

**HOUSE COMMITTEE ON JUDICIARY**  
**SUBCOMMITTEE ON CIVIL LAW**

**April 27, 2005 Hearing Room 357**

**8:30 A.M. Tapes 66 - 69**

**Corrected 10/12/05**

**MEMBERS PRESENT:           Rep. Bob Ackerman, Chair**

**Rep. Linda Flores**

**Rep. Bill Garrard**

**Rep. Kelley Wirth**

**GUEST MEMBERS:           Rep. Jeff Barker**

**Rep. Wayne Krieger**

**Rep. Greg Macpherson**

**Rep. Andy Olson**

**STAFF PRESENT:           Sam Sears, Counsel**

**Louann Rahmig, Committee Assistant**

**MEASURES/ISSUES HEARD:**

**HJR 31 – Public Hearing and Work Session**

**HM 4 – Public Hearing and Work Session**

**HB 2912 – Public Hearing**

**HB 2662 – Work Session**

**HB 2888 – Public Hearing**

**These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.**

| <b>TAPE/#</b>     | <b>Speaker</b> | <b>Comments</b>  |
|-------------------|----------------|--|
| <b>TAPE 66, A</b> |                |  |
| 004               | Chair Ackerman | Calls the meeting to order at 8:38 a.m. and explains the procedures to accommodate legislators wishing to testify. |
| 010               | Chair Ackerman | Opens a public hearing on HJR 31.  |

### **HJR 31 – PUBLIC HEARING**

|     |                  |   |
|-----|------------------|---|
| 013 | Michael Gillette | Senior Associate Justice, Oregon Supreme Court. Testifies in opposition to HJR 31. Reminds members that judges must run for election every six years and can be recalled. Describes the authority of the Commission on Judicial Fitness and Disability that has responsibility for considering complaints against judges and the power to remove judges from office. Adds that judges in this state must be active members of the bar, so if disbarred or suspended, automatically loses the right to sit as a judge. |
| 066 | Gillette         | Continues that people who have lost lawsuits and are dissatisfied with the system believe judges are not following the law.   |
| 093 | Gillette         | States that another process is not necessary. Cites informal conversations with colleagues on the Supreme Court whose feelings are the same.  |
| 115 | Gillette         | Describes his research on the impeachment process which showed there are a few other states that do not have impeachment powers.  |
| 137 | Rep. Garrard     | Believes HJR 31 is about accountability and doesn't think it had the Supreme Court in mind. Asks what other source of accountability the public has.  |
| 160 | Gillette         |   |

Replies, appeal. Describes the appellate process. Advises that there are actually two levels of appeal to identify and correct mistakes.

- 181 Rep. Macpherson Reads from HJR 31 what he feels are the operative words on the standard for which a public official may be impeached. Asks for examples of malfeasance or negligence. Seems negligence invokes the law of torts, and malfeasance is so broad it lacks meaning.
- 192 Gillette Responds that the irony is that eventually someone will have to resort to the Judiciary for the definition of those terms. Defines what malfeasance and negligence mean in the ordinary parlance in the law. Is not sure what the terms mean in HJR 31. Continues that impeachment has always been a political act.
- 235 Rep. Flores Asks if his conclusion that HJR 31 came from those who have lost lawsuits is based on conversations with those people or if it is from the research done with the impeachment movement.
- 244 Gillette Responds, from both. Is not questioning the sincerity or honesty of the people who support measures such as this.
- 265 Rep. Flores Asks if he sees HJR 31 as a constitutional impediment to performing his duties.
- 269 Gillette Replies that he uses the term in the broadest sense and perhaps institutional impediment is more appropriate.
- 278 Chair Ackerman Closes the public hearing on HJR 31 and opens a public hearing on HM 4 which requests that Oregon's United States Senators work to ensure expeditious Senate action on Supreme Court nominations.

#### **HM 4 – PUBLIC HEARING**

- 285 Rep. Max Sumner House District 18. Testifies in support of HM 4. Reads a portion of the memorial.
- 319 Chair Ackerman Raises concern with wording regarding activist judges and strict interpretation of the Constitution. Continues that the President should have the unimpeded authority to appoint judges subject to Senate confirmation. Cites some of the language that should be modified or stricken.

- 335 Rep. Sumner Agrees as it doesn't serve a great purpose. Adds that if the President chooses a qualified judge, all this memorial suggests is that the Senate take the matter under consideration and vote for or withhold approval. Has no problem with removing some of the potentially damaging words.
- 348 Chair Ackerman Suggests working with Rep. Sumner on some language to present to the full committee.
- 360 Chair Ackerman Closes the public hearing on HM 4 and opens a public hearing on HB 2912.

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### **HB 2912 – PUBLIC HEARING**

- 374 Sam Sears Counsel. Explains HB 2912 which prohibits a public body from substantially burdening a person's free exercise of religion, including when the burden results from the application of a rule of general applicability, unless the public body meets the burdens of providing evidence and persuading the trier of fact that the imposition of the burden furthers a compelling government interest and is the least restrictive means of furthering that compelling government interest. Continues that HB 2912 attempts to model the standard that would bring the Free Exercise Clause back into conformance with the pre-Smith decision.
- 400 Rep. Gordon Anderson House District 3. Testifies in support of HB 2912. Provides history of attempts by some leaders to force their ideas on others at great cost. Believes that religious freedom needs to be protected.

### **TAPE 67, A**

- 035 Rep. Anderson Continues that although Christianity has been the host culture in America, our freedoms allow any person to practice their beliefs without inhibition. Testifies that HB 2912 protects that freedom to exercise all religions.
- 051 Rep. Dave Hunt House District 40. Testifies and submits written testimony in support of HB 2912 (**EXHIBIT A**). Provides additional background on HB 2912. Discusses two clauses in the U. S. Constitution that impact religion.

|     |                 |   |
|-----|-----------------|---|
| 071 | Rep. Hunt       | Continues that over the last 50 years this has been an increasingly spiritually diverse country. Refers to <b>EXHIBIT A</b> which discusses some issues under the establishment clause in the Constitution. Discusses the free exercise clause, which is the subject of HB 2912.    |
| 108 | Rep. Hunt       | Advises that the Religious Freedom Restoration Act was passed in 1993 almost unanimously and restored the compelling government interest standard. Indicates that HB 2912 is supported by a broad range of religious groups and is opposed by a wide range of government interests. |
| 128 | Rep. Macpherson | Asks what problems we are trying to solve in Oregon.  |
| 135 | Rep. Hunt       | Gives examples of some cases encountered.   |
| 163 | Rep. Hunt       | States that issues related to land use have been taken out of HB 2912 as those are covered in other legislation.  |
| 176 | Rep. Barker     | Refers to one of the examples described by Rep. Hunt. Explains the actual problems with feeding the homeless in the City of Portland. Asks for an opinion if HB 2912 would apply in a theoretical example cited.  |
| 188 | Rep. Hunt       | Understands that the City of Portland limited the attendance at a Sunday service.   |
| 195 | Chair Ackerman  | Cites a theoretic example of a landlord refusal to rent to an unmarried coupled based on religiously held convictions, and the prospective tenants sue the landlord. Asks if HB 2912 would prohibit such actions.   |
| 207 | Rep. Hunt       | Responds that the question would best be answered by a Constitutional attorney. Believes that HB 2912 relates to the government restricting the exercise of religion. Is not sure how HB 2912 would apply to individuals.   |
| 215 | Rep. Anderson   | Adds that the example deals with the rights of two different parties, and the judges would have to decide on whose rights would prevail.  |
| 221 | Chair Ackerman  | Closes the public hearing on HB 2912 and opens a work session on HB 2662.   |

## **HB 2662 – WORK SESSION**

- 233 Sam Sears Counsel. Explains HB 2662 which prohibits the Employment Department from disqualifying individuals who are victims, or parents and guardians of minor children who are victims, of domestic violence, sexual assault, or stalking from receiving unemployment benefits if those individuals leave work or avoid other available work in order to protect themselves or their minor children from further domestic violence, sexual assault, or stalking. Describes the changes in the -4 amendments (**EXHIBIT B**).
- 257 Rep. Garrard **MOTION: Moves to ADOPT HB 2662-4 amendments dated 3/15/05.**
- VOTE: 3-0-1**
- EXCUSED: 1 – Flores**
- 259 Chair Ackerman **Hearing no objection, declares the motion CARRIED.**
- 262 Rep. Garrard **MOTION: Moves HB 2662 to the full committee with a DO PASS AS AMENDED recommendation.**
- 266 Rep. Wirth Supports HB 2662 and states it is vital to get passed this session.
- 272 **VOTE: 3-0-1**
- AYE: In a roll call vote, all members present vote Aye.**
- EXCUSED: 1 – Flores**
- 277 Chair Ackerman **The motion CARRIES.**
- REP. GARRARD will lead discussion in the full committee.**
- 278 Chair Ackerman Closes the work session on HB 2662 and opens a public hearing on HM 4.

## **HM 4 - PUBLIC HEARING**

- 297 Jason Williams Executive Director, Taxpayers Association of Oregon. Testifies in support of HM 4. Does not wish to see any changes to the wording;

however, if the committee wishes to change “activist” to “overreaching” or something similar, they would agree.

- 331 Rep. Barker Asks how many judge nominees President Bush has made and how many not allowed.
- 335 Williams Replies that he doesn’t have the number, but it is lower than it should be. Refers to nine appellate court nominees now under delay.
- 342 Rep. Barker Inquires if President Clinton got all his in.
- 350 Williams Answers that there were delays but the situation has gotten worse.
- 377 Steven Green Professor, Willamette Law School. Testifies in opposition to HM 4. Advises that there are activist judges on both sides. Continues that many of President Clinton’s judicial nominees were opposed on ideological grounds.
- 421 Rep. Flores Asks for some examples of the use of the filibuster technique in the Clinton administration and other administrations.

#### **TAPE 66, B**

- 003 Green Responds that he did not come prepared with specific examples, but it is not an uncommon practice. Continues that many nominations die in committee due to failure of a full committee to vote.
- 017 Chair Ackerman Closes the public hearing on HM 4. States his opposition to HM 4 as written and plans to propose an amendment for consideration by the full committee. Opens a work session on HM 4.

#### **HM 4 – WORK SESSION**

- 021 Rep. Garrard **MOTION: Moves HM 4 to the full committee with a BE ADOPTED recommendation.**
- 027 Chair Ackerman States that his will be a courtesy vote to move HM 4 to the full committee.
- 033 Rep. Macpherson

Believes it is a waste of resources to be spending time on this politically charged statement. Does not plan to support in the full committee.

042 Rep. Garrard States that issues of freedom of speech are both subjective and objective. Reminds the committee that the arguments heard are subjective.

044 **VOTE: 3-1-0**

**AYE: 3 - Flores, Garrard, Ackerman**

**NAY: 1 – Wirth**

047 **Chair Ackerman The motion CARRIES.**

**REP. GARRARD will lead discussion in the full committee.**

052 Chair Ackerman Closes the work session on HM 4 and opens a public hearing on HJR 31.

### **HJR 31 – PUBLIC HEARING**

061 Sam Sears Counsel. Explains HJR 31, which proposes an amendment to the Oregon Constitution to allow the House of Representatives to impeach certain elected or appointed state officials; specifies grounds for impeachment; requires trial by Senate. Describes the -1 amendments (**EXHIBIT C**) and the -2 amendments (**EXHIBIT D**).

078 Erin Thurber Resident, Brooks, Oregon. Testifies in support of HJR 31. Provides personal background. Cites specific cases from information provided to the committee at the previous public hearing.

130 Thurber Refers to Justice Gillette’s testimony on preventative measures already in force. States that under HJR 31 frivolous complaints would be dismissed early in the process. Cites the *Book of States* contains the information on the states with impeachment powers.

179 Rep. Jeff Kropf House District 17. Testifies in support of HJR 31 and the -1 and -2 amendments. Informs that the issue would be referred to the voters. Advises that HJR 31 does not change or remove the recall law but provides another tool the citizens can use to express their opinion.



Concludes that recalls work well at the local level but are difficult at the state level.

- 221 Layne Barlow Oregon Men’s Association. Testifies and submits written testimony in support of HJR 31 (**EXHIBIT E**). Refers to ORS 107.425 that says a judge has the option of meeting with a child of parents who are divorcing or separating, but the meeting must be recorded. Continues that judges are having private discussions and making rulings from unrecorded meetings.
- 260 Barlow Comments on the Commission on Judicial Fitness and Disability and provides membership information.
- 272 Barlow Concludes that the -1 amendments took care of their concern on how to start the process. Urges disapproval of the -2 amendments as they talk about appointing a special prosecutor.
- 291 Rep. Wirth Asks if the cases cited in the written testimony (**EXHIBIT E**) are all related to family law.
- 297 Barlow Replies, all but one.
- 298 Rep. Wirth Seeks clarification that by suspending these laws, the outcome of the rulings was unfair to one party as opposed to the other.
- 303 Barlow Answers, absolutely. Restates a judge’s decision based on a private, unrecorded conversation.
- 314 Rep. Wirth Asks if the rulings were to the noncustodial parent’s detriment and in favor of the custodial parent.
- 320 Barlow Responds that their association doesn’t just represent fathers. Continues that not all the cases were custody cases and corrects earlier response that all but two are family law cases. Advises that one case went all the way to the Supreme Court.
- 335 Rep. Wirth Asks if the standing law would have been in favor of noncustodial parents.
- 343 Barlow Answers, no. Provides information on cases and reiterates that if the law says “shall” there is no discretion.

372 Rep. Wirth Inquires if there is an equal number of cases where laws were suspended and went against the association's members.

378 Barlow Responds that there are many more cases than presented.

381 Rep. Garrard Asks if the association's position is politically motivated.

**TAPE 67, B**

007 Barlow Replies, absolutely.

009 Rep. Krieger States that he was offended by Judge Gillette's comments when he implied that those who support HJR 31 were losers. Continues that the judge also impugned those who support HJR 31 and wonders if he would allow anyone to impugn him in his court room without having something to say. States that as chair of the House Judiciary Committee he has always tried to have an open, fair and respectful process. Believes the same process is needed in the court room.

032 Chair Ackerman Relinquishes the gavel to testify.

039 Rep. Bob Ackerman House District 13. Testifies and submits written testimony in opposition to HJR 31 (**EXHIBIT F**). States that he researched constitutional and civil and criminal law to determine what methods are already available to remove public officials from office. Reads from a prepared statement and refers to several articles in the Oregon Constitution.

076 Rep. Ackerman Summarizes the different ways an official can be removed from office. Advises that impeachment extends to agency heads who are not publicly elected.

092 Rep. Flores Asks about the reference to Article II, Section 7 of the Oregon Constitution in **EXHIBIT F** which refers to a very specific incident and appears not to reach the broad concern brought forward in HJR 31.

101 Rep. Ackerman Replies that it is a narrow recital of grounds but wanted to point it out as one of the alternatives.

109 Chair Ackerman Closes the public hearing and opens a work session on HJR 31.

**HJR 31 – WORK SESSION**

- 115      **Chair Ackerman**      **MOTION: Moves HJR 31 to the full committee with a DO NOT ADOPT RECOMMENDATION.**
- 118      Rep. Macpherson      Concurs with the chair’s views on the resolution but believes it should be moved forward to the full committee.
- 125      Rep. Wirth      Asks if amendments should be considered.
- 128      Chair Ackerman      Responds that he is not processing any amendments by motion.
- 129      Rep. Wirth      States opposition to the motion.
- 132      Rep. Flores      Requests clarification that the motion is to move HJR 31 to the full committee with a do not pass recommendation.
- 138      Chair Ackerman      Responds that if the motion fails, another motion can be made to forward to the full committee with a do pass recommendation.
- 140      Chair Ackerman      Restates his motion to move HJR 31 to the full committee with a do not pass recommendation.
- 142           **VOTE: 1-3-0**  
**AYE:            1 - Ackerman**  
**NAY:            3 - Flores, Garrard, Wirth**
- 148      **Chair Ackerman**      **The motion FAILS.**
- 153      **Rep. Flores**      **MOTION: Moves HJR 31 to the full committee with a BE ADOPTED recommendation.**
- 155      Rep. Garrard      Points out that the -2 amendments need to be acted upon.
- 158      Rep. Flores      Withdraws her motion.
- 161      **Rep. Garrard**      **MOTION: Moves to ADOPT HJR 31-2 amendments dated 4/22/05.**

**VOTE: 4-0-0**

163      **Chair Ackerman**      **Hearing no objection, declares the motion CARRIED.**

164      **Rep. Flores**      **MOTION: Moves HJR 31 to the full committee with a BE ADOPTED AS AMENDED recommendation.**

167      Rep. Wirth      States she will cast a courtesy vote to move to the full committee.

170      **VOTE: 3-1-0**

**AYE:            3 - Flores, Garrard, Wirth**

**NAY:            1 - Ackerman**

176      **Chair Ackerman**      **The motion CARRIES.**

178      Chair Ackerman      Closes the work session on HJR 31 and opens a public hearing on HB 2888.

**HB 2888 – PUBLIC HEARING**

187      Sam Sears      Counsel. Describes HB 2888 which requires a court to consider the geographical distance between the parents when determining custody of their minor child in a domestic relations case. Continues that currently the court is directed to give primary consideration to the best interest and welfare of the child, using the criteria in ORS 107.137.

190      Sally Royston      Resident, West Linn, Oregon. Testifies and submits written testimony in support of HB 2888 (**EXHIBIT G**). Reads the circumstances surrounding her custody battle from a prepared statement.

269      Royston      Continues reading from written testimony.

307      Royston      Concludes by urging support of HB 2888.

320      Chair Ackerman

Explains that HB 2888 adds one more factor to the determination of custody, and the focus needs to be on that. Advises that the committee needs to know how HB 2888 will help or hinder.

- 330 Jan Erickson Resident, West Linn, Oregon. Testifies in support of HB 2888.
- 374 Rep. Wirth Seeks clarification that both parents lived in Portland at the time of the custody award so geographical distance was not a consideration.
- 387 Royston Responds that the father was going to move out of state for employment.
- 390 Rep. Wirth Asks if, at the time of the second decision, the judge knew the father would not be living nearby.
- 397 Royston Answers, yes.
- 399 Rep. Wirth Comments that it appears geographic distance was considered in the appeal but the much bigger problem was relocation after the custody decision.
- 421 Royston States that originally the father was unemployed and likely would move out of state.

#### **TAPE 68, A**

- 011 Rep. Scott Bruun House District 37. Testifies and submits written testimony in support of HB 2888 (**EXHIBIT H**). Believes the wording should be open so the court can have discretion, but geographic distance needs to be a consideration and is good public policy.
- 058 Rep. Macpherson Comments that the wording doesn't quite get at the problem trying to be solved as geographic separation is equal between the parents. Believes that connection to a place is important to nurturing children.
- 067 Rep. Bruun Responds with a personal example. Agrees that perhaps the language can be clarified.
- 086 Rep. Wirth Asks if consideration should be to the parent most likely staying in the place of origin.

- 095 Rep. Bruun Responds that the court needs flexibility and discretion, and geographic location is one factor to be considered. Asserts that the best interests of the children are paramount.
- 126 Rep. Flores Refers to language in HB 2888 that seems to give weight to the location consideration, but it is not the overriding one. Believes HB 2888 is trying to address the best interests of the child.

**The following prepared testimony is submitted for the record without public testimony:**

- Lauren Saucy Family Law Section, Oregon State Bar. Submits written testimony in opposition to HB 2888 (**EXHIBIT L**).
- 147 Chair Ackerman Closes the public hearing on HB 2888 and opens a public hearing on HB 2912.

**HB 2912- PUBLIC HEARING**

- 158 Steven Green Professor, Willamette Law School. Testifies and submits written testimony as neutral on HB 2912 (**EXHIBIT I**). Does not see an overwhelming need for HB 2912. Comments that private action would be affected, not just state action. Indicates that an amendment to change the standard of review from strict scrutiny to intermediate scrutiny is a good compromise.
- 211 Rep. Macpherson Asks if there is a problem in Oregon that needs to be addressed.
- 216 Green Does not see any ground swell of problems. Continues that most of the claims that arise do not represent substantial burdens, or are accommodated informally.
- 261 Greg Hamilton President, Northwest Religious Liberty Association. Testifies and submits written testimony in support of HB 2912 (**EXHIBIT J**) and a booklet *State Religious Freedom Restoration Acts* (**EXHIBIT K**). Cites some legal cases.
- 302 Hamilton Continues reading from a prepared statement.
- 333 Hamilton Refers to the 1999 Sunnyside Methodist Church situation when it was disproved that the church was being indifferent to the needs of the community. Discusses fair housing.

## TAPE 69, A

- 008 Robert Castagna Executive Director, Oregon Catholic Conference. Testifies in support of HB 2912. Advises that the United Methodist Church, Oregon-Idaho Conference also supports HB 2912. Refers to the Sunnyside Methodist Church meal program for the homeless and the taping of a confession several years ago, when both religious bodies were put to significant effort and expense to uphold their religious free exercise claims.
- 028 Sam Sears Counsel. Asks if a court finds there is a substantial burden placed on someone's religion based on some law, what standard of review is used.
- 032 Castagna Answers that he understands it is a lower standard of review, following a similar standard of the U. S. Supreme Court law of general applicability mutually applied.
- 036 Sears Inquires if the court distinguishes between an incidental burden and a substantial burden, or if that test no longer used.
- 038 Castagna Replies, may depend on the factual circumstances.

### **The following prepared testimony is submitted for the record without public testimony:**

- Dorothy Karman The Oregon Christian Home Education Association Network. Submits written testimony in support of HB 2912 (**EXHIBIT M**).
- 041 Chair Ackerman Closes the public hearing on HB 2912 and adjourns the meeting at 10:57 a.m.

## **EXHIBIT SUMMARY**

- A. **HB 2912, written testimony, Rep. Dave Hunt, 2 pp**
- B. **HB 2662, -4 amendments, staff, 1 p**
- C. **HJR 31, -1 amendments, staff, 2 pp**
- D. **HJR 31, -2 amendments, staff, 2 pp**
- E. **HJR 31, written testimony, Layne Barlow, 3 pp**

- F. **HJR 31, written testimony, Rep. Bob Ackerman, 2 pp**
- G. **HB 2888, written testimony, Sally Royston, 3 pp**
- H. **HB 2888, written testimony, Rep. Scott Bruun, 1 p**
- I. **HB 2912, written testimony, Steven Green, 3 pp**
- J. **HB 2912, written testimony, Greg Hamilton, 4 pp**
- K. **HB 2912, booklet, Greg Hamilton, 18 pp**
- L. **HB 2888, written testimony, Lauren Saucy, 2 pp**
- M. **HB 2912, written testimony, Dorothy Karman, 4 pp**