

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

Measures Heard HB 2026 (PUB) HB 2027 (PUB) HB 2020 (PUB) SB 852 (PUB) HB 2031 (PUB) HB 2035 (PUB) HB 2418 (PUB) HB 2022 (PUB) HB 2023 (PUB) HB 2024 (PUB)

SENATE COMMITTEE ON THE JUDICIARY

May 8, 1991Hearing Room C 1:10 p.m.Tapes 152 - 154

MEMBERS PRESENT:SEN. JOYCE COHEN, CHAIR SEN. JIM HILL, VICE CHAIR
SEN. PETER BROCKMAN SEN. JIM BUNN SEN. JEANNETTE HAMBY SEN. BOB
SHOEMAKER SEN. DICK SPRINGER

STAFF PRESENT: INGRID SWENSON, COMMITTEE COUNSEL MARK THORBURN,
COMMITTEE ASSISTANT

WITNESSES: GEORGE STEVENSON, CITY OF SALEM THE
HONORABLE TED CALOURI, STATE REPRESENTATIVE DAVID FIDANQUE, ACLU OF
OREGON PETE SHEPHERD, DEPARTMENT OF JUSTICE DOUG HARCLEROD, LANE COUNTY
DISTRICT ATTORNEY BOB LANE, LANE COUNTY DISTRICT ATTORNEY'S OFFICE GENOA
INGRAM, OREGON ASSOCIATION OF REALTORS JENNY COOKE, OREGON CRIMINAL
DEFENSE LAWYERS ASSOCIATION VIC MANN, CITY OF EUGENE THE HONORABLE MIKE
BURTON, STATE REPRESENTATIVE

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE 152, SIDE A

003 CHAIR COHEN: Calls meeting to order at 1:10 p.m.

HB 2026

036 CHAIR COHEN: We'll start with 2026.

- Invites George Stevenson to testify.

HB 2026, HB 2418, AND HB 2023

048 GEORGE STEVENSON, CITY OF SALEM: Supports HB 2026. Submits Exhibit

A (which deals with all three bills). Paraphrases portion of Exhibit A and explains purpose of the HB 2026.

ASSET FORFEITURE BILLS IN GENERAL

088 TED CALOURI, STATE REPRESENTATIVE: Discusses history of current bills on asset forfeiture.

143 CHAIR COHEN: Thanks witness.

150 REP. CALOURI: There is one bill that did not come from this process, but is on this subject, that is on its way which deals with forfeitures regarding driving while suspended; asks committee to watch for it.

166 SEN. SPRINGER: How are we doing on the LCDC budget?

167 REP. CALOURI: It's in pretty good shape; summarizes discussions that have been surrounding the budget.

- Urges committee's support for the forfeiture bills.

HB 2026

198 CHAIR COHEN: Invites more witnesses to testify.

202 DAVID FIDANQUE, ACLU OF OREGON: Submits, and paraphrases a portion of, written testimony (Exhibit B).

- HB 2026 deals with a minor, but important, issue. Has mixed feelings about it; explains why.

306 SEN. SHOEMAKER: If property is subject to forfeiture, then it cannot be reclaimed; so this is dealing with property that is not forfeitable?

311 FIDANQUE: Describes how a person can file a claim of an affirmative defense to prevent a forfeiture.

331 SEN. SHOEMAKER: If I have property that was wrongfully seized and I don't get my notice in within 21 days,

336 FIDANQUE: It's gone.

336 SEN. SHOEMAKER: Regardless?

337 FIDANQUE: Unless it's real property

338 SEN. SHOEMAKER: Let's say its an automobile.

343 FIDANQUE: If you didn't file a claim, they're going to take your car and it's gone.

352 CHAIR COHEN: Invites Pete Shepherd to testify.

357 PETE SHEPHERD, DEPARTMENT OF JUSTICE: The requirement of filing a claim

is triggered only as to people who've received notice, so if you've never received notice, your property cannot be forfeited.

371 SEN. SHOEMAKER: What if it's notice by publication and I didn't read it?

372 SHEPHERD: The obligation of the government is to serve notice in the manner which will most likely to give notice; if the government fails to do so and takes a judgment, then you can move to set aside the judgment.

386 INGRID SWENSON, COMMITTEE COUNSEL: Section four talks about manner of service. It is my understanding that its after notice, not receipt of notice, that the 15 days begins to run.

395 CHAIR COHEN: So it is after the publication that you didn't read.

400 SEN. SHOEMAKER: A person may be served as provided in ORCP 7D.

402 CHAIR COHEN: Ms. Swenson might want to brief us on that.

405 SWENSON: Explains ORCP 7D.

413 SEN. SHOEMAKER: Wants to see a copy of ORCP 7D.

HB 2027, HB 2026, AND SB 852

418 SHEPHERD: The Department of Justice supports 2026 and 852. The Department has trouble with a portion of 2027.

SB 852

431 CHAIR COHEN: So as far as you're concerned, the 852 piece is appropriate?

434 SHEPHERD: We support the bill; submits Exhibit H; mentions what the bill does. 443 CHAIR COHEN: Reminds committee that both Mr. Shepherd and Mr. Fidanque support 852 ; lists the topics covered by the bill.

467 SWENSON: It also limits the information that the claimant is required to provide.

474 CHAIR COHEN: If we pass 852 and we change the time to 21 days, we would find no longer any need (inaudible) or we could put the remains of 852 into 2026.

HB 2027

496 CHAIR COHEN: Let's move to 2027.

TAPE 153, SIDE A

046 FIDANQUE: Supports the bill. Explains the bill and the underlying problem. Stresses that, under forfeiture, once the property is seized, there is no way to get it back. Discusses how lopsided the attorney fee provision is.

123 CHAIR COHEN: So we're substituting "shall order" for "if it finds or reasonable

124 FIDANQUE: Yes and that's important; explains why.

135 SHEPHERD: Supports the bill; it's an improvement over current law. Disagrees with portion of Mr. Fidanque's testimony. Has concerns about the attorney fee provision; cites example. Has amendments (Exhibits C and D) to offer; explains Exhibit C.

198 SWENSON: For the record, he's referring to Exhibit C.

200 SHEPHERD: That's our preference; Exhibit D is our secondary alternative. Explains Exhibit D.

226 SEN. SHOEMAKER: Regarding the second alternative, if the final decision was more favorable to the claimant than the settlement offer, then the claimant would still be entitled to attorney fees?

232 SHEPHERD: My intent is to borrow whatever law presently exists in that field.

238 SEN. HILL: In the place of a spouse, is it always necessary for them to get an attorney?

247 SHEPHERD: Nothing in the statute requires the person to retain an attorney and our office has dealt with unrepresented claimants. Many claimants do have an attorney.

256 SEN. HILL: Is that most of the time?

257 SHEPHERD: In more than 80% of the contested forfeiture cases, the person does have an attorney.

265 SEN. HILL: Do you attempt to settle this before they get an attorney or does the situation just beg itself to getting an attorney?

270 SHEPARD: Part of the notice that's given to them encourages them to seek legal advice. Also, when we get calls from unrepresented claimants when we know we have a strong case for forfeiture, we tell them to consult with an attorney.

287 SEN. SHOEMAKER: In Exhibit C, you're one line off.

- Tell me where the changes from Exhibit D appear in the bill.

294 SHEPHERD: Reads the revised language if Exhibit D became law.

300 SEN. SHOEMAKER: Where are we on the page?

301 SHEPHERD: Page 3 of the A-engrossed bill; it should say line 17.

306 SEN. SHOEMAKER: Line 18.

309 FIDANQUE: Yes; Mr. Shepherd doesn't have the corrected version of the bill.

311 SHEPHERD: I have the A-engrossed version; borrows Mr. Fidanque's copy.

316 SEN. SHOEMAKER: Reads the changes.

317 SHEPHERD: Correct.

- And the other change would be in the following line.

324 SEN. HAMBY: Cites fact situation; claimant is still liable for attorney fees?

335 SHEPHERD: Explains his understanding of ORCP 54 and of what the amendment would do.

350 SEN. HAMBY: Would it ensure payment?

351 SHEPHERD: If the committee did nothing else and left in the "shall" language, yes; is that incorrect?

357 SWENSON: I don't know.

358 SEN. HILL: We'll have to look into that.

360 SHEPHERD: Explains intent behind the amendment.

370 SEN. SHOEMAKER: Explains how ORCP 54E works.

397 SHEPHERD: It was not my intent to try to find a way to get attorney fees for the government.

401 SEN. SHOEMAKER: But you do provide for attorney fees for the prevailing party which would be the government; in effect, you are going beyond ORCP 54 for a forfeiture case.

407 SHEPHERD: That's correct.

408 SEN. SHOEMAKER: I thought it would be useful to see that the Rules of Civil Procedure don't go that far.

412 FIDANQUE: When the government agency is successful in getting a forfeiture, they are currently able to recover their costs and attorney fees out of the proceeds of the forfeiture.

424 SEN. SHOEMAKER: We might consider just making this subject to ORCP 54.

426 FIDANQUE: Except that that would add the increased penalty for the claimant who didn't accept a settlement offer and then got a less favorable settlement to then be required to pay costs and disbursements in addition to losing their property.

434 CHAIR COHEN: I think we've got to amend the (inaudible) here.

- Invites Mr. Harclerod and Mr. Lane to testify.

447 DOUG HARCLEROD, LANE COUNTY DISTRICT ATTORNEY: Introduces Mr. Lane. Submits handout (Exhibit E); explains handout.

467 CHAIR COHEN: Is that a drug case because the schemer network didn't work or because you couldn't charge?

TAPE 152, SIDE B

023 HARCLEROD: This was before the troubles with the schemer network.

- The point I want to make is that the forfeiture statute provides an additional deterrent to commit drug activity.

- Do have an objection to the attorney fees provision; explains why.

081 BOB LANE, LANE COUNTY DISTRICT ATTORNEY'S OFFICE: Objects to the attorney fee provision; explains objection and cites examples of current practice.

101 SEN. HAMBY: What was the pc?

102 LANE: It was a traffic violation.

- Continues examples.

119 CHAIR COHEN: Did you lose the case?

120 LANE: Yes; he proved that the money was not drug proceeds.

121 SEN. HAMBY: Discusses high percentage of drug contaminated cash.

129 SEN. BUNN: We were wrong in the case, but since he's a bad guy, he isn't entitled to attorney fees?

131 LANE: No. Am saying that the information the police were confronted with when they seized the money strongly indicated that it was drug money and, later, when he produced information, the money was returned, but at the time, the police were acting reasonably.

137 SEN. BUNN: Doesn't the court set reasonable attorney fees?

139 LANE: The bill, as written now, just says "shall pay attorney fees."

140 SEN. BUNN: Do we need the word "reasonable"? Seems that any attorney fee incurred after the proceedings were dropped would be unreasonable; wouldn't that take care of the concern?

144 LANE: It may very well, although I'd still be concerned about paying attorney fees incurred up to that point; explains concern.

148 SEN. BUNN: When dealing with attorney fees, the judge has to look at what's reasonable. If you've got an innocent individual and he needs an attorney to prove that innocence, why shouldn't that compensation be there?

155 LANE: It will have an undue deterrent effect on the police; cites examples.

167 CHAIR COHEN: Don't you have a pool of money that they pay you from that they can also pay the attorney fees.

171 LANE: Three of the agencies do; the smaller ones aren't a part of that.

173 HARCLEROAD: If you're saying there's a pool of money

174 CHAIR COHEN: No; I said that the forfeiture proceeds go to the local governments to do as they wish and they can write contracts that say that, in the event of a pay out of attorney fees, the fees will come

out of there.

184 HARCLEROAD: Those arrangements could be made. I doubt the Eugene Police would be willing to pay for the attorney fees for a case that arose from a Cottage Grove police officer. Negotiating an agreement between all those agencies to get them to

188 CHAIR COHEN: Some of us would like to take all that forfeiture money for the state.

191 SEN. BUNN: Comments on the dampening effect of the attorney fees provision.

197 HARCLEROAD: Could tolerate attorney fee provision that went both ways. Mr. Fidanque's comment that they can get their attorney fees from the proceeds of the assets is only partially correct; explains.

223 SEN. HILL: You mentioned that you're not concerned about the banks and so forth; how do you distinguish between their attorney fees and someone else's?

228 LANE: In the statutes as they stand now, I don't. The bill doesn't distinguish between them either. Explains current practice. The banks are always innocent, their attorney fees are minimal, and assumes they're going to continue to be cooperative. More concerned about how the attorney fees provision will affect payments to other people.

248 SEN. SHOEMAKER: Are most of these cases contested?

250 LANE: Very few of them are contested.

257 SEN. SHOEMAKER: And the issue in the cases were?

258 LANE: The issue in each of those cases was whether there were facts to support the forfeiture.

262 SEN. SHOEMAKER: In a noncontested case, assume you would not be seeking attorney fees. There are still some attorney fees, even in uncontested forfeiture judgments.

267 LANE: They go by stipulated judgment or by administrative judgment.

268 SEN. SHOEMAKER: You're talking about a contested case; that, in those cases, attorney fees be awarded to the prevailing party.

271 HARCLEROAD: Yes; that is what I was suggesting.

271 CHAIR COHEN: That would severely dampen anybody. Why would any private

individual, unless your entire life savings were at stake, run that risk?

275 SEN. SHOEMAKER: You'd just take your lumps because you figure you're not going to win.

277 SEN. HILL: In most of the cases that you have, people are represented by attorneys?

279 LANE: Yes, in the contested cases.

280 SEN. HILL: What about the uncontested cases?

281 LANE: No.

286 SEN. HILL: So in the cases where the claimant prevails, what do you usually do about attorney fees now?

289 LANE: When there's an individual claimant, as opposed to an institution or lienholder, they're not paid. Those usually go by stipulated judgment where they agree there were no costs to either party.

- Another fact situation regarding attorney fees is when property is, in fact, subject to forfeiture, but where evidence may be suppressed later; cites examples.

- The bill currently reads that if you get a court order, then you are insulated from attorney fees. Under the new bill, it says that if you lose, then you're going to have to pay attorney fees.

366 HARCLEROAD: We'd like the police to get court orders before seizing property.

368 CHAIR COHEN: Are you suggesting that the only reason that police go to court is because they're afraid of getting sued and someone might have to pay an attorney fee?

375 HARCLEROAD: That's not the only reason, but it is one reason.

HB 2020 AND 2027

388 GENOA INGRAM, OREGON ASSOCIATION OF REALTORS: Submits Exhibit F.

HB 2027

394 INGRAM: Explains background and rationale of attorney fees provision in the bill. Opposes language that would require attorney fees be paid to the prevailing party; explains why. Requiring forfeiting agency to pay attorney fees will not stop the police from seizing the property; explains why. Attorney fees is the only avenue for the landowner to get equitable treatment.

TAPE 153, SIDE B

HB 2020

033 SWENSON: HB 2020 specifically provides for attorney fees for contract sellers, but not for other claimants.

HB 2027

035 SEN. HILL: How much property is seized?

037 CHAIR COHEN: Ms. Swenson has prepared a report (Exhibit I) for us; I'll ask her to get it out.

039 SEN. HILL: Just wants a summary.

041 CHAIR COHEN: Maybe we can ask her to get copy from a page before

we're through.

- Invites Jenny Cooke to testify.

044 JENNY COOKE, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION: Testimony during the interim indicated that most forfeitures were in the \$75 to \$100 range; nobody can afford to litigate these seizures. Cites examples.

- Refutes earlier testimony from those who oppose attorney fees provision.

- Supports the bill.

091 VIC MANN, CITY OF EUGENE: Supports the bill. Concerned about the attorney fees provision. Suggestions about using the civil code would be appropriate.

106 CHAIR COHEN: Why not just put in the word "reasonable"?

107 MANN: That might solve the problem; there may be procedures in the civil code that are more appropriate.

112 STEVENSON: Line 18 of the corrected version says "shall order." There is no precedent for mandatory attorney fees. This would not conform to Oregon Rules of Civil Procedure on attorney fees.

- So if you substituted "may."

132 CHAIR COHEN: How about substituting "reasonable"?

133 STEVENSON: Then you still have

133 CHAIR COHEN: We understand that.

HB 2031

134 CHAIR COHEN: 2031.

137 FIDANQUE: Explains the bill and the reason behind it.

164 SHEPHERD: Supports the bill; we're already voluntarily submitting reports.

171 CHAIR COHEN: Comments about the value of reports.

175 SHEPHERD: Also values the reports.

HB 2035

179 CHAIR COHEN: Let's move to HB 2035.

- Asks Ms. Swenson to go through the bill.

183 SWENSON: Explains the bill.

198 SHEPHERD: Supports the bill; explains it intent.

204 FIDANQUE: When the statute passed last session, there was a

presumption that real property would be subject to civil suits rather than being able to be forfeited through an administrative procedure. It makes sense to treat residences as real property.

216 COOKE: Supports the bill.

HB 2035 and HB 2418

223 CHAIR COHEN: On to 2418.

- In the meantime, we're waiting for Representative Burton who has amendments on 203 5.

HB 2418

227 SWENSON: Explains the bill.

233 FIDANQUE: Discusses the time spent by the oversight committee about the bond requirement. The provision in the current statute is borrowed from federal law; its purpose is to make it tough for people to protect their interests. The bill is a middle ground; if had choice, would make it clear why the bond is required at all and, for someone whose indigent, that the bond is not required.

- Discusses the type of situation the oversight committee had in mind for the court to exercise its discretion to waive the bond requirement.

- This is improvement over current law; explains why.

270 SEN. SHOEMAKER: How does forfeiture apply to shared interests in real property?

276 FIDANQUE: Defers to the attorneys.

279 COOKE: No one really knows; it appears that the forfeiting agency can only affect the interest that you have and that you can't forfeit someone else's interest in the property.

290 SEN. SHOEMAKER: So a tenancy in common would be a forfeiture of the one half undivided interest. Would the person who holds the other tenancy be involved in the proceeding?

295 SHEPHERD: Supports the bill.

- 14 out of 800 cases involved real property.

- Everyone with an interest in the property must be served with a summons and complaint. The innocent interest holder could protect their interest by proving an affirmative defense.

326 SEN. SHOEMAKER: It couldn't be a tenant by the entirety because of the marital relationship.

327 SHEPHERD: It's been a long time since I've done real property law.

- It doesn't help anyone for us to be a tenant in common with another person.

- This hasn't been a problem in the federal system.

342 FIDANQUE: The burden is on the innocent holder to prove that they're innocent; cites example.

382 SEN. SHOEMAKER: Do you know whether that property was forfeited?

383 COOKE: We ended up settling the case. It was a very typical situation of where a claimant with money buying their way out.

397 CHAIR COHEN: Your client was the trust?

398 COOKE: My client was the father who was the trustee.

400 SHEPHERD: This discussion illustrates one of the difficulties in discussing forfeiture cases; explains.

434 COOKE: Supports HB 2418.

- Discusses problems surrounding the bond requirement.

470 CHAIR COHEN: Might return to the bond issue later.

HB 2035

474 CHAIR COHEN: Invites Representative Burton to testify and then we'll go back to HB 241 8.

TAPE 154, SIDE A

027 MIKE BURTON, STATE REPRESENTATIVE: Asks for approval of the dash one amendments (Exhibit G). Explains the amendment.

046 SEN. HAMBY: What else may we have forgotten?

046 REP. BURTON: Vans and (inaudible).

HB 2418

049 STEVENSON: Supports the bill.

- In real property cases that I've dealt with, where the legitimate interests are of record, the court and I have not been requiring a bond to be filed.

HB 2020

061 CHAIR COHEN: Let's take 2020.

065 SWENSON: Explains the bill.

085 SEN. SHOEMAKER: Have anything against the bill other than the attorney fee provision and the objections made regarding the other bills?

088 SHEPHERD: We support 2020 as drafted.

- The procedure is modelled on the Oregon Rules of Civil Procedure regarding motions for summary judgment; explains idea behind the bill.

104 COOKE: Supports the bill.

109 FIDANQUE: The language that appear on lines 25 through 32 of the A-engrossed bill is the language that had originally been in HB 2027 and was taken out; explains why it was left in this bill. You'll have three different standards if this and 202 7 are approved; explains.

- We support HB 2020.

HB 2022

136 CHAIR COHEN: 2022.

- Comments on upcoming meeting.

142 FIDANQUE: Supports and explains the bill.

178 COOKE: Supports the bill.

HB 2023

181 CHAIR COHEN: Let's move to 2023.

184 COOKE: Supports and explains the bill.

197 SHEPHERD: Supports the bill; we also support the change that Ms. Cooke is referring to, although that is in another bill.

- This bill does address a similar feature; explains the bill.

HB 2023 AND HB 2024

211 COOKE: I was addressing 2024; likes 2023 for similar reasons.

215 CHAIR COHEN: I guess we can address both of these bills at that same time.

217 FIDANQUE: Supports and explains both bills. Cites examples of underlying problem.

HB 2024

254 SHEPHERD: Likes the bill.

- There is concern about a change in line 4, page 2 from "may" to "shall"; explains concern.

287 CHAIR COHEN: We'll have Ms. Swenson take another look at that with you.

292 SHEPHERD: That's a good suggestion; commends Gloria Gardner at the Clackamas County District Attorney's Office as a good resource for those concerns.

296 CHAIR COHEN: We could insert it in another place.

- Invites other witnesses to testify.

HB 2023

306 STEVENSON: Explains the bill; cites practices of the City of Salem.

HB 2024

321 MANN: Mr. Shepherd has addressed the issue that the City of Eugene is concerned about. Cites past case.

334 CHAIR COHEN: You enhanced the value of something you were going to get.

335 MANN: It does raise the issue of what is reasonable if you got a person who has got property under forfeiture.

344 CHAIR COHEN: Don't you think "reasonably appropriate" is O.K. as long as you get it into the body of the

345 MANN: It is, but there might be something in the legislative record that, in case of a dispute, there is a suggested way of resolving it.

350 CHAIR COHEN: We'll take that under advisement.

- Adjourns meeting at 3:25 p.m.

Submitted by:

Reviewed by:

Mark Thorburn

Committee Counsel

Ingrid Swenson Committee Assistant

EXHIBIT LOG:

A - Testimony on HB 2026, HB 2418, and HB 2023 - George Stevenson
- 3 pages B - Testimony on HB 2026 - David Fidanque - 6 pages
C - Amendments to HB 2027 (Preferred Alternative) - Peter Shepherd
- 1 page D - Amendments to HB 2027 (Least Preferred Alternative) -
Pete Shepherd - 1 page E- Statistics of case under sentencing
guidelines (HB 2027) - Doug Harclerod - 2 pages F - Testimony on
HB 2020 and HB 2027 - Genoa Ingram - 2 pages G - Amendments to HB
2035 - Representative Burton - 1 page H - Testimony on SB 852 -
Pete Shepherd - 5 pages I - Quarterly Report as Required by
Chapter 791 (Representative Calouri/Committee Staff) - 7 pages

EXHIBITS DISTRIBUTED TO COMMITTEE BUT NOT REFERRED TO DURING HEARING

J - Testimony on HB 2020, 2022, and 2024 - Mari Stein-McWilliams -
1 page K- Testimony on HB 2024 - David Whitlow - 2 pages