

HOUSE COMMITTEE ON JUDICIARY - CRIMINAL LAW

February 22, 1999 Hearing Room 357

8:30 a.m. Tapes 51 - 53

MEMBERS PRESENT: Rep. Mannix, Chair

Rep. Prozanski, Vice-Chair

Rep. Bowman

Rep. Gianella

Rep. Hansen

Rep. Simmons

Rep. Sunseri

STAFF PRESENT: John Horton, Counsel

Patsy Wood, Administrative Support

MEASURE/ISSUES HEARD:

HB 2253 Public Hearing and Possible Work Session

HB 2255 Public Hearing and Possible Work Session

HB 2526 Public Hearing and Possible Work Session

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.

TAPE/#	Speaker	Comments
TAPE 51, A		

004	Chair Mannix	Calls meeting to order at 8:34 a.m.
<u>HB 2253 PUBLIC HEARING</u>		
018	Col. Lynn Ashcroft	Oregon Military Department Testifies in support of HB 2253. Discusses the three levels of court martial within the Oregon National Guard. Discusses the process of appointing court personnel (prosecutor, defending attorney and judge) when a soldier is charged in a court martial. HB 2253 would allow the convening authority or the State Judge Advocate to appoint those positions.
080	Rep. Prozanski	Could you give us more background as to what is being proposed in HB 2253? What other systems do we have in place? Is this being used in other states? Why would we want to shift the appointing authority to the State Judge Advocate as compared to leaving where it currently is?
089	Ashcroft	Describes what happens when a soldier commits a crime. In the military, when you are charged with a crime, there is a preferral of charges by the commanding officer. The next step is the referral of charges to the level of officer who can convene a court. A general court martial can be convened only by the Adjutant General and the Governor. Discusses the levels of command that the referral of charges would go through in a general court martial.
184	Rep. Prozanski	Are there other states expanding this authority to appoint?
187	Ashcroft	Yes. In other states it is the staff or state judge advocate that selects the appropriate personnel to sit in a trial. Discusses the problem of having to draw courtroom staff from a limited pool because there are only two commands in Oregon.
230	Rep. Prozanski	If HB 2253 passes, will you have the authority to appoint the defense attorney, and the prosecutor?
238	Ashcroft	Yes. I am contacted as soon as a soldier needs a defense attorney. The same is true if a prosecutor is needed, I have the authority to appoint both of those positions.
262	Rep. Prozanski	Would you also be bringing in or determining who would be the judge?
272	Ashcroft	I could request a judge from another branch of the service and then I would appoint that person. There is already a statute in place that says every judge advocate has to be certified by me. HB 2253 would help eliminate some administrative steps.
310	Rep. Prozanski	Would the changes we make here change what a soldier would face in a civil court?

313	Ashcroft	No.
318	Rep. Gianella	How many other states are involved in the process you described?
322	Ashcroft	Every state is a military force unto itself, some states don't have formalized court martial codes. Describes the Texas military code. Describes re-writing the manual for court martial to align with codes of the state. Procedurally, HB 2253 would bring us statutorily in line with federal standards.
378	Rep. Gianella	How many other states use this same procedure of appointment?
381	Ashcroft	I do not know.
383	Rep. Simmons	How many court martials have there been in Oregon in the last 15 years?
385	Ashcroft	We do 10-15 a year, but I do not have a figure for over the last 15 years. We rarely have a general court martial, they are mostly summary court martials which is the lowest level of court martial.
415	Rep. Simmons	Is the percentage of individuals you have to deal with higher or lower than outside the military?
419	Ashcroft	The incidence of prosecution within the military is lower than in the civilian world. The National Guard prosecution level is lower than in the active forces.
TAPE 52, A		
005	Rep. Bowman	What is the difference between a State Judge Advocate and a Staff Judge Advocate?
007	Ashcroft	Describes the difference between a State Judge Advocate and a Staff Judge Advocate.
028	Rep. Bowman	What is the main rule of law for the military? Is it the Uniform Code of Military Justice or is it State of Oregon law?
032	Ashcroft	We are not subject to the Uniform Code of Military Justice unless we are on active duty under Title 10 of the United States Code. Describes when the National Guard would become subject to Title 10. When we are in typical National Guard status, we are subject to the Oregon Military Code, Chapter 398, and the Oregon manual for court's martial.
044	Rep. Bowman	Would the State Judge Advocate have to certify the judge, prosecutor, and defense attorney for a court martial?

046	Ashcroft	Yes. Describes how these people are "certified" for each position.
063	Rep. Bowman	How does the Uniform Code of Military Justice differ from the Oregon Military Code?
071	Ashcroft	Discusses the difference between the Uniform Code of Military Justice and the Oregon Military Code. Discusses the establishment of the Trial Defense Service. Describes attaching all National Guard lawyers to the state headquarters and then re-assigning them to each command.
133	Rep. Bowman	Was attaching those lawyers to state headquarters and then reassigning them an administrative rule change?
133	Ashcroft	Yes, it was a regulation we followed.
137	Rep. Bowman	You said you have limited abilities to sentence people under a court martial status. My experience has been that the military can be brutal in their sentencing. Would you comment on that?
142	Ashcroft	Discusses the different capacities he has served in the military as a lawyer. My experience in the military has been that the rights of the soldier are paramount. It is the responsibility of the prosecutor to protect the rights of a soldier and any record from a trial. Our role in the prosecution system is not remedial (for punishment), but to uphold morale and discipline.
197	Col. Mike Caldwell	Oregon Military Department Testifies in support of HB 2253. The military prosecution process starts with the command of the Governor then goes down to the Adjutant General and finally flows to commanders who make the decision to prosecute.
204	Rep. Prozanski	I realize the purpose of HB 2253 is for administrative purposes, but if you were sitting where we are, would you be hesitant in moving forward with this bill?
209	Ashcroft	No. It would not change what is already the practice.
214	Rep. Sunseri	We have not mentioned the convenience to the National Guard if you are able to bring judges from other armed services.
218	Ashcroft	Discusses a situation where all their lawyers were involved in the same circumstance so there was no one to appoint as the judge. If current law continues, there might be a situation that we wouldn't have the personnel to prosecute.
241	Caldwell	There were qualified people in town to help with the prosecution, but we didn't have the authority to appoint them.

252	Chair Mannix	Closes public hearing on HB 2253.
<u>HB 2253 WORK SESSION</u>		
255	Rep. Prozanski	MOTION: Moves HB 2253 to the floor with a DO PASS recommendation.
		VOTE: 7-0
	Chair Mannix	Hearing no objection, declares the motion CARRIED. REP. SUNSERI will lead discussion on the floor.
265	Rep. Bowman	How are court reporters and interpreters selected? Is there a pool and are different languages taken into account?
271	Ashcroft	We do not have those services available "in house" so we go out under a private contract and hire these personnel.
296	Chair Mannix	Closes work session on HB 2253.
<u>HB 2255 PUBLIC HEARING</u>		
298	Chair Mannix	For the record, the testimony on HB 2253 will be incorporated into the record for HB 2255.
314	Col. Lynn Ashcroft	Oregon Military Department Testifies in support of HB 2255. Discusses the background of the National Guard Act and the federal code for the structure of the National Guard. Discusses how punishments differ based upon the offense and the level of court the crime is sent to. We are dealing with punishments adopted and enacted 60 to 70 years ago. Discusses the "bad conduct discharge". We are asking that available punishments for the National Guard be brought into line with the active forces.
424	Rep. Prozanski	You are asking for a broader perspective like calling for incarceration that may not be available now?
TAPE 51, B		

004	Ashcroft	Yes. Discusses how the broader range of punishments will ultimately benefit the soldier.
017	Rep. Prozanski	Would jail time be served in a county facility or a state prison?
020	Ashcroft	By statute the National Guard can incarcerate in any county facility.
027	Rep. Prozanski	Does the cost of incarceration come out of the budget for the Oregon military?
028	Ashcroft	Yes, and quite often the soldier gets paid while he is incarcerated.
038	Rep. Sunseri	Under the State Military Code, is Article 15 available?
039	Ashcroft	Yes.
039	Rep. Sunseri	What is the maximum punishment under Article 15?
040	Ashcroft	Discusses the punishments under Article 15.
052	Chair Mannix	What does Article 15 mean?
053	Ashcroft	It is a non-judicial punishment. Roughly like a traffic offense with a small hearing. Discusses how Article 15 punishment is "offered" to a soldier and what happens if the soldier turns down Article 15.
078	Rep. Sunseri	Can you reach the \$200 fine and forfeiture of pay with Article 15?
080	Ashcroft	I can exceed that. A commander can take more money away from a soldier under non-judicial punishment than we have been able to under court martial.
083	Rep. Sunseri	So HB 2255 would bring the punishment more in line with the seriousness of the crime?
084	Ashcroft	Yes. Except for the fine, these punishments are in line with the active forces.
090	Chair Mannix	Asks for clarification of the language in Section 7.
092	Ashcroft	Discusses the background of ORS 398.400 using the incident of a soldier dying on active duty while the National Guard was outside the state of Oregon. This section gives us the ability to prosecute if the court having jurisdiction chooses not to exercise that jurisdiction.

200	Chair Mannix	You do not have jurisdiction if the state has jurisdiction and chooses to prosecute?
202	Ashcroft	Yes. Discusses the double jeopardy rule in a prosecution case.
217	Counsel Horton	Discusses problems that could occur in the District Attorney's office with respect to the double jeopardy rule.
226	Ashcroft	In the few cases that we have had, we have obtained a "declination of prosecution" or a "declination of jurisdiction" from the prosecuting authority.
242	Rep. Bowman	A general court martial is the lowest level of court martial?
246	Ashcroft	No. The general court martial is the highest level of court martial.
246	Rep. Bowman	The summary court martial is the lowest?
246	Ashcroft	Yes.
247	Rep. Bowman	When could someone be prosecuted for a summary court martial?
252	Ashcroft.	Discusses what circumstances would necessitate a summary court martial.
293	Rep. Bowman	Could someone go to a court martial for a very simple offense and have it cost thousands of dollars because of the fines attached to the offense?
311	Ashcroft	Only a general court martial imposes those larger fines or punishments. We are asking for intermediate punishments at an intermediate court.
332	Rep. Bowman	Discusses page 2, lines 13 & 14 that gives fines under current law for a summary court martial.
340	Ashcroft	I was talking about the special court martial, the intermediate court.
342	Rep. Bowman	I was talking about the summary court martial which is the lowest level of court martial, correct?
343	Ashcroft	Yes.
346	Rep. Prozanski	In Section 7, are we giving dual jurisdiction with a caveat that the military would not be able to exercise its jurisdiction unless the civilian court isn't prosecuting?

358	Ashcroft	Yes.
359	Rep. Prozanski	Discusses Section 5, lines 32-34. Would this be one of those situations that if someone agreed to an Article 15 they could be prosecuted at a later date?
376	Ashcroft	No. If a soldier accepts an Article 15 and punishment is given, the offense can be prosecuted later only if the Article 15 and the punishments are set aside.
425	Rep. Prozanski	Can a higher authority overrule a determination of punishment at the lowest level of military court?
TAPE 52, B		
009	Ashcroft	Discusses the death of Private Driscoll and how certain commanders didn't want to do anything or only hand out a reprimand after his death.
045	Col. Mike Caldwell	Oregon Military Department Testifies in support of HB 2255. Discusses the investigation into Private Driscoll's death and what kind of training was given to young men in the National Guard. Our investigation was trying to determine if there was someone in a leadership role who should have given more training or taken more action prior to the incident causing Private Driscoll's death?
067	Rep. Prozanski	Would the military still be able to sanction the higher commanders of Private Driscoll because of their failure to do whatever they were charged to do?
070	Ashcroft	Yes.
071	Rep. Prozanski	Discusses directives that could be given to a commander during an investigation.
083	Caldwell	It is hard for people to remember what was done in the last hearing concerning the death of a soldier because there is only about 1 death every 10 years.
104	Ashcroft	A higher level commander cannot direct a lower level commander to take or not to take action. Each commander exercises his own discretion. A lower level commander could even become the object of an investigation depending upon the orders he gave in the situation.
132	Chair Mannix	Could this be construed as an anti-cover-up provision?
132	Ashcroft	Yes. Discusses situations where a cover-up might occur.

150	Rep. Gianella	Is it possible that they could get wrongly reprimanded?
154	Caldwell	That could happen, but the reprimand could be challenged up the chain of command.
164	Rep. Bowman	Does the Governor review every bad conduct discharge?
166	Ashcroft	We don't have bad conduct discharges available to us, but if we impose a dishonorable discharge, it has to be approved by the Governor.
198	Rep. Simmons	Do the same laws or rules apply throughout the military from the top to the bottom?
201	Ashcroft	Yes.
202	Rep. Simmons	What would the penalties be for obstruction of justice or perjury?
203	Ashcroft	Describes fines for "general articles" in the National Guard.
216	Rep. Simmons	Under the federal military code, could the commander in chief be charged with obstruction of justice or perjury?
222	Ashcroft	The commander in chief in Oregon is the Governor and he would be subject to impeachment, but not to the code.
233	Rep. Prozanski	Under Oregon law, can we establish jurisdiction over someone's conduct when they are outside the state? Is that constitutional?
245	Ashcroft	We currently have the ability to prosecute offenses that occur outside our borders. Discusses which offenses the National Guard can prosecute. HB 2255 clarifies that if no other jurisdiction chooses to prosecute for an offense then we can.
297	Rep. Prozanski	Discusses Section 6, lines 40-44. What is the goal here?
306	Ashcroft	If we can establish a military connection, even if the soldiers are not on duty, then we can assert our jurisdiction.
326	Rep. Prozanski	If a soldier was on non-duty status, wouldn't civilian jurisdiction have authority in enforcing the law?
333	Ashcroft	This is concurrent jurisdiction with the civilian courts.

342	Chair Mannix	Closes public hearing on HB 2255.
<u>HB 2255 WORK SESSION</u>		
345	Rep. Sunseri	MOTION: Moves HB 2255 to the floor with a DO PASS recommendation.
348	Rep. Bowman	Discusses her concern with broadening the authority of the National Guard.
363	Chair Mannix	<p>VOTE: 5-2</p> <p>AYE: 5 - Gianella, Hansen, Simmons, Sunseri, Mannix</p> <p>NAY: 2 - Bowman, Prozanski</p> <p>The motion CARRIES.</p> <p>REP. SUNSERI will lead discussion on the floor.</p> <p>Closes work session on HB 2255.</p>
<u>HB 2526 PUBLIC HEARING</u>		
402	Russ Spencer	<p>Oregon State Sheriffs Association</p> <p>Testifies in support of HB 2526. The provision limiting the amount that can be offered in a reward is an outdated provision, and we ask you to remove that limit.</p>
418	James Rice	<p>Oregon Criminal Defense Lawyers Association</p> <p>Testifies in opposition to HB 2526. Discusses his concern about placing the burden of a large reward reimbursement on a defendant after incarceration.</p>
TAPE 53, A		
035	Rep. Simmons	Discusses that the court "may" impose reimbursement of a reward.
042	Rice	Discusses the difficulties that released offenders already face when integrating into society.
058	Chair Mannix	I know you are concerned with the reimbursement portion of HB 2526. How do you feel about removing the limit on the amount that can be offered for a reward?

068	Rice	Citizens or groups should not be prevented from offering a big reward.
074	Chair Mannix	If we left in the limitation on the reimbursement, would that deal with your concern?
074	Rice	Yes.
075	Chair Mannix	How do the members of the committee feel about leaving the limit in place?
077	Rep. Simmons	It is not mandatory; it is at the discretion of the judge.
081	Chair Mannix	I think the proponent of HB 2526 is more concerned with the amount of the reward than the reimbursement feature.
087	Rep. Bowman	I would support HB 2526 if we left the reimbursement amount as is.
093	Rep. Sunseri	Does Oregon prohibit the use of bounty hunters?
098	Spencer	My understanding is that bounty hunters are prohibited in Oregon.
102	Rep. Sunseri	Discusses bounty hunting in hopes of a large reward.
110	Rep. Bowman	The county court or county governing body gets to authorize the reward?
113	Chair Mannix	There are still some counties where the county commissioners are called the county court, but they are not the usual circuit court.
117	Rep. Bowman	We're not talking about a county commission being able to authorize this reward. Does it have to be a judicial process?
119	Chair Mannix	No. This is just the opposite; the county commissioners may establish a reward.
121	Rep. Prozanski	County commissioners are referred to differently in some counties.
124	Rep. Bowman	Even though it says county court, are we referring to a Board of Commissioners?
125	Rep. Prozanski	Yes.
126	Chair Mannix	Discusses the policy elements of HB 2526.

145	Rep. Simmons	What if we had a formula that 10% of a large reward had to be reimbursed by the defendant?
151	Counsel Horton	Discusses the statutes regarding restitution and other fines and fees where the defendant's ability to pay is considered.
162	Rep. Hansen	Is there a hierarchy for restitution?
163	Rep. Bowman	Yes.
164	Rep. Hansen	Would child support come before reward reimbursement?
164	Rep. Bowman	Child support is at the bottom of the list.
166	Chair Mannix	Would you want the financial circumstances of the defendant considered when ordering reimbursement?
167	Rice	That would address some of my concerns.
175	Spencer	Discusses that the Sheriff Association's primary concern is Section 2, allowing a citizen to offer a large reward, not Section 1.
182	Chair Mannix	Closes public hearing on HB 2526
<u>HB 2526 WORK SESSION</u>		
185	Rep. Sunseri	MOTION: Moves to SUSPEND the rules for the purpose of adopting conceptual amendments.
		VOTE: 7-0
		Chair Mannix
		Hearing no objection, declares the motion CARRIED.
196	Rep. Simmons	MOTION: Moves to ADOPT the conceptual amendment on HB 2526 that the court must take into consideration the defendant's financial ability to pay the reimbursement.

201	Rep. Bowman	Would that put the limit of \$5,000 back in Section 3?
203	Chair Mannix	No. It is still the judge's discretion to ask for reimbursement.
206	Rep. Bowman	I am not in favor of this conceptual amendment.
211		VOTE: 6-1 AYE: 6 - Gianella, Hansen, Prozanski, Simmons, Sunseri, Mannix NAY: 1 - Bowman
	Chair Mannix	The motion CARRIES.
222	Rep. Prozanski	MOTION: Moves to ADOPT the conceptual amendment on HB 2526 leaving in "not exceeding \$5,000".
233	Rep. Hansen	Discusses that a very large reward is probably being offered for a grievous offense (a Measure 11 offense), and by the time the offender is released, he may have very little ability to pay.
253	Rep. Bowman	My concern is the political motivation to seek publicity and not justice by imposing an enormous fine to look good in the media.
267	Chair Mannix	The conceptual amendment to leave in the \$5,000 cap takes away the reason for amending Section 3 in the first place.
281		VOTE: 3-4 AYE: 3 - Bowman, Hansen, Prozanski NAY: 4 - Gianella, Simmons, Sunseri, Mannix
	Chair Mannix	The motion FAILS.
288	Rep. Sunseri	MOTION: Moves to ADOPT the conceptual amendment on HB 2526 that no public rewards be paid to any individual or group functioning as a bounty hunter.

292	Chair Mannix	How are we going to define bounty hunter?
297	Counsel Horton	There may be a definition for bounty hunter in the Oregon Revised Statutes.
300	Chair Mannix	Discusses prohibiting the practice of being a bounty hunter in Oregon.
310	Rep. Sunseri	The amendment I propose would prohibit us from encouraging bounty hunters from other states.
319	Chair Mannix	Because I am uncertain about the law concerning bounty hunters, HB 2526 will be held over for another work session.
325	Rep. Prozanski	We may not be able to keep a bounty hunter from entering Oregon from some other state, but we can limit their reward.
333	Chair Mannix	Do you want an amendment that says no person regularly engaged in the practice of seeking rewards for capturing people may claim a reward?
336	Rep. Prozanski	They may be on contract for a bail bondsman to capture an individual, but we don't want them to collect a reward on top of being paid by the bail bondsman.
343	Spencer	Discusses the possibility of limiting a "public" reward being paid to a bounty hunter, but not being able to prohibit private funds being paid as a reward.
358	Chair Mannix	I will ask for an LC draft stating that no public monies may be used to pay a reward to a bounty hunter under these provisions.
365	Rep. Sunseri	We are not challenging their constitutional rights to exist, we are just taking away their incentive to practice in Oregon.
369	Rep. Simmons	We need to define bounty hunters as looking for humans.
377	Chair Mannix	Closes work session on HB 2526. Adjourns meeting at 10:45 a.m.

Submitted By, Reviewed By,

Patsy Wood, Sarah Watson,

Administrative Support Administrator