

## **MINUTES**

### **MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN BRUCE D. CRIPPEN**, on January 28, 1997, at 10:00 A.M., in the Senate Judiciary Room (Room 325).

#### **ROLL CALL**

**Members Present:**

Sen. Bruce D. Crippen, Chairman (R)  
Sen. Lorents Grosfield, Vice Chairman (R)  
Sen. Al Bishop (R)  
Sen. Sue Bartlett (D)  
Sen. Steve Doherty (D)  
Sen. Sharon Estrada (R)  
Sen. Mike Halligan (D)  
Sen. Ric Holden (R)  
Sen. Reiny Jabs (R)  
Sen. Walter L. McNutt (R)

**Members Excused:** None

**Members Absent:** None

**Staff Present:** Valencia Lane, Legislative Services Division  
Judy Keintz, Committee Secretary

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

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB 178, January 15, 1997  
SB 168, January 13, 1997  
Executive Action: None

#### **HEARING ON SB 178**

**Sponsor:** SEN. STEVE DOHERTY, SD 24

**Proponents:** John Connor, Montana County Attorneys Association  
George Corn, Ravalli County Attorney  
Mike Batista, Department of Justice  
Mike McGrath, President, Montana County Attorneys Association  
Tim Shanks, Montana Police Protective Association,

**Opponents:** None

**Opening Statement by Sponsor:**

*{Tape: 1; Side: a; Approx. Time Count: 10:05; Comments: .}*

**SEN. STEVE DOHERTY, SD 24**, introduced SB 178. This bill revises the offense of criminal syndicalism which is described in the stricken language. It redefines the elements of the crime and brings it in line with U. S. Supreme Court decisions. This bill changes criminal syndicalism to criminal incitement. This takes into account the right to free speech and assembly. This bill will clarify what is necessary to obtain a conviction for criminal incitement.

**Proponents' Testimony:**

**John Connor, Montana County Attorneys Association**, rose in support of SB 178. This bill arose from their difficulty as prosecutors to statutorily address those situations which involve the most common types of anti-government extremism that we have been dealing with in Montana. SB 168 and SB 178 are related, but do not necessitate the same action. SB 178 proposes to revise the criminal syndicalism statute which has been part of our criminal code since 1973. This statute has become the statute by which prosecutors have most frequently addressed cases involving anti-government extremism. The statute has some constitutional problems. It was enacted before the benefit of U. S. Supreme Court rulings dealing with speech issues and what is or is not acceptable prohibition with respect to limitations on speech. In Brandenberg v. Ohio, which was a 1969 case, the U. S. Supreme Court held that violations of law based upon advocacy must be limited to cases in which the advocacy is directed to producing or inciting imminent lawless action and is also likely to incite or produce such action. If it proposed to prohibit imminent lawless action, then the U.S. Supreme Court acknowledged that that was a constitutionally permissible limitation on speech activities. The present statute also contains some limitations on assembly which are subject to constitutional question. The limitations have been deleted in this bill. Assembly per se within a particular organization is not constitutionally prohibited as long as that organization is not actively, imminently advocating violent action. There are currently several cases pending in Montana dealing with anti-government extremism for which charges of criminal syndicalism have been filed. A case in eastern Montana involved an individual named Staton. He refused to use his court appointed lawyer. He was convicted and sent to prison. The case was not appealed. That case did not present an opportunity to address the constitutional issue of syndicalism. Calvin Greenup was having trouble with Ravalli County and state authorities due to an unlicensed elk herd and nonpayment of taxes. There was a warrant for his arrest. This led to hostile encounters with law enforcement who were trying to keep away from violent confrontations. While this was going on an individual from Indiana, F. Joe Holland, who was a business associate of Mr. Greenup and who claimed to be the

National Director of the North American Volunteer Militia, issued press releases encouraging people to get involved in the Ravalli County situation. One of the phrases in the letter sent to officials stated, "How many of your people have to be sent home in body bags before you hear the pleas of the people?" They sent a letter to Mr. Holland advising him that he may be violating statutes of a criminal nature. The press releases were for national distribution and he claimed that he could put a million men into Ravalli County to help Calvin Greenup if necessary. One press release stated, "This must not be left to be swept under the carpet by those government bastards who are operating on behalf of an agency that is nothing more than the illegitimate offspring of a prostituted political system. Only by exposing these despotic, degenerate maggots to the general public will we be able to live in America without having the new world order shoved down our throat." The final press release stated, "If you are active in a militia and feel you would like to help the people of Ravalli County defend against the tyrants that seek their and your destruction, you need to call and pledge your help at this time. In my opinion, it looks as though another Waco or Ruby Ridge may be in the planning stages in Ravalli County. There has been a build up of police over the last few days." This was not the case at all. They had an undercover agent offer to help. He was told to go to Ravalli County where they would be conducting trials and holdings those public officials responsible who were violating the constitutional rights of those people and indicate in response to questioning that if they were found guilty in these trials, they would be hanged as treason violators. He was also told to bring guns that could shoot long and short distances because they were going to shoot cops. He spent a day or two with that contingent of people, all of whom were well armed. This was part of a process by which all of these individuals for which warrants were issued were taken out of Montana late at night to the Idaho border. In the process of taking these people, they were loading crates of automatic weapons and boxes of ammunition. They charged Mr. Greenup with criminal syndicalism and Mr. Holland with accountability for aiding and abetting. In the course of the trial of Mr. Holland, he pled guilty reserving the right to appeal the issue to the Montana Supreme Court. He was not sentenced. The court said they had to enter a judgement before they could rule. He tried to withdraw his plea, which was denied by the court, and they have been trying to get him back to Montana. During the course of the prosecution, the court issued an opinion on the issue of the criminal syndicalism statute. The court ruled that the statute is salvageable by instructing the jury on sufficient information that it can make determinations about whether or not this offense was committed by examining the facts and context in which the offense occurred.

**George Corn, Ravalli County Attorney,** spoke in favor of SB 178. Speech is a fundamental right, but no right is absolute. His concern started in January of 1995 with a letter delivered to Judge Langton stating that he should be careful of how he ruled

on any cases involving Calvin Greenup or people would be sent home in body bags. This letter came from F. Joe Holland. Calvin Greenup sent Sheriff Prince information on how his officers could be shot. He could constitutionally defend himself by slaying an officer who tried to arrest him. Sheriff Prince told his officers not to be the trigger for a confrontation. There were threats to planning boards and county commissioners. There was a threat of a bomb in the courthouse, two days before the Oklahoma City bombing. On April 2, a group of men openly defied a town marshall trying to arrest someone on a minor traffic ticket. They carried ammunition and assault rifles. Had they been able to address these threats, they might not have come to this stage.

**Mike Batista, Department of Justice,** rose in support of SB 178.

**Mike McGrath, President, Montana County Attorneys Association,** rose in support of SB 178.

**Tim Shanks, Montana Police Protective Association,** rose in support of SB 178.

Opponents' Testimony: None

Questions From Committee Members and Responses:

*{Tape: 1; Side: a; Approx. Time Count: 10:30; Comments: .}*

**SEN. SHARON ESTRADA** questioned whether taking the bill down to a few words would weaken the bill. She questions whether the individuals creating the problems in 1995 were constitutionally correct in doing so.

**Mr. McGrath** felt the constitutional defect in the current syndicalism law is that it is capable of being interpreted in a lot of different ways. Oftentimes the language you hear from a court when striking down this type of statute is that it is void for vagueness. This bill clarifies what conduct is covered.

**CHAIRMAN CRIPPEN** stated this bill would be before the fact rather than after the fact. The statute was more objective by listing the elements which constituted the original crime. Wouldn't this be more of a problem now? Anytime you switch from the objective to the subjective in the law you are inviting a constitutional challenge.

**Mr. Connor** agreed that may be true. However, the subjectivity is left to the jury and becomes a question of weight of the evidence. The statute, as originally written, allows a broader scope of operation. Even though it would now be more difficult for them to use, it would be something that is more consistent with existing Supreme Court decisions with respect to limiting speech activities. SB 168 deals with acts rather than speech.

**CHAIRMAN CRIPPEN** felt it was important to address a potential argument which may come forth in a criminal appeal before the Supreme Court dealing with this subject.

**SEN. DOHERTY** commented that looking at both the language which is being struck and the language they are attempting to insert, the question of whether the prior language was more objective than the new language is a good question. He would argue that under this bill the intent is to retain that degree of objectivity. They are tying the crime to someone who advocates the commission of a criminal offense. Unless the prosecutor can tie that advocacy to a violation of a criminal offense, he would not have the elements necessary to bring a charge. The criminal offense makes it very objective because the prosecutor must show that the advocacy is directly tied to breaking a law.

**SEN. AL BISHOP** questioned if someone who was unlawfully advocating the commission of a misdemeanor could be charged with a felony of criminal incitement under this law?

**SEN. DOHERTY** agreed that would be true.

**CHAIRMAN CRIPPEN** stated that in the area of abortion they have handled some very difficult issues. If a group of individuals advocated picketing an abortion clinic and in so doing violated a city ordinance, would they be subject to a felony?

**SEN. DOHERTY** stated that his opinion is that if it is a constitutionally protected activity that this tool would not be available to a prosecutor. If the advocacy was to shoot the clinic doctor, the advocacy would lead a reasonable person to believe that the shooting was imminent and this tool would then be available to the prosecutors.

**Mr. Connor** commented that if you are acting on behalf of another whose purpose is to promote, you could also be charged under this statute. The proposed changes would require that your advocacy be designed for and has the purpose of producing imminent unlawful action. The jury has to be satisfied that the person speaking is trying to get someone to break the law and is likely to break the law as a result. This is not disjunctive, but conjunctive. It is a lot more limited in terms of potential abuse than the existing law. The existing law has not been used for an abusive situation.

**CHAIRMAN CRIPPEN** felt that they had stricken straightforward language, i.e., malicious damage or injury to property, violence, or unlawful methods of terrorism. This standard would be removed. Lines 24 through 26 contain a more subjective standard.

**Mr. Connor** stated that the first sentence of the existing statute allowed injury to property as a condition to prosecution. In all instances, it would have to be a criminal offense and not just injury to property. They wanted to make sure the statute

contained the imminent threat and capacity to produce the imminent threat.

Closing by Sponsor:

*{Tape: 1; Side: b; Approx. Time Count: 10:54; Comments: .}*

SEN. DOHERTY summarized that SB 178 is a preventive bill to correct a vagueness which currently exists in the law. He recalled the concern of the stalking bill limiting constitutionally protected free speech rights. This has provided prosecutors with a tool that they need to put these folks away. He encouraged anti-government extremists to get involved in our democratic forms of government. When they cross the line and that advocacy has an imminent danger of unlawful action, we have to be able to give prosecutors in Montana the tools to deal with that situation.

HEARING ON SB 168

Sponsor: SEN. STEVE DOHERTY, SD 24

Proponents: John Connor, Montana County Attorneys Association  
George Corn, Ravalli County Attorney  
Mike Batista, Department of Justice

Opponents: Tara Mele, Citizen  
Laurie Koutnik, Executive Director of Christian  
Coalition of Montana  
Scott Crichton, ACLU

Opening Statement by Sponsor:

SEN. STEVE DOHERTY introduced SB 168 which deals with the individual going beyond incitement and actually taking an unlawful, violent act against an individual or unlawful damage against property. In criminal law, there is a marriage of act and intent. SB 168, line 11, talks about an individual who purposely or knowingly commits a violent act or damages property for the purposes of influencing the public policy of the state of Montana. The actions are wrong if they are done for a wrong purpose. The bill makes the acts of terrorism to try to influence public policy in the state of Montana a crime. This will provide some deterrents. No longer would prosecutors be limited in their ability to bring charges against an individual on a simple assault or a malicious damage to property act, if it is tied to a political purpose. If an individual is convicted of an assault, you have an indication that that individual might be willing to assault another human being. If that individual is convicted of domestic terrorism, it gives the law enforcement community the opportunity to deal with precautions. They need advance knowledge to provide protection to law enforcement members. He is very sensitive to free speech.

In this bill they are talking about an act that is either connected with property damage or with violence against another human being. The union of act and intent in this bill would survive constitutional challenges. Section 8, Title 45, 107 contains a section delineated "purpose". This bill would be codified in that section. This section states that the legislature recognizes every citizen's constitutional right to express beliefs on any subjects, to associate with others who share those beliefs and to keep or bear arms in defense of home, person or property. The protection is there. This bill provides another tool, after the incitement, when the act has occurred, for prosecutors to bring charges against domestic terrorists. This bill will give the law enforcement community the tools they need to deal with these people.

Proponents' Testimony:

*{Tape: 1; Side: b; Approx. Time Count: 11:02; Comments: .}*

**John Connor, County Attorneys Association**, spoke in support of SB 168. He stated that the County Attorneys Association is not seeking this legislation for purposes of trying to limit or suppress legitimate civil disobedience. This bill arises out of their concern about dealing with those people who commit acts of anti-government extremism for the purpose of trying to persuade the government to do a particular thing. While those people may be prosecuted under other crimes, they have a need by which they can identify those persons as persons who are anti-government extremist. **SEN. DOHERTY** received a letter from **Scott Crichton, ACLU**, which suggested that this bill might allow the investigation of political activity. He feels the opposite is true. This bill provides a safeguard against the free exercise of political activity. If a member of this committee voiced an unpopular position and his property was damaged by someone hoping that might bring about a change of his position, that has an attempt to stifle the free exercise of political activity. This bill will let us track those offenders so we know there is someone we need to watch.

**George Corn, Ravalli County Attorney**, explained that in 1991 several people in Ravalli County were willing to break the law by challenging laws that the legislature had enacted. At that point they were deciding not to get drivers' licenses, vehicle licenses, etc., and there was no concern on the part of law enforcement regarding domestic terrorism. It has been only recently that there is a need in this area of law to be addressed. None of us could imagine the events which we have seen happening in this state. This bill will give a message to the public that we support a representative government and that people can go too far with their acts in support of an idea. They need to stay within lawful channels. If they don't, they will be prosecuted. When people openly defy state government and commit acts to prove their point, they should be charged and a

jury of their peers should be asked to convict them under domestic terrorism.

**Mike Batista, Department of Justice**, rose in support of SB 168.

Opponents' Testimony:

*{Tape: 1; Side: b; Approx. Time Count: 11:10; Comments: .}*

**Tara Mele, Citizen**, felt that this bill would have a chilling effect on free speech. There are times when people must protest in an unlawful manner. Imminence has a lot of grey to it. During the civil rights movement, there were many people who had to break the law to make a point. When the point you are trying to make is not within the law, you must break the law to make your point. That may cause violent acts on other people because you incite a feeling in them. That does not prove that you went out to produce an imminent danger. She believes in the free speech of all people. She is appalled when abortion clinics are blown up. She is horrified when abortion doctors are killed, that is not within her personal value system. However, she strongly believes in the Right-to-Life Movement to protest outside of abortion clinics. In the bill, there is a comma between unlawful and violent act. Is this saying that if someone engages in direct but non-violent action and does not leave when asked to, that person committed a felony? That would have a chilling affect on her free speech. We have to protect the rights of those we do not agree with, to speak in order to protect ours. She feels this bill is reactionary. She suggested limiting this bill to include violent actions resulting in harm against people.

**Laurie Koutnik, Executive Director of Christian Coalition of Montana**, commented that in the 93 Session there was an act which addressed the act of bombing an abortion clinic in Missoula as an act of terrorism. **FORMER REP. JIM RICE** pointed out in the definition of terrorism, that this was an act perpetrated by an outsider and usually related to another government from a foreign entity on our home soil. We have coined a new term called domestic terrorism. Many people in this room have sent out information saying that positions she stands for are anti-government. Don't we already have enough laws on the books to prosecute people? In the stalking bill it was specified that they did not want to see the bill have a chilling effect on constitutional rights. Our nation was founded on grievances.

**Scott Crichton, ACLU**, voiced his concerns about SB 168. The definitions in this bill are wide open in terms of which acts qualify to allow an additional 10 years imprisonment or \$50,000 fine. A violent act is unspecific. During the Vietnam problems, he felt that our government was lying to us. This was later confirmed to be true. He engaged in a lot of activity to try to stop our government's policy. He respects the people who served.

However, the people who stood up to that had a right to stand up to it and did a service to this country by expressing their First Amendment concerns. Some of those demonstrations were violent. Some of them resulted in property damage. In Missoula, a way to get beyond deaf ears for individuals was to dig a mock grave on the county courthouse lawn. People involved in a speech rally would now be terrorists because they disagree with the government's policies. While they are advocates of a women's right to choose on the abortion issue, they also believe that people who disagree with that have the right to exercise their First Amendment rights. What this bill would do is offer a criminal avenue to investigate political activity, which is clearly protected under the First Amendment.

Questions From Committee Members and Responses:

*{Tape: 2; Side: a; Approx. Time Count: 11:24; Comments: .}*

SEN. LORENTS GROSFIELD asked if legislators were included in this bill?

Mr. Connor felt that this bill should cover individual policy makers as well as the entity itself. This would include school board members. The comma following unlawful is misplaced. Their intent is for the language to state "commits an unlawful violent act or an unlawful damage to property".

SEN. GROSFIELD commented that last session a lobbyist held a legislator up against a wall and threatened that legislator to change his position with regard to a certain bill. The Senate and House censored that lobbyist. He was not allowed in the capitol for two weeks. If this bill had been in place, could that lobbyist have been charged with 10 years imprisonment or \$50,000?

Mr. Connor stated that the legislature quite often presents the worst case scenario. From a prosecutors perspective, they operate on a much more equitable basis. The prosecutor looks at the equities of the situation and how justice might best be served under the circumstances. They do not look for the worst punishment. That is not serving good justice.

SEN. GROSFIELD asked SEN. DOHERTY if he was now going after civil liberties?

SEN. DOHERTY commented that was a legitimate question and he thanked the opponents for addressing this bill. Influencing government policy should be encouraged. People should be encouraged to a robust debate on the issues before a vote. Once this is over, we have to live with the laws which are passed. Influencing government policy by burning down a representative's cabin on the Stillwater River when that representative advocates metal mine reclamation laws or bouncing someone off of a wall and causing personal injury, is what we are trying to address.

Montana is subject to the same inflictions we have seen in other parts of the country.

**SEN. SHARON ESTRADA** asked if juveniles were included under this bill?

**SEN. DOHERTY** answered the determination to charge them as an adult would fall under the same determinations that current law allows for prosecutors.

**SEN. ESTRADA** asked if 18 year olds would be charged with 10 years and \$50,000?

**SEN. DOHERTY** clarified that would be up to the prosecutor. If the crime merits the charge the choice would be up to the prosecutor as it is under current law.

**SEN. REINY JABS**, referring to the comma mentioned earlier, stated he interpreted the language to be an unlawful act, a violent act, or unlawful damage.

**SEN. GROSFIELD** commented that this language dealt with influencing, either the policy or the conduct of the state. A person charged under this for bombing an abortion clinic may say they were not trying to influence public policy, they simply wanted to get rid of the clinic.

**Mr. Connor** explained this would not be the act to prosecute under. There is the additional element of proving that the purpose was to influence the policy or conduct of the state or any political subdivision.

**SEN. SUE BARTLETT** asked if there were examples of occurrences in which this particular bill would be used to charge someone.

**Mr. Connor** remembered a situation in Garfield County where the courthouse was utilized by a group of freeman for purposes of conducting their own supreme court. There was tension and potential for violence.

**SEN. BARTLETT** questioned if this bill had been used, would there be other charges as well arising out of the same instance?

**Mr. Connor** stated there could be other charges. There could be intimidation in the form of communicated verbal threats for the purpose of trying to affect some act by the person being threatened. The Garfield County situation resulted in charges of impersonating public officials which the legislature elevated to a felony last session.

**SEN. BARTLETT** commented that the fiscal note stated that this bill would make a felony out of property damage under \$500, which is a misdemeanor. Is your intent that regardless of the amount of property damage the charge could be domestic terrorism? Is

the character of the conduct the issue as opposed to the quantity of damage to property?

**Mr. Connor** stated that was correct. If there was damage of a felony amount, which is over \$500, then the person could be charged with felony criminal mischief, or felony theft, depending on the circumstances. If this was done for the purpose of influencing government, they wanted to make sure that they identified that person.

**CHAIRMAN CRIPPEN** felt the comma should stay where it was. This would point out that there has to be an act and it has to be both an unlawful act and a violent act.

**Mr. Connor** stated their intent was to require that the act be an unlawful one. He would defer to **Ms. Lane** on this.

**CHAIRMAN CRIPPEN** stated that this bill contains two elements, an unlawful and violent act. In the case of a rally in front of an abortion clinic, this led to physically abusing someone involved in the clinic for the purpose of influencing policy of the state.

**Ms. Koutnik** stated she understood the intent of the bill and believed that violence begets violent. If the person becomes violent and does bodily harm, there are statutes on the books to address that.

**CHAIRMAN CRIPPEN** commented that there are times where we have to go beyond the freedom of speech and assembly where the individual becomes physical. We as a society went through that so we could create a nation under laws which would provide for us the method by which we can object to what our government's policy is. This did not include violence.

Closing by Sponsor:

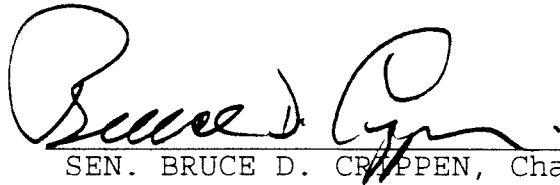
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**SEN. DOHERTY** stated domestic terrorism is here. We can't avoid it. The reason they tied this definition of a crime to an unlawful, violent act is that they are tying it to a specific breaking of the law. It is an additional crime which prosecutors can use with the additional problems of trying to prove the elements of that crime. Not only do you have to prove that the individual had the intent to cause the damage or harm but that that individual did it with the purpose of trying to influence state policy. As far as the reference to this being a legislative protective act, he does not feel it is legislative protection for the people working in the county courthouses. The Kalispell mayor has been threatened for taking stands. People have had their homes defaced. These acts have been inflicted on us as a society. If the prosecutors abuse this, the legislature can change it. This bill cuts against the individual who tree spikes and harms someone as well as the individual who burns down

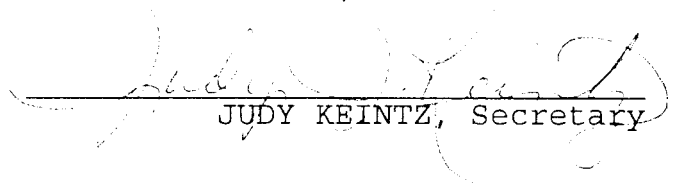
the abortion clinic. When they cross the line and commit a unlawful, violent act against an individual, we need to make a stand. Crossing that line diminishes and chills the ability of all of us to influence public policy.

ADJOURNMENT

**Adjournment:** The meeting adjourned at 12:04, p.m.



SEN. BRUCE D. CRAPPEN, Chairman



JUDY KEINTZ, Secretary

BDC/JJK