

House Committee on Judiciary Crime & Corrections Subcommittee April 3,
1991 - Page

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statements made during this session. Only text enclosed in quotation
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report a speaker's exact words. For complete contents of the
proceedings, please refer to the tapes.

HOUSE COMMITTEE ON JUDICIARY CRIME AND CORRECTIONS

April 3, 1991Hearing Room 357 1:00 p.m.Tapes 71 - 72

MEMBERS PRESENT:Rep. Randy Miller, Chair Rep. Ray Baum Rep. Judy
Bauman Rep. Tom Brian Rep. Rod Johnson Rep. Tom Mason Rep. Del Parks
Rep. Ron Sunseri

STAFF PRESENT: Greg Chaimov, Committee Counsel Jeff Steve,
Committee Assistant

MEASURES HEARD:HB 2846 P.H. HB 2835 P.H. HB 2570 - W.S.

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TAPE 71, SIDE A

004 CHAIR RANDY MILLER: Opens Subcommittee on Criminal Law and
Corrections at 1:00 p.m.

015 GREG CHAIMOV, COMMITTEE COUNSEL: Reviews provisions of bills on
subcommittee's agenda.

HB 2846 authorizes the Attorney General to issue subpoenas in any
criminal investigation conducted by the Department of Justice.

HB 2835 reduces the penalty for assault in the fourth degree from six
months imprisonment and a fine of \$25,000 to a fine of \$25 if the
defendant injures someone burning the Oregon or United States flags.

HB 2834 authorizes the use of deadly force to stop someone from
tampering with or stealing property.

HB 2570 is the bill that Reps. Schoon and Markham brought before the
committee in February that authorizes the use of deadly force to stop
someone who is unlawfully in a home with a weapon.

035 CHAIR MILLER: Opens public hearing on HB 2835.

PUBLIC HEARING - HB 2835 Witnesses:Rep. Bill Markham Rep. Bill Dwyer
Stevie Remington, ACLU

037 REP. BILL MARKHAM: Testifies in support of HB 2835.

Reads letter received in support of HB 2835.

085 REP. BILL DWYER: Testifies in support of HB 2835.

121 REP. R. JOHNSON: Do you believe that burning the Oregon flag
creates the same emotional reaction in people?

122 REP. DWYER: Does not believe so. Has no objection to the addition
of the Oregon flag to the bill.

155 REP. BRIAN: Seems that to encourage an assault on someone
expressing his opinion is in conflict with First Amendment rights.

180 REP. DWYER: Expresses support for Rep. Schoon's bill, HB 2570.

188 CHAIR MILLER: Recesses hearing on HB 2835.

Opens work session on HB 2570.

WORK SESSION - HB 2570 Witnesses:Rep. John Schoon

190 CHAIMOV: When HB 2570 first came to the committee it allowed the
use of deadly force against anyone unlawfully in a dwelling.

The committee expressed concern that the bill was too broad. Rep.
Schoon has prepared amendments, HB 2570-1, that add a requirement that
the intruder have a weapon before deadly force can be lawfully used
against the intruder.

Committee may wish to consider inserting "dangerous" in the amendments
to make them conform more closely to existing law.

205 REP. JOHN SCHOON: Agrees that the word "dangerous" or "deadly"
should be added to the amendment.

Weapon provision was added to eliminate the possibility that someone
just might be in the house, an altercation could arise, and the home
owner could drill them.

Purpose of the amendment is to indicate that the individual entered the
house unlawfully in the first place, and entered with a weapon.

222 REP. PARKS: What does the bill add to current statute if we insert
the requirement of a weapon?

235 CHAIMOV: Current statute may be broad enough to cover this conduct.
HB 257 0 would make it clearer.

247 REP. PARKS: Why does a home owner have to guess if an intruder has
a weapon in order to exercise his right of self defense?

Who suggested the bill be amended to include the weapon provision?

260 REP. SCHOON: District attorneys brought up the possibility that an
individual could just happen to be in the house. Prompted to introduce

the bill because of the incident in Turner when two armed individuals broke into a house, and killed and injured occupants and pled self defense because the home owner grabbed a gun.

280 CHAIR MILLER: Would read the amendment as not limiting, but adding another group against whom you are authorized to use deadly force.

285 REP. R. JOHNSON: Disagrees. Thinks existing language in line 10 that says "unlawfully entering or unlawfully within the dwelling." is pretty clear that no weapon is required. This amendment would require that the person have a weapon with him as well as be in the dwelling.

290 CHAIR MILLER: Reviews committee's concerns at prior hearing.

298 REP. R. JOHNSON: Think we could address that concern by specifically saying a person who is lawfully within a dwelling and who is asked to leave shall be given a reasonable time to leave.

315 REP. SUNSERI: Likes bill the way it is written.

Does not want to see anyone who should be protected by the law end up being prosecuted by the law because they were not able to identify the weapon when they were being attacked.

325 REP. BRIAN: Agrees with comment about not putting "weapon" in the bill. Because someone is not carrying a weapon does not mean that some sort of weapon is not readily accessible after they enter the home.

Would like definition of possible transition from lawful to unlawful presence in a dwelling.

340 REP. BAUM: "Unlawfully entering or unlawfully within" will be the language that will cause trouble.

Gives his understanding of what the bill is designed to address and current law.

380 CHAIR MILLER: Has heard concern from citizens about domestic relations situations.

390 REP. SCHOON: Has no problem making it clear in the bill that it is the person who has entered unlawfully.

400 REP. BAUM: Does "unlawfully entering the dwelling of a person" get to the point?

405 REP. SCHOON: That may be interpreted that you have to catch them in the act of entering.

407 REP. BAUM: Only means that they came in without your permission.

420 REP. BRIAN: Concurs with direction Rep. Baum is going in.

Believes "unlawfully entering the dwelling" covers most of our concerns.

430 MOTION: REP. BAUM: Moves to strike "or unlawfully within" on line 10 of the printed bill so that it reads "unlawfully entering the dwelling of a person".

455 REP. R. JOHNSON: Criminal statutes are strictly construed and if we

leave this to read nothing but "unlawfully entering" that is not an act consummated once you are inside a dwelling.

Suggests friendly amendment. Could define what is meant by "unlawfully entering" or "unlawfully within the dwelling" as follows: add a new section "As used in this section, the phrase "unlawfully entering or unlawfully within a dwelling" shall include all circumstances in which the person is within a dwelling or entering or attempting to enter a dwelling without the consent of the owner, except where a person was once inside the dwelling with the permission of the owner and the permission was revoked." We would then add language that would address that specific situation.

495 REP. BAUM: What if we changed the language on line 3 to read "unlawfully enters"?

TAPE 72, SIDE A

040 REP. R. JOHNSON: Does that take care of attempting to enter?

045 REP. BRIAN: Should take time for counsel to draw the amendment correctly.

050 CHAIR MILLER: Let's conceptually agree. If the entering or enters seems to capture your intent, we can agree on that, and have language drafted.

056 REP. R. JOHNSON: Thinks still need to have the "within" language to cover all degrees of entry.

066 REP. SCHOON: Thinks problem in drafting of the right words is centered in the word "is" at the end of line 6.

Suggests putting ":" after "person", then make the conditions separate.

080 REP. SUNSERI: Does line 7 address the language?

090 CHAIMOV: Suggests language. "Unlawfully entering or unlawfully enters and remains within".

095 REP. BRIAN: Is it clear that unlawfully entering includes the act of attempting entry?

098 REP. R. JOHNSON: Rep. Edmunson would remind us that attempting to do something is included in statute as doing it.

Would feel more comfortable adding the attempt language.

105 CHAIMOV: My concern about adding "attempting" is that it might give someone a license to go down the block to shoot someone who is putting together the materials to break into a house.

Restates his proposed language: "unlawfully entering or unlawfully enters and remains within" with a little modification along Rep. Schoon's suggestion to pull the "is" out of line 6 so that everything stays in proper grammatical order.

125 MOTION: REP. BRIAN: Moves the amendment stated by Counsel Chaimov.

135 CHAIMOV: My intention with this amendment would be to exclude the

conduct of someone who has lawfully entered and then that lawful entry becomes unlawful at some later date, you would not be allowed to use deadly force.

150 REP. SUNSERI: Unlawful entry can be walking through an open door if you have been told never to come in again, even though there might be other people inside.

170 REP. BAUMAN: How often does a person enter a dwelling without the intent to commit a crime therein?

200 CHAIMOV: The bill is aimed at protecting people who might shoot someone who is in their living room before that person has the TV under their arm. If you end up using deadly force, you can not interview the intruder to determine his intentions.

205 REP. BAUMAN: Could you find some cases on point?

Not aware of any cases that say it is not burglary even though you have not accomplished the crime. Theft inside the dwelling is not the only crime we are concerned with. There are personal crimes as well.

230 REP. MASON: You could have a situation where a spouse has been forced out of the home on a restraining order at 5:00 o'clock, comes back at 7:00 o'clock in violation of the restraining order, uses his key to open the door to get his clothes. That person would be fair game.

245 REP. PARKS: Thinks "committing or attempting to commit a felony within the dwelling of another" removes restraining orders and the guest who will not leave, out of it.

257 REP. BRIAN: Will withdraw his motion if there is a better one.

260 REP. BAUMAN: What is the difference between your proposed amendment and burglary?

261 REP. PARKS: For burglary, in the bill as it now stands, some type of imminent use of physical force is required.

270 REP. R. JOHNSON: Thinks it is important that we go back to the reason the bill was proposed, i.e., to not require a home owner to be forced to guess the motives and intentions of the person he finds in his dwelling in the middle of the night.

Whole point of the bill is to be able to shoot first and ask questions later and to establish a clear law that if you have a problem you do not go into someone else's house to cure it without getting their permission first. If you do so, it is at your peril, no matter what your intentions were. To add a weapon, felony, or anything abrogates the initial intent of this bill.

330 REP. SCHOON: Suggests going back to putting in "dangerous weapon" so that it makes it absolutely clear that if a person has entered the house illegally with a weapon, the home owner has the ability to defend himself.

370 CHAIR MILLER: Restates motion.

380 REP. BAUM: Comments on motion.

Are we changing anything that does not already exist?

Reads burglary statutes.

440 REP. SCHOON: Intent can be shown by circumstances. The burglary statute in Oregon has been so bastardized by the courts that there is nothing left.

480 REP. R. JOHNSON: The difference between burglary and this proposed bill is that it would cover a case where an owner uses deadly force on someone who enters his dwelling without intent to commit a crime.

050 REP. SCHOON: Would be willing to work with Committee Counsel and Legislative Counsel to resolve concerns.

060 CHAIR MILLER: Closes work session on HB 2570.

Reopens public hearing on HB 2835.

PUBLIC HEARING - HB 2835

072 CHAIMOV: Notes materials relevant to HB 2835 which are before members.

080 STEVIE REMINGTON, AMERICAN CIVIL LIBERTIES UNION: Testifies in opposition to HB 2835 which they view as an invitation by the legislature for people to commit violence.

100 CHAIR MILLER: Are you aware of the actions in other states that have adopted this concept?

101 REMINGTON: No.

102 REP. SUNSERI: Doesn't flag burning invite violence?

110 REMINGTON: Knows of no instances of violence.

Thinks flag burning is foolish but does not think government should pass a bill like HB 2835.

125 CHAIR MILLER: Did you have a position on the bill Rep. Markham has seeking protection for the American flag?

126 REMINGTON: We lobbied against any kind of constitutional amendment to accomplish that.

129 CHAIR MILLER: Is there nothing, in the view of the ACLU, that can or should be done to protect the American flag?

132 REMINGTON: As long as it is not someone else's property, I agree with that statement.

Do not believe that the symbol of the basic rights we enjoy should be more worthy than the rights themselves.

140 REP. SUNSERI: We do protect the Statue of Liberty and the eagle which are also symbols of our liberty. They enjoy specific protection. Why should the situation be different for the flag?

145 REMINGTON: Believes there is no comparison.

160 REP. BAUMAN: Is there any record of interest with your legal support group over the enforcement of ORS 166.075 which is the law that protects all of us from abuse of venerated objects.

175 REMINGTON: That was part of the revised criminal code and I testified against it as it applied to the flag. We have, on three occasions, attempted to represent someone who was charged with flag desecration. The case never gone beyond the trial stage, but always got a dismissal.

265 REP. BAUMAN: Would it be possible to reduce the punishment for any crime committed in retaliation to any action of which we disapprove to reflect our policy with regard to the original action?

292 CHAIR MILLER: Closes public hearing on HB 2835.

Opens public hearing on HB 2846.

PUBLIC HEARING - HB 2846 Witnesses: Pete Shepherd, A.G.'s Office Stevie Remington, ACLU

297 CHAIMOV: Reviews provisions of HB 2846.

307 REP. BILL MARKHAM: Testifies in support of HB 2846.

360 REP. CLARK: Offers support for HB 2846.

410 PETE SHEPHERD, ATTORNEY GENERAL'S OFFICE: Testifies in support of HB 284 6 which would give the Attorney General a greater potential to achieve a successful result in the investigation of cases in which the potential suspect is intimately involved in the criminal justice system. It would also facilitate the public's interest in insuring that the facts necessary to continue Oregon's tradition of good government are available to the public for their use.

Summarizes written testimony and exhibit (EXHIBIT A).

TAPE 72, SIDE B

SHEPHERD: Concludes review of (EXHIBIT A).

060 REP. BRIAN: What are the arguments against this that caused 40 states not to adopt it?

063 SHEPHERD: The more recent trend appears to be that other states are recognizing the utility of this tool. Other states have not yet realized how useful such a tool would be.

075 REP. BRIAN: Oregon and other states have looked to local grand juries to assist in the state's interests.

090 REMINGTON: Submits hand engrossed HB 2262 (1983 Session) (EXHIBIT B).

The ACLU thought that this was a reasonable compromise between the need for this kind of authority and the public interest in seeing that it is not abused.

Recommends that the committee amend HB 2262 as it was done in 1983.

120 REP. PARKS: Why do you think 40 other states don't have this?

122 REMINGTON: Has not done research on other states. Only familiar with concerns raised here in 1983.

127 REP. PARKS: Do you have specific objections to giving the Attorney General this authority?

130 REMINGTON: We think it would be easy for someone who was intent on harassment and lends itself to abuse.

136 REP. BRIAN: Do district attorneys apply to a judge or issue a subpoena on their own power?

140 REP. PARKS: It has to be in connection with a judicial proceeding.

145 REP. BRIAN: Would the authority given the Attorney General under HB 2846 be different than what district attorneys have?

150 SHEPHERD: Yes. District attorneys do not have the authority to issue a subpoena of the nature described in HB 2846.

158 REP. BRIAN: Who can issue subpoenas for criminal investigation?

160 SHEPHERD: No prosecution entity is currently authorized under Oregon law to issue the kind of subpoena that is contemplated by HB 2846, which is a subpoena that would direct a recipient to come to the Attorney General's office or to such location as might be appropriate to respond to questions.

A district attorney currently has to ask a grand jury to issue a subpoena and bring witnesses before the grand jury or use the grand jury process to secure documents.

175 REP. BRIAN: Does the bill say that the Attorney General should have direct subpoena authority without going through the district attorney process?

180 SHEPHERD: Yes.

185 REP. BRIAN: Would granting authority to the Attorney General, but having the office required to go through a grand jury, be better than what we currently have?

187 SHEPHERD: That would put us back to where we are.

190 REP. BRIAN: Is supportive of effective criminal investigation. Why should the Attorney General's office be different from district attorney investigations?

205 SHEPHERD: Does not believe the Attorney General, under current law, could go to a neighboring grand jury because the grand jury is charged with investigating crimes that occur within its jurisdiction.

Does not solve the difficulty that is presented when an investigation falls short of an indictment, but reveals information which is necessary for the public to act upon or to consider in correcting a problem which has led to unethical or administratively improper conduct.

220 REP. PARKS: Did the Attorney General have a hand in the prosecution of the district attorney of this county when he was convicted?

225 SHEPHERD: Understands that the Attorney General was asked to prosecute that case and because of a conflict, designated a separate prosecutor from Multnomah County.

That case was indicted by the Marion County Grand Jury. That case is different from the kind of case we are concerned with in HB 2846.

In more typical cases, the kind of allegations that falls to the Attorney General's office, are allegations that have not yet become public and there may be need for a confidential investigation.

250 REP. PARKS: The grand jury has provisions for secrecy to protect innocent people.

257 SHEPHERD: The nature of offenses that the Attorney General is charged with investigating under current law carry, as the essential quality, some high interest that the people of the state of Oregon have.

In those instances there is a high value in being able to act upon information which falls short of criminal misconduct but is significant for other public purposes.

280 REP. BAUMAN: Is there a situation where you would be able to compromise with the ACLU and bring back acceptable amendments?

290 SHEPHERD: Would like time to review Ms. Remington's exhibit.

Willing to work with whoever committee thinks is appropriate.

308 REP. BAUMAN: Was this issue introduced in the 1989 Session?

311 SHEPHERD: Issue was not heard last session. Does not know if it was introduced.

314 CHAIR MILLER: Concept has been broached, but there was a recognition that it would be a difficult struggle.

320 REP. BAUMAN: Not clear why it is so important for the Attorney General to have the additional power or why the additional power is such a threat.

330 SHEPHERD: We think the bill is important because it allows us to do the job we are already charged with doing and facilitates the public's interest in knowing how the public servants are going about their business where it may fall short of criminal misconduct.

345 CHAIMOV: To what does "and materials" refer in the bill?

360 SHEPHERD: Not sure that it adds anything to what is already required to be produced under the authority of (a).

370 REP. PARKS: If amendments are drawn, would like to have something that provides that the subpoena power does not exceed the geographical boundaries of the county in which the subpoenaed person lives.

400 SHEPHERD: Some other states provide that the deposition shall take place in the county in which the person resides. That is easy to

accommodate.

There is a procedure under the federal grand jury rules that provides that information collected in the federal grand jury may be disclosed for certain purposes. Would it address your concerns with respect to use of the information, or do you feel it necessary, if the bill were amended to require the approval of a court and demonstrated need for some public interest purpose before the information collected in the investigation could be released?

420 REP. PARKS: Likes that idea.

425 CHAIR MILLER: Will allow the committee time to consider the bill and bring it back at a future meeting.

Close public hearing on HB 2846.

Adjourns meeting.

Transcribed by,

Pat Zwick

EXHIBIT LOG A:HB 2846 Testimony and Exhibit - Pete Shepherd - 8 pages
B:HB 2846 Exhibit - Stevie Remington - 1 page