican Governor Fife Symington has convinced his legislature to appropriate S1 million for a Constitutional Defense Council to sue the federal government.[14] If a respectable body of precedent is built up on unfunded mandates, the states may be able to make progress against so-called "crossover" requirements.[15] Eventually, even "cross-cutting" (funded) mandates may be vulnerable.

2. **Withdrawal from federal programs.** The Wisconsin legislature recently voted to withdraw from A.F.D.C. despite the substantial amount of federal money involved. Republican Governor Tommy Thompson enthusiastically agreed.[16] As the burden of federal requirements grows and the evidence for failure of funded programs becomes more clear, additional states may take this course.

V.
MONTANA OFFICIALS MUST ACT

More than the citizens of many other states, Montanans have a serious stake in the current battle to restore constitutional limits to the federal government. Thus, it is surprising that except for a small amount of gubernatorial rhetoric, Montana state officials (governor, attorney general, superintendent of public instruction, legislature) generally have not acted to protect the rights of their state and her citizens. They have fought for additional federal funds and applied for participation in such dubious, mandate-laden programs as "Goals 2000." They

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[11] See, e.g., THE FEDERALIST, Nos. 28, 46.

[12] 112 S.Ct. 2408 (1992).

[13] E.g. Bd. of Nat. Resources of State of Washington v. Brown, 992 F.2d 937 (9th Cir. 1993); Printz v. U.S., 854 F. Supp. 1503 (D. Mont. 1994).

[14] Mary Jo Pitzl, *Symington Fails For Third Time on Education; But Governor Follows Through With Big Tax Cut,* Arizona Republic, p. A-9, 4/18/94.

[15] "Crossover" requirements "force states to implement federal policy in one area or risk losing funds, usually in a related area. For example, state that fail to meet federal standards in licensing and testing school bus drivers could lose 5 percent to 10 percent of major federal highway grants. . ." Andrew J. Cowin, *How Washington Boosts State and Local Budget Deficits* (Heritage Foundation 1992).

[16] Jason DeParle, *Wisconsin Pledges To Take Own Path On Welfare By '99,* New York Times, p.A-1, col. 3, 12/14/94.

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have failed to join Ravalli County Sheriff Jay Printz in his thus-far successful attack on the Brady law. There have been no executive orders, no legislative resolutions, and virtually no coordination with other states. Montana's Governor has failed to even *attend* two conferences with his peers where the subject was discussed.

This inactivity in the face of crisis is no longer acceptable. It is time for Montana's elected officials to act. This paper offers many ways to proceed. Committed research and brainstorming undoubtedly will identify many others.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 1/16/95
BILL NO. SB143

TESTIMONY OF BOB DAVIES, Box 3634, Bozeman, MT 59772

Subject: 10th Amendment Proposal SB 143

Virtually everyone agrees that the Federal Government has gotten out of control. A good indicator of the amount of power a governmental body exercises is the amount of money it spends. As recently as the thirties, the state and local governments spent about four times as much as the Federal government. And that was only about eight billion dollars to two billion. Now the federal government is spending many hundred times that amount. Clearly the spending will continue to escalate until we collapse as a nation, or until we, at the state level, put a stop to it.

The possibility that this situation could occur was clearly foreseen by our founding fathers. Their objective was to give us the best chance to prevent it. Thus they gave us a Constitution which conferred upon the government only a very few, specific powers. But even then, there were a number of states that would ratify the Constitution only if the Bill of Rights was added. This, of course, was done as soon as the first congress convened. The first eight amendments listed a number of things that the federal government could not do, then the Ninth Amendment said in essence, "The listing of certain rights herein shall not be construed in such a way as to be considered the only rights the people shall enjoy." Then the Tenth Amendment said, again in essence, "The Federal Government shall not have the power to do anything that is not specifically listed in the Constitution."

This limiting of the power of government by law is the basic definition of a republic. The Constitution also grants to the states the right to form a republican government. Thus all the states have written constitutions. By spelling out the powers of government you automatically limit governmental power, and individual rights are protected, as long as the constitution is obeyed.

But, there are always those who see in government the means to gain power for themselves. So, they must somehow circumvent these limitations on governmental power. This means that their grab for power must meet with the approval of the citizens or they will put a stop to it. How has this been done? Simply by appealing to the base instincts of the people. That is, they appealed to greed and began to make promises that they could only fulfill by ignoring the Constitution. They began to promote the idea that the majority should be able to rule; that we are a democracy. So all that was necessary to pass an unConstitutional law was to convince the people that a majority wanted the law. In more recent years, polling has been used extensively for that purpose. It is not difficult to make a poll come out any way you wish, just by the way you word your questions. So, many times polls do not measure public opinion, they make it.

It is very rare indeed to hear the question of Constitutionality

asked when a law that extends the power of government is being debated. It is mentioned when the curbing of government power is being considered. The most recent example of this was on the opening day of the new Congress when the rule change that would require a 60% vote to raise taxes was debated. That would be unConstitutional said one liberal after another. But the Constitution is never mentioned by them when they want to exercise powers the government does not have under the Constitution.

We badly need to pass this Tenth Amendment measure, if for no other reason than that it may cause the Constitution to again be considered in legislative debate. But it will do more than that. In view of the fact that this same measure is being passed in many other states, it could be the means to begin to reign in the runaway federal government before it devours us all. It is a start toward perhaps stronger measures that will save our liberty and our nation. History shows us that government has a propensity to grow and eventually become oppressive whenever the people allow it to happen. Let us take this opportunity to make some history of a different kind and leave to our children a greater measure of freedom than we ourselves inherited.

EXB 8

In behalf of Tom Neikart of Deer Lodge, I submit these "hi-lited" copies to this committee.

I am sorry I may not be here today to testify to this committee on S.B. 143 Tom fell on the steps out front and is now at the V.A. Hospital being checked for possible broken hip.

He wants you to know he is opposed to Federal mandates. His home phone 8-16-3343.

In behalf of myself, Judy Dalton, Deer Lodge, I want

to state for the record that I support S.B. 143 as it was originally written... meaning "shall reject" rather than "may reject". In my 50 years experience and as a parent I find that "may do" usually leads to probably won't, and only when "required to" do we get the desired results. This applies especially, I believe, to our elected and appointed officials. Clearly it's time to protect states rights - and serve the people.

What Is Americanism?

There has to be a definition of Americanism somewhere. Yet it is quite obvious that many Americans would be hard-pressed to come up with one. A housewife might offer that it is a combination of patriotism and love of tradition. That's good, but not very specific.

A young radical might insist that Americanism is oppression of the little guy by the big guy. A retired school teacher might point to the marvelous opportunity and good will that has always characterized this nation. And a fifth grade idealist might answer: "Americanism is loving your neighbor."

All of which is to say that the term means many things to many Americans. But there is a definition that is historically accurate and ever so pertinent in these troubled times. If it were better understood, all of us would have a more certain future.

The Source of Rights

When our Founding Fathers had enough of British oppression, they broke away with the marvelous Declaration of Independence. In it, they spelled out clearly the essence of our nation: "... men are endowed by their Creator with certain unalienable rights...." What it says is that God exists and that rights come from Him, not from government. Then the Declaration tells us that government has no other valid purpose than to protect the God-given rights of the people who formed government in the first place. The clear inference is that government is to be the servant, not the master.

The first Americans had to fight for the definition of Americanism that they set down in the Declaration. After their victory, they wrote a Constitution the entire purpose of which was to limit the power of the government they had created. They knew well that an unchecked government would become oppressive, so they tied it down "with the chains of the Constitution," as Thomas Jefferson noted.

And so it was. Our Constitution does not limit the people; it limits the government. Because our people have been free, they have produced, invented, built, and dreamed. Millions came here to enjoy the blessings of liberty, and they helped to build the greatest nation in all history.

The greatness of this nation is traceable to this new concept of government, a system which should be known by the name Americanism. It includes the belief in God from whom all rights proceed. It affirms the innate dignity of every individual. And it insists on strict limitation of government as a fundamental guarantor of freedom.

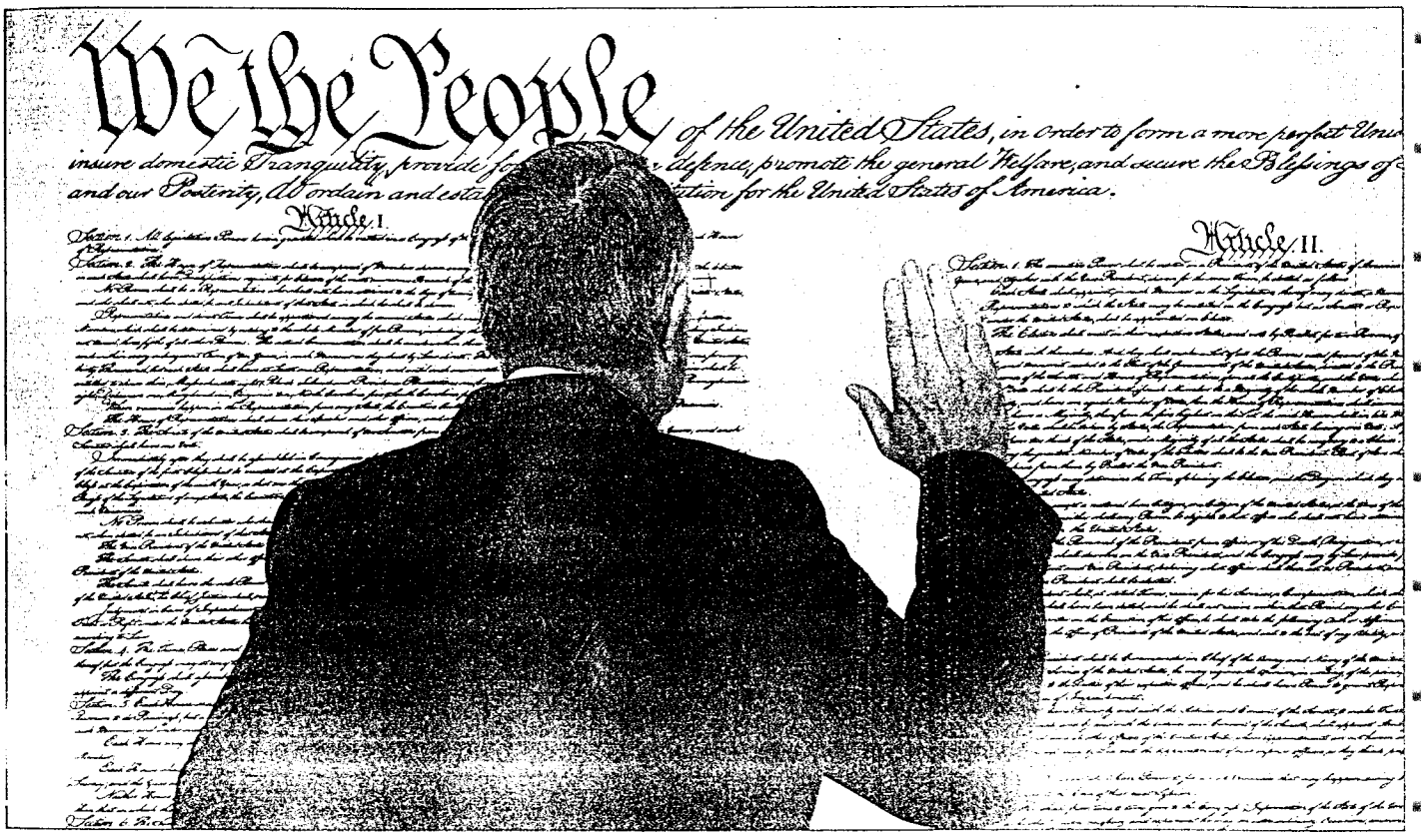
Don't Let It Fade Away

But anyone who answers to the name American today should be concerned, since so few understand our marvelous heritage. Because Americanism is so little appreciated, we have invited a burgeoning federal government to build itself into another master more oppressive than the one from which we separated two hundred years ago. Our courts, through anti-God decisions, have even barred from the classrooms any positive statement of the truths in the Declaration of Independence, the very birth certificate of our nation.

Americans enjoy the blessings of freedom far beyond any other inhabitants of the earth. We are indeed the heirs of all the ages. But we dare not relax and merely enjoy our good fortune. As Americans, we have a responsibility to pass along our glorious heritage to the future. So let us become determined to understand and live by fundamental American principles. And let us insist that our elected and appointed officials do likewise. If they do not, they should be replaced. Taking such action is also part of Americanism. ■

Correction: In our latest "Conservative Index" (THE NEW AMERICAN, November 14, 1994), the columns of pluses and minuses for votes 68 and 69 in the House vote key were transposed. That is, the pluses and minuses under vote 68 actually reflected how the House voted on the measure described under vote 69, and vice versa. The percentage ratings are unaffected by this error.

Stand By Your Oath



Do you swear that you will support and defend the Constitution of the United States against all enemies, foreign and domestic; that you will bear true faith and allegiance to the same; that you will take this obligation freely, without any mental reservation or purpose of evasion; and that you will well and faithfully discharge the duties of the office on which you are about to enter: so help you God?

—Congressional Oath of Office

Every second year, both newly elected and re-elected members of Congress pledge to honor their commitment to the U.S. Constitution, the supreme law of our nation. Though scorned and ignored by many of our elected leaders, the Constitution as established by our Founding Fathers has been labeled by many great minds as civilization's premier political document. William Pitt the younger, the famous British parliamentarian, predicted of our nation's Constitution, "It will be the wonder and admiration of all future generations, and the model of all future constitutions." Nineteenth century British Prime Minister William Gladstone thought so highly of what our Founders had produced that he enthused: "It is the greatest piece of work ever struck off at a given time by the brain and purpose of man."

France's Alexis de Tocqueville saw the Constitution as the basis for America's prosperity and urged others to "look to America ... to those principles of order, of [the] balance of powers, of true liberty, of deep and sincere respect for rights [that] are indispensable to all republics."

But historic praise means little if those whose duty now calls on them to uphold the Constitution turn on it and betray their oath. If a simple majority in Congress would fully honor the commitment to "support and defend" the Constitution today, our alarming slide into tyranny would be reversed, and we could once again proudly call our nation the "land of the free." If our congressmen would faithfully follow the Constitution, the federal government would shrink to approximately 20 percent its size and 20 percent its cost. Such actions by that simple majority would cause the federal government to cease meddling in the private and local affairs

of the people and discontinue sticking its nose into the problems of other lands.

But the sad truth is that for a very long time now the majority of congressmen have not operated within the confines of the Constitution's clearly defined limitations on federal power. Instead, while offering lip service to the Constitution, they have voted for the federal government to fund and control education, medicine, agriculture, housing, and a host of other unconstitutional pursuits. They have ignored James Madison's clear and correct explanation: "The powers delegated by the proposed Constitution to the federal government are *few and defined*" (emphasis added).

Precedents set by the courts and previous Congresses have turned most members of Congress away from the Constitution, and have indentured our leaders to the federal juggernaut that is swallowing up all power and enslaving the American people. It is as if our elected officials are powerless to do otherwise in the face of a vast assumption of powers at the federal level. But they are not without recourse.

Let us examine some of the most damaging of these precedents to see the harm that is being done, and to see how Congress can turn our nation back to sane and lawful government.

Article I, Section 1 of the Constitution begins: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." But many people have come to accept the false notion that a Supreme Court decision can somehow outweigh this basic constitutional precept. Such faulty thinking has led to a vast array of federal intrusions either being sanctioned or initiated by the Supreme Court and lower federal courts.

Federal judges now regularly base decisions not on a strict interpretation of the Constitution, but on what they hold to be "public policy," a "modern doctrine," or even their own sociological interpretation of history. Decisions of the past several decades are now referred to as precedents for additional intrusions into the lives and affairs of the people.

In *The Federalist Papers*, #78, Alexander Hamilton addressed the critical distinction between what judges may personally prefer and what the limitations of their positions allow:

> The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

Hamilton's words seem to anticipate the 20th century plague of judicial activism Americans have suffered through the last several decades.

Thomas Jefferson contended that the Constitution means nothing if it does not mean what the framers held:

> The Constitution on which our Union rests shall be administered by me according to the safe and honest meaning contemplated by the plain understanding of the people of the United States at the time of its adoption — a meaning to be found in the explanations of those who advocated it....

Jefferson's position was reinforced several decades later by Supreme Court Chief Justice Roger Taney, who declared that the Constitution

> speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hand of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of the Court and make it the mere reflect of the popular opinion or passion of the day.

By contrast, John Marshall, Chief Justice during Thomas Jefferson's Presidency, insisted that the Supreme Court must be the final interpreter of the Constitution. His decision in *Marbury v. Madison* helped to establish the doctrine of judicial supremacy under which the nation suffers today. In 1821 Jefferson predicted what would ultimately befall the nation if judicial supremacy replaced strict constitutional interpretation:

> It has however been my opinion ... that the germ of dissolution of our federal government is in the constitution of the federal judiciary ... working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped from the States, and the government of all will be consolidated into one. To this I am opposed; because when all government shall be drawn to Washington as the center of all power, it will render powerless the checks provided ... and will become as venal and oppressive as the government from which we separated.

The lead clause in Article I, Section 8 of the Constitution reads in part: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States...."

While contemporary "wisdom" holds that this clause authorizes the federal government to provide for the material welfare of both the citizens and the states, such is assuredly not what the framers of the Constitution intended. James Madison, in *The Federalist Papers*, #41, emphatically denied that it supplied "an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare."

Madison pointed out that the entire Article I, Section 8 in which the powers of Congress are given is a single sentence and that the lead clause was merely "a general phrase" introducing an enumeration of the powers following it. He asked: "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?"

Soon after Alexander Hamilton became the nation's first Secretary of the Treasury, he proposed using federal money for local or specific welfare rather than for the general welfare of the nation as a whole. He argued that Congress could spend — and even borrow — money for any good cause. James Madison, then a member of the House of Representatives, vigorously disagreed, declaring in a speech to the First Congress:

DATE 1/16/95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 81 SB143
SB 77

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Check One

Name	Representing	Bill No.	Support	Oppose
JAMES M HUMPHREY	SELF	143	✓	
Robert W WAYNE	FLATHEAD COUNTY	143	✓	
MARSHELL LAFRANCE	SELF	143	✓	
WARD STUSNATTEN	ST BOR of Mont.	77		✓
RAYMOND F. BABB	SELF	77	✓	
Frederick J Hammel	SELF	143	✓	
Frederick J Hammel	SELF	77	✓	
Betty Nistelson	Montanans for Better Government	143	✓	
John Rice	Montanans for Better Government	143	✓	
Paul Gyhra	Montana for Due process	77	✓	
Bob Steele	Montana's for Due Process	77	✓	
Sam Gregg	Self	77	✓	
Sue Mary Emerson	Self & Spouse	77	✓	
Pam Egan	Montana Family Union	143		✓

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SENATE COMMITTEE ON Judiciary

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Check One

Name	Representing	Bill No.	Support	Oppose
GORDON MORRIS	MACo.	SB 81	✓	
Vern Petersen	MACo Fergus Co.	SB 81	✓	
Russell B Hill	MTLA	SB 77		✓
JIM MOYER	SELF	SB 143	✓	
Bob Balyeat	self & FAMILY	SB 143	✓	
DON DOIG	Self	SB 143	✓	
Bob Davies	Self	SB 143 SB 77	✓	
ROBERT PHILLIPS.	STATE BAR OF MT.	SB 77		✓
H. M. (Bud) Elwell	WCSOM/NWAC	SB 143	✓	
Charles R. Brooks	Yellowstone County	SB-81	✓	
Fred Happel	motto for better GOVT	SB 81 143	✓	
[signature]	Governors Office	SB 131	✓	

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SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 81 SB 143
SB 77

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Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Richard E. Manzer	myself	143	✓	
GEORGE L. BOUSLIMAN	STATE BAR	77		✓
Jess Quinn	Self-	143	✓	
Henry Brogers	Self	143	✓	
MARY ELLERD	MT JUV PROB OFF ASSOC	81		
R. L "Bob" BANCROFT	834 BASS LANE	143		
CAROL "	" "	143		
LARUE MOUSLEY	P.O. 252 CORVALLIS	143		
Jerry O'Neil	Self	143	✓	
Jerry O'Neil	✓	77	✓	
RAYMOND F. BABB	SELF	143	✓	
JOSEPH R. GRAY	SELF	143	✓	
Tana Watne	Self	143	✓	
ELIZABETH HUMPHREY	SELF	143	✓	

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