

TRANSCRIPT PREPARED BY THE CLERK OF THE LEGISLATURE
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COMMITTEE ON JUDICIARY
February 10, 2005

LB 281, 152, 669, 537, 703, 757, 320

The Committee on Judiciary met at 1:30 p.m. on Thursday, February 10, 2005, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 281, LB 152, LB 669, LB 537, LB 703, LB 757, and LB 320. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ray Aguilar; Ernie Chambers; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: None.

SENATOR BOURNE: Welcome to the Judiciary Committee. This is the tenth day of committee hearings. We'll be hearing seven bills today. I'm Pat Bourne from Omaha. To my left is...the shorter left there is Senator Mike Flood from Norfolk; Senator Mike Friend from Omaha; Senator Ray Aguilar from Grand Island. Laurie Vollertsen is our committee clerk. Jeff Beaty is our committee counsel. Senator Foley from Lincoln and Senator Dwite Pedersen from Elkhorn, a suburb of Omaha (laughter). I'll introduce the other committee members as they...Senator Combs is here as well. I'll introduce the other committee members as they arrive. Please keep in mind that from time to time committee members will leave the hearing to introduce bills or conduct other business so if they leave while you're testifying please don't take offense. They're simply conducting other business. If you plan on testifying on a bill, I'm going to ask that you use these two on-deck chairs here and I would like for you to sign in legibly so that our transcribers can read your name. Following the introduction of each bill I'll ask for a show of hands to see how many people plan to testify on a particular bill. We will first hear the introduction. Then we'll hear proponent testimony, then opponent testimony and then if there's neutral testimony we'll take that then. When you come forward to testify at the stand here, please clearly state and spell your name for the transcribers. All of our hearings are transcribed and they would appreciate it very much if you would spell that. Due to the large number of bills the Judiciary Committee has, we're going to use the Kermit Brashear memorial lighting system which is here on the testifier's table. Senators introducing bills get five minutes to open, three minutes if they choose to close. All other testifiers will get three minutes exclusive of any questions the committee may ask. The blue light will go on at three minutes.

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Yellow light will come on as a one-minute warning and then when the light turns red we ask you to conclude your testimony. The rules of the Legislature state that cell phones are not allowed so if you have a cell phone please disable it. Appreciate that. We will allow you to submit someone else's testimony. However, we will not allow you to read that into the record. With that, Senator Cornett to open on LB 281. We've also been joined by Senator Chambers from Omaha. Senator Cornett. Welcome.

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SENATOR CORNETT: Thank you. Good afternoon, Senator Bourne and members of the Judiciary Committee. My name is Abbie Cornett...

SENATOR BOURNE: Hold on one second, Senator.

SENATOR CORNETT: Oh, wrong table (laughter). Sorry.

SENATOR BOURNE: No, that's all right.

SENATOR CORNETT: It's been a long, long day and it's even half over (laughter).

SENATOR BOURNE: It's been a long week, I'll tell you.

SENATOR CORNETT: Yes, it has.

SENATOR BOURNE: Welcome to the committee.

SENATOR CORNETT: Thank you. Again, my name is Abbie Cornett, C-o-r-n-e-t-t, representing the 45th Legislative District. Under the Political Subdivisions Tort Claims Act, a claim must be filed with the political subdivision before a claimant may file a lawsuit. That filing must be made within one year of the occurrence or discovery of a tort. After the claim is filed, a political subdivision has six months in which to act or not to act on that claim. If the political subdivision chooses not to act on the claim, the claimant may withdraw the claim and file a lawsuit. Existing law provides that if a political subdivision chooses not to take action on the claim within a six-month period, the statute of limitation period may be extended for

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an additional six months if the statute of limitation expires prior to the time when the claimant withdraws the claim. This bill would bring the time frame for filing claims under the Political Subdivisions Tort Claim Act in line with the time frame of the state claims Tort Claims Act which is two years. LB 281 is a bill which does not change the statutory limitations for political subdivisions. It does not change any of the existing protections for political subdivisions that exist under the Political Subdivisions Tort Claims Act such as requiring a trial to the judge rather than a jury and capping damages at one million. It simply eliminates a "got you" for the claimants by minimizing confusion that may occur by having two different time limitations for filing claims under two similar acts. An example of this, the current bill creates a trap which causes fundamental injustices to occur. If a state truck runs a stop sign people have two years, within two years to file a claim. If a city trucks runs the same stop sign they only have one year. This is a problem for unwary attorneys who may believe that he has two years to act instead of one depending on the body which was responsible. As I have stated before in prior testimony, I believe in consistent logical laws because they are easier to obey and enforce. By bringing the City Tort Claims Act or the Political Subdivisions Tort Claim Act into line with the state, it would be more logical and would be more consistent. Thank you.

SENATOR BOURNE: Before we ask questions of Senator Cornett, could I get a showing of hands of those here to testify in support of this bill? I see two. Those in opposition? I see three. Those neutral? I see none. Questions for Senator Cornett. Seeing none, thank you. (See also Exhibit 1)

SENATOR CORNETT: Thank you.

SENATOR BOURNE: First testifier in support?

STEVE LATHROP: Good afternoon, my name is Steve Lathrop. I am an attorney from Omaha and here in support of LB 281. As Senator Cornett has indicated, and by the way, I'm here on behalf of Nebraska Association of Trial Attorneys. As Senator Cornett has indicated, LB 281 changes the Political Subdivision Tort Claims Act to make it mirror the notice and

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statute of limitations requirements of the state tort claims act. I think it is important because it is a trap for not just lawyers but people who have claims, legitimate claims against a political subdivision. The one-year notice requirement that presently exists in the Political Subdivision Tort Claims Act is too short a period of time for many people to realize, particularly those that are not represented by counsel for them to realize exactly what the claims process requires. In a Political Subdivision Tort Claim, the current requirement is that you file a claim with a governing body within one year. And that might be a little simple if it's the city of Omaha or Douglas County, for example, but if it's OPPD or MUD or some things that aren't so obviously political subdivisions it can take more than a year before you realize, first of all, that you have a claim and, second of all, where the appropriate governing body is to file that claim. So many people who have legitimate claims aren't allowed to make those claims because they missed the one-year notice requirement. All this statute does is extend the one-year notice to two which is the very same thing that presently exists in the state Tort Claims Act. I can tell you also that there are lawyers that miss that one-year requirement. That is a very, very short period of time for people who have had a death in the family or a catastrophic injury. Many times they don't, you know, getting the claim in and done in a one-year time is not feasible for somebody that's...a family that's reeling from a catastrophic injury. I think that changing the statute to mirror the state tort claims is in the best interests of the people who have legitimate claims against a political subdivision.

SENATOR BOURNE: Thank you. Questions for Mr. Lathrop? Seeing none, thank you. Next testifier in support? And would those testifiers that are going to testify in opposition make their way to the on-deck area? Mr. Mueller, welcome.

BILL MUELLER: Thank you. Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Nebraska State Bar Association in support of LB 281. As Mr. Lathrop testified, we believe that the time period for filing a claim under both the state Tort Claims Act and the Political Subdivisions Tort Claims Act should be a uniform two-year period of time. As

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Mr. Lathrop testified, a one-year time period is a very short time period for filing any type of a claim. In Nebraska, as an example, a general tort claim must be filed within four years of the occurrence. A professional liability claim, a medical malpractice claim must be filed within two years. A one-year statute of limitations is a very short statute. We believe that the better policy is to make them uniform, two-year time period both under the state Tort Claims Act and the Political Subdivision Tort Claims Act. I'd be happy to answer any questions the committee may have.

SENATOR BOURNE: Thank you. Questions for Mr. Mueller?
Seeing none, thank you.

BILL MUELLER: Thank you.

SENATOR BOURNE: Next testifier in support. The first testifier in opposition?

TOM MUMGAARD: Good afternoon, Mr. Chairman and members of the committee. My name is Tom Mumgaard. I'm a deputy city attorney for the city of Omaha. I'm here today to express to you the city of Omaha's experience with the Tort Claims Act and what we...our opposition to this change. Basically, the city of Omaha sees this as a solution looking for a problem. We have not seen over a number of years that people are missing their opportunity to make claims against at least the city of Omaha. Our experience over the last four years, for example, shows that we had between 500 and 900 claims per year made under the Tort Claims Act during that time period. A vast majority of those claims are made within the first six months of when an incident occurs. We only see about less than six per year that are denied due to the expiration of the one-year claim period. So our experience at least shows that there are not a large number of people who are coming to our attention who are being trapped into not getting a timely claim or lawyers who are being lulled by misapprehension about who they need to make a claim with, that many, many people are taking advantage of the tort claims act every year against the city of Omaha and very few come to our attention who are not timely. The shorter period certainly is a great benefit to the public and to the claimant, that certainly getting the claim made quickly leads to a quicker investigation and a quicker

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decision. We are better able then to budget on a yearly basis as to how much we need to put aside to pay for claims. We are better able to sort out the good claims from the bad claims if we learn about them quickly. It is not...now certainly the state handles it and getting one more year to make a claim in a lot of instances would not be a problem. In those instances where a record is made of an incident, a tort, such as car accidents, those types of things where there is a documentation, there is an investigation made, the extending this to one year would not really be a problem for the city of Omaha. But we have very diverse types of activities occurring that can lead to tort claims and many of those, there is no record made at the time that the injury purportedly occurs. For example, the falls on sidewalks due to defects or snow and ice on sidewalks. If we don't learn about those within a very short period of time, whatever evidence there may be to see whether that is a good or bad claim quickly disappears. The longer wait to be notified can, at times, make it impossible to determine what really happened other than what the claimant purports to happen. The beneficiary of a change such as this, we think, based upon our experience would largely be the people with spurious or questionable claims who count on that fact that time will erase any evidence that would support the city's defense to a claim. We just propose that the tort claims act is working well now. It is satisfying the needs of many, many people throughout Nebraska and there is no need to change. I'd answer any of your questions.

SENATOR BOURNE: Thank you. Questions for Mr. Mumgaard?
Senator Chambers.

SENATOR CHAMBERS: Mr. Mumgaard, you're here as an advocate for the city of Omaha, correct?

TOM MUMGAARD: That's correct.

SENATOR CHAMBERS: And you're advocating in your role as an attorney for the city.

TOM MUMGAARD: That's correct.

SENATOR CHAMBERS: And your ethics require you to offer zealous representation for your client, is that correct?

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TOM MUMGAARD: That's correct.

SENATOR CHAMBERS: And you are giving what I consider to be very zealous representation today so I don't fault you for that at all. I want to get that out of the way. If delay causes evidence to disappear or memories to fade wouldn't that also affect the claimant's case?

TOM MUMGAARD: Well, certainly it could but the claimant is the person who immediately knows that something has happened to them. They need to remember it, they need to record it. The city is not, the city is not aware that something has happened so we cannot document any of the evidence. So the evidence that tends to disappear is evidence that would support the city's defense rather than the evidence that would support the claimant's assertions.

SENATOR CHAMBERS: Now this will be a civil action that will be brought.

TOM MUMGAARD: Well, ultimately, claims if they're not resolved in the claim stage, yes, they can go to a civil action.

SENATOR CHAMBERS: Right. And whether it goes to the what I call the informal resolution which means short of court or goes into a court as a lawsuit, the burden of proof has to be borne by the claimant. Is that true?

TOM MUMGAARD: Yes.

SENATOR CHAMBERS: Is the standard of proof preponderance of evidence in those claims?

TOM MUMGAARD: Yes.

SENATOR CHAMBERS: So how...

TOM MUMGAARD: Well, let me take it back. Okay, we don't necessarily apply the same standard of proof to a claim that we're trying to adjust much like an insurance company as we would be applied in a court.

SENATOR CHAMBERS: Okay.

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TOM MUMGAARD: I mean, sometimes it's well, simply the plaintiff has a better account of what happened than the city does so we're going to pay the claimant.

SENATOR CHAMBERS: But in the instances where the city does not want to settle then the claimant would have to meet the standard of preponderance of the evidence.

TOM MUMGAARD: Just like any other civil plaintiff, yes.

SENATOR CHAMBERS: Right. If this bill is passed, what harm do you think will come to the city?

TOM MUMGAARD: Well, this bill won't necessarily change what happens once a claim gets to a lawsuit. You still have to file your lawsuit in the two years. You still have to get going on it. You still have the same burden of proof. What this bill would do in cases with claims that go beyond the one year and stretch out as long as two years, what that would do is just simply make it more difficult for our office who handles those claims to determine accurately and fairly what really happened.

SENATOR CHAMBERS: Now would you agree that my role as a policymaker is different from your role as an advocate for your client?

TOM MUMGAARD: Certainly.

SENATOR CHAMBERS: And mine is broader so perhaps the few, relatively speaking, who will lose their claim because the statute of limitations which is different from others would expire, may have a greater impact on my decision than it would on your feeling as an advocate. Would you agree with that and grant me that?

TOM MUMGAARD: Certainly. And I would offer whatever assistance I could for you and your policymaking role. And I would just simply suggest that if the Legislature wants to set public policy which is your role, that in this area you should do what on balance achieves the greatest benefit to the greatest number of people. And I would submit that the one-year statute and the tort claims act as it exists now is fulfilling that role, is doing that. And that to do that you do not need to focus upon a few people who may because

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of their own inattention or their lawyer's inattention, who may not get a claim in within a year. That our experience shows that is a very small number of people and we don't think that public policy should be aimed at, you know, ensuring or guaranteeing that those people will not be hurt by their own mistakes.

SENATOR CHAMBERS: Did you say earlier and I'm asking because I don't want to put words in your mouth, that this bill if enacted into law would be beneficial to the public?

TOM MUMGAARD: Well,...

SENATOR CHAMBERS: Or did you not say that?

TOM MUMGAARD: ...no, I think the existing tort claims is on balance more beneficial to the public because it allows the city to take care of their claims quickly; it allows them more certainty on their budgeting process,...

SENATOR CHAMBERS: Then let me ask the question a different way. Did you say that this bill, if passed, would be beneficial to the public?

TOM MUMGAARD: Well, if I did, I misspoke. I...

SENATOR CHAMBERS: Okay, so you don't think it would be beneficial to the public?

TOM MUMGAARD: No, I do not. I...

SENATOR CHAMBERS: You think it would be harmful to the public?

TOM MUMGAARD: Well, it'd be harmful to the taxpayers that would then be faced with claims that are more difficult to resolve and perhaps more spurious.

SENATOR CHAMBERS: Mr. Mumgaard, if I were a law professor and you were a student and I asked you a question on the exam, is this beneficial to the public, would you start your answer, this would not be beneficial to the taxpayers? Would you answer the question as I asked it or would you substitute words to change the question?

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TOM MUMGAARD: Excuse me, Senator. Yeah, I was trying to define who the public is. If the public are the people that my client serves and that's the taxpayers. That's the residents of Omaha.

SENATOR CHAMBERS: Um-hum.

TOM MUMGAARD: If that is the public, I would say no, this will not be beneficial to those members of the public.

SENATOR CHAMBERS: My final question. Will this bill just apply to Omaha or will it be a statewide statute?

TOM MUMGAARD: Certainly it will be statewide. All that I can offer you is the city of Omaha's experience.

SENATOR CHAMBERS: I didn't understand.

TOM MUMGAARD: All that I can offer is the city of Omaha's experience and...

SENATOR CHAMBERS: That's all I have. Thank you, Mr. Mumgaard.

SENATOR BOURNE: Thank you. Further questions for Mr. Mumgaard? Seeing none, thank you. Appreciate your testimony. Next testifier in opposition?

VINCE VALENTINO: (Exhibit 2) I have a handout, Senator.

SENATOR BOURNE: The page will get it so if you just set it on the desk and begin when you're ready.

VINCE VALENTINO: My name is Vince Valentino from York, Nebraska. I'm an attorney, been in the practice of law for 30 years now. I represent the Nebraska Intergovernmental Risk Management Association. It's located here in Lincoln, Nebraska. They share approximately 70-some counties in this state. My handout which is more for information so that the committee can determine its policy, there are various states that have much shorter statute of limitations than Nebraska do. And, in fact, there are many states that also have split statute of limitations for filing claims within their own state regarding both political subdivisions versus state government. Frankly, in my representation of the various

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counties that we represent in our office for various types of claims, we have never, frankly, come into a situation where an attorney has missed a statute for filing a claim. Policywise, I guess, the question you folks always have to answer is, why do we want to change a statute that apparently seems to be working well simply because it may or may not be coincidental with the state statute. Most of the claimants that I'm familiar with that we represent and litigate against always have an attorney. They generally file their claims within the statutory period. I have not run into one that I can recall that hasn't filed their claim within the statutory period. In smaller departments, smaller counties, for instance, getting the information quickly on a claim really helps the investigative process. We're able to get individuals out and about to do the investigation promptly rather than wait one year and 364 days to do an investigation when a claim comes in. Frankly, the state of Iowa has a 60-day statute of limitation for its political subdivisions. You talk about fast and quick, they know about those claims, they're investigated. The quicker the claim is investigated the quicker the resolution to the claim. My view is, our system has worked well. I haven't really seen a situation that necessarily requires a legislative change, just the two years. I didn't know we were setting laws for the unwary attorneys but I was unwary once too when I first started out (laugh) in the practice of law. But we, you know, everybody certainly learns and if you don't know the answer you certainly check with your other cohorts or legal counsel or go to the law books, that helps. Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Valentino?
Senator Chambers.

SENATOR CHAMBERS: I have known Mr. Valentino for more years than I'll say for the sake of both of us. But I will say, your 30 years of practicing law have been kinder to you than my 35 years in the Legislature (laughter) have been to me.

VINCE VALENTINO: Senator, we're both gray.

SENATOR CHAMBERS: Okay. But I just want to ask a couple of questions because I went through with Mr. Mumgaard the basic things.

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VINCE VALENTINO: I understand.

SENATOR CHAMBERS: If this bill became law the group that you represent feel that it would be harmful to their interests and, if so, which interests of theirs would be harmed and how?

VINCE VALENTINO: Senator, my view of that question is that I wouldn't use the word harmful. I would use the word prejudicial. The quicker a claim is known, the quicker it can be investigated, the quicker it can be resolved. Some people have a view that all insurance companies spend their time trying to figure out how to deny claims and not pay claims. My experience with NIRMA, in particular, has been that if a claim is there and it is to be investigated and they know about it and they're on top of it to take the pictures, do the investigation and get it done, if there's a claim that they believe not to have a defense to they will take care of it. They will resolve it. The quicker that claim is filed the better it is not only for the claimant but also for the political subdivision. Will it harm a political subdivision? It might prejudice it to the extent that they won't gather the evidence they really need. If you go to one year and 364 days before a claim is filed, it doesn't take a rocket scientist to know that that can be prejudicial to either party to have it go out that long, either party whether you're a claimant or whether you're the person who the claim is asserted against.

SENATOR CHAMBERS: As a legal scholar, Mr. Valentino, and I'm aware of some of the...I hate to give you credit,...

VINCE VALENTINO: Don't.

SENATOR CHAMBERS: ...some of the inventive ways you have presented cases and won them when they seem unwinnable. I know you've read Nebraska Supreme Court decisions and, on occasion, the court will say in an opinion, although we will consider what our sister states have done, our responsibility as a court ultimately is to do what's best for the citizens of the state of Nebraska and, as a result, sometimes they will render a decision that goes against what's called the majority authority around the country. So as policymakers we may feel that it is valuable enough to have a type of consistency and thereby notice to possible

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claimants that would justify extending this from one year to two years. So if that happens, don't think that you've lost anything. You're still adept. You could pirouette on a dime and you'll still win some of the, apparently, unwinnable. But even Barry Bonds doesn't hit a home run every time and I don't stop every bill that I'm opposed to. That's all I would have.

VINCE VALENTINO: I understand, Senator. Thank you.

SENATOR BOURNE: Further questions for Mr. Valentino? Seeing none, thank you. Appreciate...

VINCE VALENTINO: Thank you.

SENATOR BOURNE: ...appreciate your testimony. Next testifier in opposition?

GARY KRUMLAND: Senator Bourne, members of the committee, my name is Gary Krumland. It's spelled K-r-u-m-l-a-n-d, appearing on behalf of the League of Nebraska Municipalities in opposition to LB 281. Just wanted to point out, there is a difference between local governments and the state government in requirements on developing a budget. Local governments are under requirements that they do have to do an annual budget. There's strict requirements on what's in the budget, when it's filed, and that sort of thing. So we think the one year in the tort claims act fits in with what the local government requirements are in the budget so that any claims payments that they want to consider and pay would be...fit in better with the budget. So their budget cycle is different than what the state budget is.

SENATOR BOURNE: Thank you. Questions for Mr. Krumland? Senator Chambers.

SENATOR CHAMBERS: Mr. Krumland, I'm not going to ask you any legal questions because I know that you're not a lawyer but I think you can answer...

GARY KRUMLAND: I am a lawyer but.

SENATOR CHAMBERS: Oh, you are?

GARY KRUMLAND: Yeah, but maybe I shouldn't have said that

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(laughter).

SENATOR CHAMBERS: But since I didn't know, I'll still abide by the rule that I adopted because I don't want to drag this out too long. But each person who has spoken has spoken from a different perspective and yours is as a representative of the municipalities. And you represent municipalities as entities but not the citizens who reside in those municipalities. Is that true?

GARY KRUMLAND: I would say so although we represent the elected officials who represent the citizens.

SENATOR CHAMBERS: But you are not here to represent the citizens in those municipalities, are you?

GARY KRUMLAND: No, we are here that the city as an entity.

SENATOR CHAMBERS: As an entity, right. That's what a municipality is. And you know that cities are created by the state.

GARY KRUMLAND: Right.

SENATOR CHAMBERS: And they can be abolished by the state.

GARY KRUMLAND: Well, I don't know about that. Cities are municipal corporations that are created under the laws that create the states. They're not created by the state.

SENATOR CHAMBERS: Well, the Supreme Court has said that the states can abolish cities and all we have to do is say a municipality shall consist of one-and-a-half or fewer persons. And if there are no entities that meet that definition there are no municipalities. But anyway, our job as members of the Legislature is not to represent entities and political subdivisions but the citizens of the state at large. Does that sound like a reasonable statement of what our responsibilities are to you?

GARY KRUMLAND: To a certain extent, although because of the authority you have over cities, other political subdivisions, I do think that you need to take those into consideration too and.

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SENATOR CHAMBERS: We do,...

GARY KRUMLAND: Yeah.

SENATOR CHAMBERS: ...and you're presenting their position. But our primary responsibility, I will assert it rather than offer it as a question, is to the citizens and if a persuasive case has been made that since the state establishes statutes of limitations it would make more sense for us from the standpoint of policy to have a consistency. That doesn't mean every statute of limitations is the same but there might be four years or two years. But this one year is kind of out of step with the others, or do you disagree with that?

GARY KRUMLAND: I mean, it is out of step but I think there are policy reasons for that.

SENATOR CHAMBERS: If I were a chiropractor who dealt with centipedes and the centipede can't get quite where he's going and we check him and we said, one leg is out of step with the rest of them. To get him to function properly, we should just put that one leg in step with the others or should we put all the others out of step with that one?

GARY KRUMLAND: Well, with a centipede I suppose you would put it in step with all the others but there are already, like I pointed out, laws that apply to political subdivisions that may not apply to other situations.

SENATOR CHAMBERS: That's all that I would have. Thank you, Mr. Krumland.

GARY KRUMLAND: Okay.

SENATOR BOURNE: Thank you. Further questions for Mr. Krumland? Seeing none, thank you. Further testifiers in a negative capacity? Are there any neutral testifiers? Senator Cornett to close.

SENATOR CORNETT: Thank you again for your time. I've listened to the opposition to the bill and I've heard, this is about a budget. This is about risk management. No one brought up, other than Senator Chambers, that this is beneficial to the people. It is not about a budget issue

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for the city. It is about people that have been injured or killed that, and the time period that they have a right to file a tort claim. If this was a problem, the two-year period that we're asking for in this bill, the state would have come in and asked you to lower theirs to be in line with the city. This has not happened. What we are asking is that the cities and the municipalities are brought up to the same level as the state. I'd urge you to support this bill and thank you very much.

SENATOR BOURNE: Thank you. Questions for Senator Cornett? Seeing none, thank you. That will conclude the hearing on LB 281. Senator Hudkins to open on LB 152.

LB 152

SENATOR HUDKINS: Thank you, Senator Bourne and members of the Judiciary Committee. For the record, my name is Carol Hudkins, H-u-d-k-i-n-s. And I represent the 21st district. Today I am presenting LB 152 which was brought to me by the Nebraska Intergovernmental Risk Management Association. In a nutshell, this bill creates a definition for the term, innocent third party. As used in both the Nebraska Political Subdivisions Tort Claims Act and the State Tort Claims Act. This is important because between those two acts, both the state and its political subdivisions are held strictly liable when the actions of one of their law enforcement officers during a vehicular chase are the proximate cause of injury, death, or property damage to an innocent third party. The problem is that what constitutes an innocent third party is not defined in either of those laws. This has led the Nebraska Supreme Court to create its own definition of an innocent third party as someone who has not promoted, provoked, or persuaded the driver of a fleeing vehicle to engage in flight from law enforcement personnel and one who has not sought to be apprehended in the fleeing vehicle. What LB 152 does is expand slightly upon that judicial definition and make it statutory. Specifically, the bill says that a passenger in or on a fleeing vehicle would not be considered an innocent third party if that passenger, and there are six reasons. If that passenger, number one, is under the influence of alcohol or drugs; number two, enters the vehicle knowing or with a reasonable belief that the driver of the vehicle is under the influence

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of alcoholic liquor or drugs; number three, fails to take reasonable steps to persuade the driver of the fleeing vehicle to stop; promotes, provokes, or persuades the driver to engage in flight from law enforcement personnel; and, number five, is sought for apprehension by law enforcement personnel or; number six, is engaged in any illegal activity which would itself give rise to an arrest. It's important to point out that the bill is very limited in scope. It doesn't repeal the strict liability provisions of the current laws. Rather, it's limited in application only to passengers in vehicles fleeing from law enforcement. In other words, LB 152 would have no impact at all upon the way in which the laws currently work with regard to truly innocent third parties such as people walking down the street, sitting at the bus stop, riding a bike, or driving a vehicle not involved in the pursuit. All of these types of individuals would continue to be protected by the strict liability provisions of both tort claims acts amended by the bill. Having provided a bare bones description of what LB 152 does, I would like to make way for some proponents whose professional expertise make them much more capable than I of discussing the bill as well as far better able to respond to whatever specific questions you may have about it. Before they testify, though, I would be happy to respond to any simple questions that you might have.

SENATOR BOURNE: Thank you. Before taking questions for Senator Hudkins, could I get a show of hands of those testifying in support? I see three. Those in opposition? I see one. Those neutral? I see none. Questions for Senator Hudkins? Seeing none, thank you. (See also Exhibit 3)

SENATOR HUDKINS: Thank you.

SENATOR BOURNE: First testifier in support?

VINCE VALENTINO: (Exhibit 4) I have a handout for you, Senator. My name is Vince Valentino. I'm from York, Nebraska. I'm here representing the Nebraska Intergovernmental Risk Management Association which insures approximately 70-some counties on a self-insurance basis. I think Senator Hudkins has explained kind of the nuts and bolts of the bill. I guess there's a policy decision here for the Legislature to make and the bill is limited. The

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Legislature has already made a policy decision regarding strict liability and I'm not here to argue that at all. The real point of this is that the courts...because there was no legislative definition of innocent third party the courts have now begun to affix what they think that legislative definition was meant to be. That is not or may not be the will of the Legislature as far as that's concerned. In fact, in Henery, which is a case that has just been passed out to you, the court has noted that because the Legislature took no action that they're actually buying off on the definition that courts have affixed to the term innocent third party. I actually tried a case where a passenger was loaded on meth and the driver was drunk and went off a county road down a culvert and into a creek. We ended up paying out over \$450,000 on that claim because the passenger was "the innocent third party." You can actually have a situation where the passenger may, in fact, be wanted by the authorities and the driver ends up either killing or seriously injuring that passenger and the passenger recovers. I don't know if that's the legislative policy that the Legislature actually wants to have in place in a situation such as has been described. The various six circumstances that are set forth in the proposed LB 152 basically are those situations where you would think normally that you would not have a person claiming to be an innocent third party. Because there is no defense to strict liability save that of causation, that is, did the chase actually cause or was it a cause, not the cause, but a cause? Because our courts have gone that far just to say have to be just a cause, not the sole cause of the injury. So, essentially, those are the six circumstances that are set there. Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Valentino?
Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Thank you, Mr. Valentino, for your testimony today. I have some concerns about some of the different subparagraphs here under Section 5 on page 4, beginning on line 4. Let's assume that two individuals are at a bar. One of them is intoxicated. He asks his friend for a ride. That friend gets stopped by police or the police attempt to stop the friend and he decides he's not going to stop and then a chase ensues. That passenger who's intoxicated under

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sub 5(a) has not violated any laws. He's certainly not driving. He makes a reasonable decision to ask his friend to drive him. A chase begins and let's say he's killed in that vehicle chase. If we look at it from a policy standpoint, what has he done that's wrong?

VINCE VALENTINO: Are you saying both driver and passenger are drunk?

SENATOR FLOOD: No, I'm saying the driver is sober.

VINCE VALENTINO: Okay, and the passenger is drunk?

SENATOR FLOOD: Right.

VINCE VALENTINO: Okay.

SENATOR FLOOD: I would submit to you that the driver (sic) being drunk on his face is not an illegal activity. He's not the one driving. He's allowed, you know, maybe he's .09 and then he's killed in a pursuit. I don't see how he's committed any criminal act that would waive the state's liability under our strict liability policy. How would you respond to that?

VINCE VALENTINO: Well, public intoxication anymore is a civil offense as you probably know which could result in somebody being placed in detox and so forth. The drugs is the other issue on this one which you're just talking about drunk as opposed to under the influence of drugs because that's what (inaudible) contains also.

SENATOR FLOOD: I'm talking about under the influence of alcohol.

VINCE VALENTINO: Right. But the two are together under this proposal, the influence of alcohol or drugs. I guess that's a policy decision but you said guilty of anything. And the definition of innocent third party is a question legislatively and policywise, do you want to have individuals who are under the influence of alcohol that are passengers in a vehicle that end up in a pursuit recovering? Because if you do then you strike that provision out. I wouldn't agree with you that drugs ought not be included in there.

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SENATOR FLOOD: My second question would be, if the Chairman would permit me to ask a series of questions here; 5(c) fails to take reasonable steps to persuade the driver of the fleeing vehicle to stop the vehicle. If the passenger is now dead, we have a proof problem as to what steps...

VINCE VALENTINO: No, not really. The driver would probably testify that the passenger told him to stop. I've had that a lot too.

SENATOR FLOOD: But is it good public policy...say the driver has a gun. Should there be a burden on the passenger to try and persuade a person with a gun to stop fleeing the police even if they're friends?

VINCE VALENTINO: Well, I guess the point you were maybe asking is whether or not the person with the gun is threatening the passenger. Am I right on that or am I...

SENATOR FLOOD: Well, I'm saying...

VINCE VALENTINO: ...is he just armed with a gun or?

SENATOR FLOOD: You seem to want to place a burden on the passenger in a vehicle pursuit to take some affirmative steps to try and stop the pursuit. We don't know what's happening inside that car and it may not be reasonable in the passenger's opinion to try and do anything to stop this person that's attempting to avoid arrest from a law enforcement officer. Do you see where there might be a policy question there?

VINCE VALENTINO: Sure, sure. But as I told you before, generally, what we end up with in these cases is a driver will testify as did others, I think in the Stewart case. Well, that person wanted to get off but I didn't listen to them. That person wanted to get out. That person told me to stop. That person told me not to continue driving.

SENATOR FLOOD: And certainly you would understand that when we make a rule it applies to everybody regardless of specific instances versus others. So we have to be cognizant of the fact that our bright line rule will apply to everybody in every situation.

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VINCE VALENTINO: True.

SENATOR FLOOD: True.

VINCE VALENTINO: But isn't it not reasonable for a person to try to tell someone to stop, to not try to evade the police?

SENATOR FLOOD: Okay, let's go to 5(e), is sought for apprehension by law enforcement personnel. Against better judgment in my district, I have represented people in my criminal defense practice that have been arrested on a warrant for failure to pay a library fine. So if my, you know, library patron forgets to pay his fine and they issue a warrant for his arrest which has also happened in Senator Burling's district and that individual is in a vehicle that's being pursued by the police and he ends up being killed. Should he not be entitled to recovery because he is a wanted individual? Or maybe he forgot to pay his child support or maybe he forgot to comply with a certain administrative regulation. It's gotten to the point where there's a warrant for his arrest, or pay a speeding ticket. That would seem to be overly broad to me and we wouldn't want to try and...he is sought for apprehension.

VINCE VALENTINO: Well, right now that person can recover so if that person has a warrant out for them for armed robbery and not a library fine,...

SENATOR FLOOD: Yeah.

VINCE VALENTINO: ...or some other reason and the driver says, oh, God, you're wanted. I better get you out of here and off they go. And the reason for that, perhaps that whole scenario unfolding is because that person next to him is wanted. That person under our current law will recover without even saying, you know, well, I'm wanted...

SENATOR FLOOD: Can you see the problem, though that may arise...?

VINCE VALENTINO: You mean with the library fine?

SENATOR FLOOD: If there's a warrant out for their arrest

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that's unrelated completely to the reason that they're fleeing the police at that time, that the driver has made the choice to flee the police.

VINCE VALENTINO: I guess the question is, do you want a person who is sought to be apprehended by law enforcement to be included within that definition of innocent third party or do you want them excluded from that definition? That's really a policy choice.

SENATOR FLOOD: Thank you very much. Appreciate it.

SENATOR BOURNE: Thank you. Further questions for Mr. Valentino? Senator Chambers.

SENATOR CHAMBERS: I can't resist. Mr. Valentino, if you all hadn't shifted the arrangement and the order in which you came up here, the same three parties, I'd say as Yogi Berra is *deja vu* all over again. I don't have that many questions and Senator Flood touched on the policy considerations. But the original bill was mine that became law so I'm an advocate for that and I agree with the interpretations that the Supreme Court has laid down just so you know what my position is and you can judge my questions accordingly. In other words, I don't claim to be completely neutral as I ask these questions but none of them will be loaded more than you're able to handle.

VINCE VALENTINO: That's fair, Senator.

SENATOR CHAMBERS: So if we start with number one, it's possible that a person could have been picked up in an ambulance or even in a police car drunk or even be in his or her own car drunk and somebody could steal that car and take off.

VINCE VALENTINO: That's true.

SENATOR CHAMBERS: And that person could not recover under the law as it's written.

VINCE VALENTINO: Would not be considered an innocent third party if that passenger is under the influence...

SENATOR CHAMBERS: Right, if this passed. Right.

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VINCE VALENTINO: ...in a fleeing vehicle.

SENATOR CHAMBERS: Right. And if we look at what is meant by innocent third party from my perspective none of this applies because when I brought the bill I meant innocent of any affirmative action that generated the chase or sustained the chase. Not innocent in the sense of going to heaven if they die or being a pure person who's never committed a wrong. They could have just gotten through murdering somebody and if they're in this car and they're not fleeing from the murder and they have no role to play in the chase they're an innocent third party so you know my view. Now I'm going to go to some of the others. In B it says enters into the vehicle knowing or with a reasonable belief that the driver of the vehicle is under the influence of alcoholic liquor or drugs. How would a reasonable belief be established or if the person just flatly denied knowing, that would bring into issue the knowing. How would the establishment of a reasonable belief be undertaken? I'm not saying it would be successful but how would that be undertaken?

VINCE VALENTINO: Well, you would have to prove circumstantially that the parties that were involved in this particular pursuit that are passenger and/or driver that the passenger would know or reasonably should have known that that person was under the influence. And what you have to do basically is...we used to do under the old contributory negligence, willful reckless type of things and that is you have to show by circumstantial evidence that those people either have been together for some period of time so that the passenger would have realized that person is in fact under the influence of alcohol or drugs.

SENATOR CHAMBERS: Okay, now let's stop there because you've answered that part of it. How would a person know that if he or she got in a car with this person and they believed the person might be impaired so we don't have to say they actually know because they didn't take a test so they don't know they're over the limit. But they believe that the person is.

VINCE VALENTINO: As in visibly intoxicated or visibly under the influence of drugs.

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SENATOR CHAMBERS: Now here's what it says. Enters into the vehicle knowing the person is under the influence but it doesn't say that the person actually has to be under the influence. You could reasonably believe that person is under the influence but they're not and you couldn't recover.

VINCE VALENTINO: Well, actually...actually, I could tell you that this statute could be rewritten to say knew or reasonably should have known which is even a lesser burden than what is currently in this particular provision. In other words, Senator, if somebody wanted to load this statute so that the burden really was lower than knowing or a reasonable belief by a reasonable person one would simply have to say, knew or reasonably should have known.

SENATOR CHAMBERS: But here's the point I'm getting to. It doesn't say that the driver has to have been under the influence. It doesn't say, enters into the vehicle being driven by a person under the influence and the passenger knew or should have known or reasonably believed that that person in fact is under the influence. This doesn't establish that the driver has to in fact have been under the influence.

VINCE VALENTINO: But, in fact, by knowing or the reasonable belief to know that the driver was under the influence of alcoholic liquor or drugs necessarily requires proof by the defendant county or defendant political subdivision that that in fact has occurred.

SENATOR CHAMBERS: I think...

VINCE VALENTINO: Otherwise you're never going to have the knowing or reasonable belief.

SENATOR CHAMBERS: I know but I think the language is too loose because it doesn't establish that a fact exists initially and that this person should have known or reasonably believed the fact to exist but let me go to something else because maybe what I'm dealing with there is semantics.

VINCE VALENTINO: No, I don't think so, Senator. I think in

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fact you have a point but what I'm telling you is a practical matter. When you prove these cases, you have to prove that that driver is under the influence or you go nowhere with the court.

SENATOR CHAMBERS: Exactly. But the statute doesn't require that the way it's written.

VINCE VALENTINO: Believe me, the burden of proof would. I mean, you just can't...I don't know how else you would prove it unless you have the blood alcohol from the driver and/or some testimony that he was visibly intoxicated. I don't know how you would prove that defense otherwise.

SENATOR CHAMBERS: If I were writing this I would write it differently and I'm kind of a stickler in terms of how statutes that can carry consequences should be written. That's why I say maybe my approach is more semantical than substantive but I'll go to C.

VINCE VALENTINO: Okay.

SENATOR CHAMBERS: And I won't go into that because you and Senator Flood had discussed reasonable steps to persuade and so forth. Now promotes, provokes, or persuades the driver to engage in flight. I think if that could be established the court would even say now that there is not innocence or do you have cases where a person did provoke, promote, or, in fact, in a sense participate in the sustaining of the pursuit?

VINCE VALENTINO: Actually, I think that defense comes right out of Henery and Stewart. In fact, that's the defense the Supreme Court basically said an innocent third party is not one, one who has promoted, provoked, or persuaded the driver. That comes right out of the Henery...

SENATOR CHAMBERS: That is an innocent third party?

VINCE VALENTINO: That is a person who is not...

SENATOR CHAMBERS: Okay, and...

VINCE VALENTINO: ...under the Supreme Court's version of the only avenue that a political subdivision has to not call

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that person.

SENATOR CHAMBERS: And see, that's what I was going to say. I didn't think the court was saying that a person in that status would be because that would not have been my intent that if one is promoted and so forth. That's not what I meant by an innocent third party. So that would just be a restatement of the law. So I don't need to...

VINCE VALENTINO: The Supreme Court's definition of it.

SENATOR CHAMBERS: Right, I don't need to quibble with that. And then as sought for apprehension by law enforcement. You and Senator Flood covered that but what the Omaha police have said is that if you flick a cigarette out the window that's littering, a misdemeanor, and you can be handcuffed. So that really has got to go for apprehension. And it's not what you and Senator Flood discussed. But I have to look at the mentality of the police and since Omaha is the biggest municipality, they have more high speed chases, they kill more people in these chases. They continue to conduct these chases. They are the evil ones and they know that's what I think. So if flicking a cigarette justifies a person being handcuffed, then these people need to be brought into check especially when they would probably initiate a pursuit and say, well, this person flicked a cigarette out the window and that's a crime and I have to catch him.

VINCE VALENTINO: Well, actually, you could even tighten it up if you wanted to but I think if sought for apprehension by law enforcement personnel means that that person has conducted...done some criminal act or is wanted on a warrant or some other outstanding arrest warrant or bench warrant of some kind.

SENATOR CHAMBERS: It doesn't say why. It just says for...

VINCE VALENTINO: Well, in...

SENATOR CHAMBERS: Oh, you meant that could be added to make it tighter.

VINCE VALENTINO: Yes, if you wanted to tighten that up you could but, you know, whether or not you have an issue with the Omaha Police Department or the city of Omaha, I mean,

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really, Senator, the bottom line was the strict liability statute clearly indicates that the public policy of the Legislature and, as you said, your view was that all of these types of chases ought to result in payment to the innocent third party.

SENATOR CHAMBERS: Exactly, and here's...

VINCE VALENTINO: All we're dealing with now is what do you want to define an innocent third party to be?

SENATOR CHAMBERS: Right, and I don't...you're eliminating some of the innocent ones. And here's my philosophy behind the chase bill. If society at large is going to accept police pursuits and notice, I don't say high speed chase and you didn't either. We say fleeing or pursuit because they're not always what would be called high speed necessarily. And I deliberately did not want to make it only high speed. But if society accepts that as a legitimate law enforcement tactic and innocent persons are harmed, society as a whole should try to make that person whole who is injured to the extent that money can. So if society rejected high speed chases or pursuits or apprehending fleeing persons whether it was high speed or not, then my bill would never have come into being. But let me go to the final one. And I won't put Mr. Mumgaard through this. That's why I'm going through it with you as I did with him on the other.

VINCE VALENTINO: That's fine. I've got broad shoulders.

SENATOR CHAMBERS: Well, I know that (laughter) Hercules, Atlas. If Atlas supported the world, who supported Atlas? (laughter) His wife's father (laughter). I can only do this with Mr. Valentino. Is engaged in any illegal activity which would itself give rise to an arrest. If a youngster has an open container that could lead to an arrest for that person, couldn't it?

VINCE VALENTINO: Of what? A bottle?

SENATOR CHAMBERS: Minor in possession.

VINCE VALENTINO: Well, how about if he had a...well, you're talking about if a child?

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SENATOR CHAMBERS: If a passenger.

VINCE VALENTINO: Oh, I thought you said a child.

SENATOR CHAMBERS: No, is engaged in any illegal activity which would itself give rise to an arrest, and we're talking about the passenger.

VINCE VALENTINO: Right. Okay. Well, let's say the officer sees this on view. Let's say, for instance, that he's walking across...the officer is walking down the street or directing traffic. And he sees a vehicle go by and it has an open container of beer. He decides to give chase because he's seen an open container of beer. Is he not allowed to do that?

SENATOR CHAMBERS: Well, he can do it but if there's an innocent...

VINCE VALENTINO: Now if he causes an accident then the next question is, if that was the reason that he gave chase...

SENATOR CHAMBERS: That person in the car would still be innocent because he or she had nothing to do with the initiation, promotion, or maintaining of the chase.

VINCE VALENTINO: Well, but...but that person was engaged in illegal activity that give rise to the pursuit to begin with.

SENATOR CHAMBERS: Well, that's not what this says.

VINCE VALENTINO: It says is engaged in any illegal activity which would itself give rise to an arrest.

SENATOR CHAMBERS: An arrest, right. It doesn't say that the cop has to know that the person was engaging in this. If you're engaging in the conduct and if the fact could be established that I was in possession of marijuana as a passenger, that would in itself give rise to an arrest. It doesn't say that illegal activity on the part of the passenger gives rise to the chase.

VINCE VALENTINO: But once again, Senator, you know and I

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know that strict liability means strict liability.

SENATOR CHAMBERS: Bam.

VINCE VALENTINO: There are...there are no defenses.

SENATOR CHAMBERS: Bam (laughter).

VINCE VALENTINO: Innocent third party is the only thing that counties, that political subdivisions have to rely upon.

SENATOR CHAMBERS: Bam.

VINCE VALENTINO: And you would denude us of this last one.

SENATOR CHAMBERS: What I would say is that for once the Supreme Court got it right (laughter).

VINCE VALENTINO: You don't always say that, Senator.

SENATOR CHAMBERS: I know (laugh). That's why I said for once.

VINCE VALENTINO: (Laugh) They agree with you and you think that's right.

SENATOR CHAMBERS: That's all that I have (laugh). Thank you.

VINCE VALENTINO: All right.

SENATOR BOURNE: Further questions? Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Mr. Valentino, thanks for the dialogue here. I think just like everybody else I have questions about this but I think a lot of them have been dealt with. I did want to ask you, a lot of hypothetical has been brought up here, situations where something could occur that would put that particular third party person in a position where they...

VINCE VALENTINO: Would not recover.

SENATOR FRIEND: ...could fall under. Help me out here. If

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a person tries to flee...let, driving down the road, give you one more hypothetical. A person tries to flee from a law enforcement officer...

VINCE VALENTINO: Driver.

SENATOR FRIEND: ...driving in a motor vehicle. Is that act of fleeing in itself right now a felony?

VINCE VALENTINO: Well, if the...

SENATOR FRIEND: Offense.

VINCE VALENTINO: ...it could be a misdemeanor or it could be a felony depending upon the reason for the fleeing, the reason for the flight.

SENATOR FRIEND: Okay. The flight in itself...

VINCE VALENTINO: Is a crime.

SENATOR FRIEND: ...and more than likely a misdemeanor offense.

VINCE VALENTINO: Well, it bars the driver. The driver is barred from recovery anyway because he's not an innocent third party.

SENATOR FRIEND: Right. Right. Okay. Thank you.

VINCE VALENTINO: Sure.

SENATOR BOURNE: Further questions? Seeing none, thank you.

VINCE VALENTINO: Thank you.

SENATOR BOURNE: Next testifier in support?

TOM MUMGAARD: Good afternoon, again. My name is Tom Mumgaard, deputy city attorney for the city of Omaha. I'm the primary attorney for the city of Omaha that handles pursuit-related lawsuit. And as Senator Chambers pointed out, the city of Omaha probably has more pursuit-related lawsuits than anybody else in the state. As a result of that, I can say that I have lost more lawsuits under this

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statute than any attorney in the state. But nonetheless, that gives me a perspective as to what kinds of situations we encounter with the pursuit lawsuit. Now, through the end of 2004, about 15 percent of all the claims and judgments that the city of Omaha has paid under this statute have been paid to people who were passengers in the fleeing car. We currently have several large such claims that are pending on appeal. So this is a significant portion of the litigation that is being brought under the present statute. These situations usually involve somebody who has gone out drinking with a friend and they get intoxicated. They get in the car and then the friend who's driving decides to flee from police, loses control, and crashes and hurts the passenger. In those situations you rarely have any evidence of what went on inside the car other than the accounts of the survivors of the crash, these two friends. These accounts are always consistent. I've found that they...the driver is always remorseful and feels they made a mistake and shouldn't have done this and the passenger is always insisting they were screaming stop, stop, let me out. The Supreme Court tried to deal with this by identifying when you would not be an innocent third party. Basically, if you are somebody who is promoting the flight or you're somebody that the police are trying to catch, you're not going to be an innocent third party. We rarely see the passengers fall into those kinds of situations. We recently did have a case where I think it shows the extreme to which the claims will go that involved four people in a car, three people and the driver who were going from one drug party to another drug party carrying their drugs with them and in a stolen car. When the driver fled, crashed, the passengers claimed to be innocent third parties. We prevailed on try and trial at that but they're on appeal and it's hard to tell what the outcome is. What that just shows is the extremes to which people who are in the car with somebody with whom they have a relationship will go to recover under the statute. I read the legislative history throughout and I certainly defer to Senator Chambers' intention on what he intended but I don't find any reference in the debate that would indicate that any legislator had any idea that people inside the car that were fleeing was going to be covered by this. Basically what we have here are situations where people have made bad choices. They've made bad choices on who to ride with or they themselves are the beneficiary of the escape. That's what these elements tend to express, that concept of either

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you've made a bad choice or you're going to benefit from the escape. In that situation, you should not be an innocent third party that the taxpayers are going to pay the damages for. The consequences of your choices or you're hoping for the benefits. Those consequences should be yours and not the taxpayer's. I have nothing further. I'd answer any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Mumgaard?
Senator Chambers.

SENATOR CHAMBERS: Mr. Mumgaard, I'm sure you have read cases where the Supreme Court will be dealing with a situation which is not susceptible of precise definition and will say, we're taking this on a case by case basis. And we will not attempt to define or lay out every factor that would result in whatever the decision happens to be that day. The reason I said innocent third party and left it at that, I know that when you can give a laundry list, whatever is not included, is excluded. So by saying innocent third party, it's clear that it's going to be a fact question and the judge or the Supreme Court will make the ultimate determination. So there was no intent by me to try to define what an innocent third party is. But if you read it, I think you'll see that the discussion was that it's not somebody who had participated in the chase. And what I had tried to do at first was to try to get your city to put in place a meaningful chase policy and they refused so I said, the only way you might get the cities to crack down is to hit them in their pocketbook. So there was no intent or attempt on my part to hold the individual officer liable but rather the employer because the employer could determine what the policy would be. And the employers unwilling to do that had to suffer the consequences which were when an innocent person is harmed by a policy they condone then they are going to have to pay. And if the ones for whom they get the wherewithal to pay the taxpayers that's the way it has to be. So I think as long as you're an advocate for the city and I'm an advocate for this position, we will never agree but I do think a discussion periodically is a worthwhile one so I appreciate the fact that you came here today. And since you acknowledged that, since Omaha has more of these chases and the law being what it is, you've lost more of these cases than any other lawyer, one more loss won't make that much difference (laugh) to you.

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TOM MUMGAARD: Well, Senator, with respect to public policy, we're not here, the city is not here to say that the overall statute is good or bad. It's there, it's the law, we live with it. We're just saying that at least if that's going to be the public policy of Nebraska, at least let's have a policy that gets money to people who really deserve it. And people who have made choices that lead to their own adverse consequences or people who have hoped that their friend will get away from police are not the best people to end up with the taxpayers' money when a crash has occurred. That, you know, the Supreme Court in its definition of an innocent third party has focused on what happens after the flight begins. We just hope that in forming the public policy you broaden that and also look at choices people made before they got in that car because we all have to be responsible and accountable for our choices. Under the current law, people in cars that flee from police and crash are not being held responsible for their choices.

SENATOR CHAMBERS: Since human beings don't have the ability to make fine distinctions or weigh moral gradations with a jeweler's scales precision, you're telling us to deal with things that are up to God. God makes those decisions, you're talking about, so I don't want to get into the position of God.

TOM MUMGAARD: The Supreme Court stepped in there someplace. I think the Legislature is at least as able to do it as the Supreme Court.

SENATOR CHAMBERS: That's all I would have, though. Thank you.

SENATOR BOURNE: Thank you. Further questions for Mr. Mumgaard? Seeing none, thank you. Next testifier in support?

GARY KRUMLAND: Senator Bourne, members of the committee, my name is Gary Krumland. It's K-r-u-m-l-a-n-d, representing the League of Nebraska Municipalities, here in support of LB 152. In light of the Supreme Court decision, we do think it's important that the Legislature look at the definition of innocent third party who is a passenger and put it in the statute so that people are aware of what that standard is.

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LB 152 attempts to do that. It attempts to put some of the language from the decision in there, although in a little different way and for that reason we do support LB 152.

SENATOR BOURNE: Thank you. Questions for Mr. Krumland? Seeing none, thank you.

GARY KRUMLAND: Thank you.

SENATOR BOURNE: Other testifiers in support? Negative testimony?

STEVE LATHROP: Good afternoon. Once again, my name is Steve Lathrop. I am here on behalf of the Nebraska Association of Trial Attorneys in opposition to LB 152. I think it's important and what's not been said this afternoon is how most of these chases start which should give us some perspective on the attempts to exclude what are otherwise innocent people from the coverage of the police chase statute. Most of these chases start out as a traffic stop. They are not a premeditated, an occurrence where the passenger knows what's going to happen. Most of the time it's somebody's crossed the center line. Somebody didn't turn a blinker on. Maybe a headlight is out and it starts in a chase. And that's not something the passengers generally had anything to do with. Innocent third parties under the law today does not cover two guys that hold up a bank. What happens with the statute here is as it's drafted, as it's the law in Nebraska, innocent third parties, you have to fall in that category to make a collection. We're not talking about people that aren't innocent. We're talking about a statute that is going to make categories of innocent people excluded from the coverage. I've looked at these categories and they are, with the exception of D, which is already the law, there really is no purpose in D because it's part of the Supreme Court's definition of what is not an innocent third party. But as you look at these categories, and I'll give as an example A. If you had a designated driver pick up somebody that was under the influence and that person got into a chase because he had a taillight out, the person who called the designated driver or the cab that's driving him home wouldn't make a recovery. And he is very much an innocent person. He was not responsible for the chase, didn't participate in it. Mr. Mumgaard said that most of the

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people testify that they are in the backseat screaming, stop this chase. And that's true. And these people are not in the car generally saying, come on, come on. But if they are, then the law already excludes those people. The case Mr. Mumgaard was talking about that he just tried and won is the kind of case that's used to scare you but, in fact, they're not making recoveries. People smoking methamphetamine and going from one party to the next, every person in that car was not an innocent third party. And that's kind of what you intend and so LB 152 as it's here is going to exclude people you don't intend to exclude and I think there have been all kinds of examples of that, and for that reason would be bad law and a bad addition to the Police Chase Liability Act.

SENATOR BOURNE: Thank you. Questions for Mr. Lathrop? Seeing none, thank you.

STEVE LATHROP: Sure.

SENATOR BOURNE: Other testifiers in a negative or opponent capacity? Are there neutral testifiers? Senator Hudkins to close. Senator Hudkins waives closing. That will conclude the hearing on LB 152. I think Senator Landis has been called so we'll stand at ease until Senator Landis has arrived. Welcome, Senator Synowiecki. What we're going to do is Senator Landis is opening on a bill and then he has another bill to follow that so he's...even though his bill was next on the agenda, it sounds like he'll be unavailable for a little while. So we're going to go with LB 537 and Senator Synowiecki...Sally, we're going to go ahead. We're passing over LB 669 because Senator Landis is unavailable and we're going to go with LB 537 so would you alter the agenda on the door? Thank you very much. Senator Synowiecki to open on LB 537 (See also Exhibit 5).

LB 537

SENATOR SYNOWIECKI: (Exhibit 9) Thank you, Senator Bourne, members of the Judiciary Committee. I'm John Synowiecki. I represent District 7 in Omaha. I am introducing LB 537 on behalf of the Department of Corrections. LB 537 will allow the Department of Corrections to set up copay for routine health-care services administered within the department. I

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carried similar legislation for the department in 2003. The purpose of this legislation remains the same as in 2003. It is critical that the department use its limited medical resources efficiently. Recently, the department has realized a substantial savings in outside inmate health service costs through a contract with a private entity. The department utilizes the contractor's preferred providers as often as possible and invoices are submitted to and processed by the contractor. These savings, however, can be significantly enhanced. The fiscal year 2004 medical expense for the Department of Corrections was \$17,541,000. The fiscal year 2005 medical budget for the department is \$20,772,000. This legislation will help reduce the department's medical costs by reducing frivolous sick calls and promoting responsible use of medical resources. In 2004, the department recorded approximately 25,000 sick calls. Under LB 537, the Department of Corrections estimates that it could reduce the number of sick calls by 10 to 30 percent. Using a conservative estimate of 10 percent, the number of sick calls with a copay would be reduced to 22,500 per year. A 30 percent reduction in sick calls would result in an estimated 17,500 sick calls. That would result in savings from \$40,000 to \$51,000. Nationally, 39 states are reported to currently charge inmates a copay for health-care services including Colorado, Iowa, Kansas, and South Dakota. Eighteen states charge a \$3 or less copay. While this legislation does not (sic) include a provision limiting the copayment to \$10, the department intends to charge a copay of \$2.50. The copay program is not intended to make money off the inmates but rather to simply discourage abuse of the health-care services system within the department. It is important to note that inmates will have access to medical care regardless of their ability to contribute to the cost of the services received. Inmates will not be charged a copayment for chronic care or other nonroutine health-care situations. Another important provision within the bill provides that inmates who have not had an institutional job assignment for 30 days or more or who have had a balance of less than \$10 in his or her trust account during the past 30 days will not be charged a copayment. I believe that requiring inmates to pay a copayment for their health-care services will discourage abuse of the Department of Corrections' health-care system and will promote responsible use of medical resources by the inmates. I want to thank this

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committee for giving LB 537 your full consideration. Thank you.

SENATOR BOURNE: Thank you. Before taking questions for Senator Synowiecki, could I get a show of hands of those here to testify in support? I see one. Those in opposition? I see one. Those neutral? I see one. Questions for Senator "Synowisky? Senator Chambers.

SENATOR CHAMBERS: I heard what you said (laugh). I just have one or two. Senator Synowiecki, you said you had brought this bill in 2003. Why then are you bringing it again today?

SENATOR SYNOWIECKI: I wanted to have the opportunity for the Judiciary Committee to give it a second look.

SENATOR CHAMBERS: Oh, so it didn't pass last time?

SENATOR SYNOWIECKI: No, it didn't pass, no.

SENATOR CHAMBERS: Oh, and you're a man of optimism? Is that true? That's all I have. Thank you, Senator Synowiecki (laughter). But just to let you know I'm paying attention to your testimony.

SENATOR BOURNE: Thank you.

SENATOR SYNOWIECKI: Thank you, Senator.

SENATOR BOURNE: Further questions, Senator...?

SENATOR SYNOWIECKI: I know your feelings about the bill, Senator. You've let me know them on more than one occasion.

SENATOR BOURNE: Further questions? Senator Aguilar.

SENATOR AGUILAR: Senator Synowiecki, the Nebraska Department of Correctional Services, what all does that include?

SENATOR SYNOWIECKI: That would be all the institutions run by the Department of Corrections.

SENATOR AGUILAR: Would that include like county facilities

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or just the state?

SENATOR SYNOWIECKI: No, this is restricted to state facilities, Senator, be the penitentiary, the Omaha Correctional Center.

SENATOR AGUILAR: If I can ask, why didn't you include the county correctional facilities since they're all...

SENATOR SYNOWIECKI: I think you brought that bill in 2003, didn't you? (Laughter) It got met with the same acceptance as mine did before.

SENATOR AGUILAR: I see. Thank you.

SENATOR BOURNE: Further questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Senator Synowiecki, so I'm not taking it out on the Department of Corrections, I'm going to ask you a couple of questions. Are you aware that there's been studies done...I should have brought some of them with me knowing this bill was up today, that shows that those institutions that keep inmates busy, that their sick call goes down?

SENATOR SYNOWIECKI: No, I was not aware of it.

SENATOR Dw. PEDERSEN: There is evidence, in fact, that those people who have a structured day in institutions, especially in Corrections, that their sick call goes down because they have something else to do. It's in comparison within a hospital. If you've ever been a patient in a hospital, the only thing you got to look forward to is the meals, visitors, and the doctor to come to see you in the morning. So if you're sitting in a place, these institutions all day long, let alone if you're put in one of these solitary confinement cells like a dog cage, you have nothing to look forward to. And you don't have a job. If you do have a job it lasts for 15 minutes, a half hour. There's a few jobs that are meaningful but very few comparison wise. All you've got to do all day long is maybe read a book or if you have a little ailment, maybe stand in line for sick call.

SENATOR SYNOWIECKI: Well, that's...I was just going to say

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or go see the doctor.

SENATOR Dw. PEDERSEN: Or go see the doctor and so (inaudible).

SENATOR SYNOWIECKI: Yeah, yeah.

SENATOR Dw. PEDERSEN: And there's other ways, I would think that we need to start looking at saving money. Those people in Douglas County who are on house arrest, nonviolent offenders go on a house arrest and they go on electronic monitoring. They pay for their own electronic monitoring, their own food, their own bed, and their own medical care.

SENATOR SYNOWIECKI: Um-hum.

SENATOR Dw. PEDERSEN: Why are we locking up people that don't need to be? And the Department of Corrections has come against, every time I've offered a bill to do that. That would save a whole lot of money.

SENATOR SYNOWIECKI: Well, Senator, you're not going to get any argument from me. I just got back from or just was in Appropriations Committee where I was advocating strongly for more intensive supervision probation officers so that we can get an infrastructure in our state for community corrections rather than having...we have a lot of individuals that go to the penitentiary that, quite frankly, don't need to be there. But the problem is, we don't have the infrastructure right now in terms of community corrections to facilitate that so I think we're moving in the right direction with some of the developments that occurred in the Appropriations Committee today on a preliminary basis.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you.

SENATOR SYNOWIECKI: Thank you, Senator Bourne.

SENATOR BOURNE: First testifier in support? Just set them on the desk and he'll get them. Thank you.

RANDY KOHL: (Exhibit 6) Good afternoon, Chairman Bourne and members of the Judiciary Committee. I am Dr. Randy Kohl,

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LB 537

K-o-h-l, medical director for the Department of Correctional Services. I appear before you today in support of LB 537. I would like to thank Senator Synowiecki for introducing this legislation on the department's behalf. This legislative bill enacts new policy to have inmates share in the fiscal responsibility for their medical and dental care related to their financial ability. The funds collected will be deposited in the state's General Fund. Passage of LB 537 would permit the department to collect copayments for routine health-care services provided the inmate is not considered indigent and/or receiving chronic disease care. As noted in the bill, each inmate will have access to regular medical and dental care regardless of the inmate's ability to contribute to the cost of the care. The primary objective of the copay provision of this bill is to reduce frivolous medical visits to DCS medical clinics which in turn will provide more time for the doctors, PAs, dentists, and nurses to commit to those inmates needing medical attention. This will also allow increased patient contact time, more timely visits, additional inmate education in disease processes, and preventive medicine, adequate time for continuing medical education for staff to stay updated in all aspects of patient care and necessary staff time for quality assurance, improvement in peer review as required by the former LB 154. Staff time utilization has increased dramatically over the last several years. Contributing to this is the increased severity of illness seen in new inmates and the full implementation of chronic care clinics as required by the former bill. Interview request forms submitted by the inmates which require significant staff time and return written responses at 5,500 a month has contributed to the problem. We would expect this bill to also reduce the number of frivolous request forms submitted. An increasing inmate population as well as an aging inmate population has contributed to the number of sick calls and results in increased staff time utilization. A change in medical standards of care especially in the infectious disease arena has placed greater treatment demands on the DCS medical staff. The national nursing shortage has prevented the department from actually filling positions. It is important to note that 39 of 50 states are utilizing inmate copay. In addition, this bill provides a method for additional accountability to further prepare the inmate for his or her release into the community and is consistent with the community standard of care. I would be happy to answer

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any questions.

SENATOR BOURNE: Thank you. Questions for Dr. Kohl?
Senator Foley.

SENATOR FOLEY: The bill provides that the copayment cannot exceed \$10. It could be less than \$10, though, correct?

RANDY KOHL: Correct.

SENATOR FOLEY: And how would you determine what the copayment would be?

RANDY KOHL: The former prediction that was set up two years ago and I believe that's still the opinion of the director is like \$2.50.

SENATOR FOLEY: But it could be higher.

RANDY KOHL: That is correct. The way the bill is written, that is correct.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you, Dr. Kohl.

RANDY KOHL: Thank you.

SENATOR BOURNE: Next testifier in support? Testifier in opposition?

TIM BUTZ: (Exhibit 7) Good afternoon, Senator Bourne, members of the committee. My name is Tim Butz, B-u-t-z, executive director ACLU Nebraska. I have a written statement that's being passed out for you to read at your leisure. I wanted to respond to some of the points made by Senator Synowiecki and especially the issue of how much money this bill would save. The estimate was \$40,000 to \$51,000. I submit to you that if...inmates are going to defer seeking medical help because of this copay, and they will. I mean, if the choice is a couple of candy bars and deodorant and a couple other things that might make their life a little more tolerable in prison versus a visit to the doctor for something that seems minor but may not be, you'll eat up that \$40,000 to \$51,000 with one heart attack. There's no financial savings that can come with this bill.

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People will not seek the medical treatment that they need. There will be hard decisions that they'll have to make about how to...I mean these guys make 38 cents an hour. The prison is here telling you today \$2.50 but there's nothing to stop them from going to that \$10 an hour. That's 26 point something hours of labor to go see a doctor. I don't pay a copay that high. That's totally out of line with what any of you pay when you go see a doctor. It's really ludicrous. But the fact of the matter is, the Eighth Amendment puts the burden on the state to provide adequate medical care for people when they're incarcerated. And the state can't do an end-run around the Eighth Amendment by creating this copay system and simply saying, well, it's now a matter of their choice. That's not the way the world should operate. That's not the standard by which a civilized nation treats people that are being held in custody. This copay thing is nothing simply but a way of being punitive to people that are already being punished. It bears no reasonable relationship to furthering any kind of penological purpose; it's a budget bill. And I'm telling you that the budget will get broken the first time someone doesn't get in to see a doctor because that heartburn that they were going to see the doctor about was actually a signal of a heart attack. And with that, I'll stop.

SENATOR BOURNE: Thank you. Questions for Mr. Butz? Seeing none, thank you.

TIM BUTZ: Thank you.

SENATOR BOURNE: Other testifiers in a negative capacity? Neutral testimony?

MARSHALL LUX: (Exhibit 8) Good afternoon, Mr. Chairman and members of the committee. My name is Marshall Lux, L-u-x. I'm the ombudsman for the state of Nebraska and I wanted to take just a couple of moments to talk to you today about LB 537. And to bring to your attention the handout which is a position statement on the issue of inmate copays that has been adopted by the National Commission on Correctional Healthcare. I wanted to make certain that the committee had this because I think this statement presents one of the best discussions of the issue that I have seen. You've already heard the arguments supporting copays and those can be found included in the bullet points on page one of the statement.

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The statement also does a particularly good job of outlining the arguments against copays and those can be found in the bullet points beginning at the bottom of the first page. By way of explanation, the NCCHC is a highly-respected national organization that addresses a wide range of issues dealing particularly with healthcare provided in prisons and jails so these are the people who are the experts on these kinds of issues. I'd suggest that the committee weigh this position statement very carefully when you're considering LB 537. And I would also echo Mr. Butz's remarks about the relative cost of copays to inmates. Inmates, as Mr. Butz has explained, make very little money in their jobs as porters and runners in the institution. And so a \$2.50 copay for an inmate can be a lot of money. And you need to consider that very carefully. And I know the bill talks about a \$10 limit but from my research \$10 is the most that is being charged around the country for copays. So basically, this would allow the department to set what would be really a high limit if that's what they decided that they want to do. So I'd like simply to take a moment to give that statement to the committee so that you can see in that form what the issues are really all about. I'd be happy to answer any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Lux? Seeing none, thank you.

MARSHALL LUX: Thank you.

SENATOR BOURNE: Is there further testimony in a neutral capacity? Senator Synowiecki waives closing. That will conclude the hearing on LB 537. Senator Landis is on his way back to open on LB 669. The committee will stand at ease for a minute.

LB 669

SENATOR LANDIS: Senator Bourne, members of the Judiciary Committee, David Landis, principal introducer of LB 669, representing "the Garden District." I'm driving around this summer on my way to my cabin. I'm just thinking out loud about efficiencies in government, the kind of thing that you do on a quiet Sunday afternoon when you're in your car. And it strikes me that the state of Nebraska owns a rather good

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deal of real property. We have plots of land we own all over the state. And connected to the idea that I'd heard when I was at the prison visiting with prisoners who said that boredom is one of the chief problems of being in prison. There's any number of them but just being bored is one of them, not having work that is sustaining and valuable to do. That linked me to the topic of trying to get away from highly guarded, high security operations for people who are not violent and who are trustees and perhaps likely to, you know, not represent a substantial security risk. Could you put them in an environment that did not require a guardhouse and everything else? Something that was significantly less onerous and coercive as a prison. If I can divorce myself from the traditional images of the chain gang prison farm and think in terms of a farm upon which people live and work surrounded by groves, surrounded not by barbed-wire and fences. In fact, if you were going to walk off, you could probably walk off. It wouldn't have a guard tower in every corner. It would rely on the self-interest of the inmate to stay in that context because living there would be better than living behind bars, that they would have work, that they would have some modicum of freedom. They would be less bored and they would be in a less coercive setting if they lived in the bunkhouse of a farm. If that was the case, the property we own could also be valuable, it could turn into a meaningful work in the sense of useable, consumable food. In fact, there are 40-some states that have some kind of system for state programs that create institutional agriculture beyond gardens in some settings. So that it's not uncommon for states to have an agricultural institutional linkage of some kind or other. It's not my goal to go back to some horrific turn of the century setting of a prison farm that features leggings and chains and the like. I'm not talking about a chain gang. I'm talking about a place where people would be allowed to live and work with the lower cost of having somebody who is a manager as opposed to guarding everybody some of the day and take your chances with inmates who come into the system because they're nonviolent and, hopefully, say to themselves, you know, I might walk off and get caught. If I do, I go back to the big house which is really bad. Staying here has some logic to it. I'll stay here and keep doing my work and burn up my time and go home. I don't know if it can work but it seems to me it has the opportunity, it has the elements of being cheaper to maintain, opportunity for

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inmates to do work, lower cost to the state in that kind of incarceration setting and producing, in fact, an outcome, agricultural products which could be used institutionally around the state. Towards that end, I suggest the creation of a nine-member panel, the paying of their expenses, and reimbursements, the areas of study, and the creation of a plan to see whether or not this is technically feasible. I don't know if it is or not, although some states do it. It seems to me an opportunity for joint gain, a possibility of joint gain. I'm not so convinced that I want to say, absolutely, I can...that we need to do it. I'm saying it's worth a place that I think law enforcement, incarceration principles, restorative justice, and the good utilization of state resources could all simultaneously take a step forward. I give it to the committee for your consideration and reflection.

SENATOR BOURNE: Thank you. Questions for Senator Landis? Seeing none, thank you.

SENATOR LANDIS: Thank you.

SENATOR BOURNE: Could I get a showing of hands of those here to testify in support? Those in opposition? Those neutral?

SENATOR CHAMBERS: Okay.

SENATOR BOURNE: (Laughter) Senator Landis has waived closing. No.

SENATOR LANDIS: Why don't I just come back to see? You may have been thinking that there would be another opportunity to raise an issue or concern and to discover that there's no testimony. It does, by the way, give you a feeling that this is my idea. It doesn't come from anyplace else. I'm not sure if I'm right. I'm just saying, study it and see if we can make it work.

SENATOR BOURNE: Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne, and thank you for coming back. You might remember, Senator Landis, when we were building the Tecumseh prison that I put in an amendment to try and stop that prison to do exactly this

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kind of thing. I wanted...

SENATOR LANDIS: I don't...

SENATOR Dw. PEDERSEN: ...work release centers across the state and Senator Chambers supported that,...

SENATOR LANDIS: Yeah.

SENATOR Dw. PEDERSEN: ...so it and there's some states that have done that. Instead of building that multimillion dollar facility we have down there, dog cage, that we would take the nonviolent inmates, put them like out to Chadron, Nebraska. Let's say open up a house out there for ten of them if that's all they can put to work out there is ten. Maybe 12 up in Valentine, across the state, to open up halfway houses. And the Department of Corrections said that, you know, this was impossible to do, that we needed maximum security facilities. Do you remember that at all?

SENATOR LANDIS: I do. I'm now refreshed in my memory by being reminded of that. It's a goal, by the way, that I share with you. It seems to me that you can create a circumstance in which a nonviolent offender would have a rational choice to make that says, I'd rather stay here doing this than to walk off, get caught, and be put back in the slammer (laugh) with, you know, with an escape conviction as well, lengthening my sentence. This is a livable circumstance for me. I'm doing work. I'm living in, you know, in this group setting but it doesn't have the same feel to it that a prison does, and it would be rational for me to stay here. And that, in fact, we wouldn't have to invest in guardhouses and machine guns. One of the things that's going to make that work is to have something valuable and profitable to do. It's not just to move out to some location and turn on the TV set. It needs work that a man could find or an inmate could find meaning in dignity. And by the way, in this state, agricultural work is work of dignity.

SENATOR Dw. PEDERSEN: And you're aware that the most important tool in rehabilitation is a job, work. I agree. Thank you.

SENATOR BOURNE: Further questions? Senator Foley.

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SENATOR FOLEY: Thanks for the bill, Senator Landis. I think it's an interesting idea that has a lot of merit. I'm just wondering, are you thinking of existing state lands being used for this purpose or?

SENATOR LANDIS: Yes and, you know, look, we have farms that are going under. (Laugh) There's cheap farm equipment to be bought right now. There are lands that are under limited use because perhaps we rent them to somebody else, that, in fact, rather than renting them we could operate. There are lands that are in the flight paths of airlines, of airports, that need to be kept in agricultural purposes because there isn't then a person in a house having planes going over them that could be serviced in this way. And rather than renting to somebody else, could be part of a program. Yes, I'm thinking in terms of existing lands or public resources. There's plenty of lands owned by various public entities in this state, yes. I'm not talking about buying a farm.

SENATOR FOLEY: Right.

SENATOR LANDIS: I'm talking about making a farm and my guess is that we should be able to go into the farming business today if we have capital relatively cheaply compared to other times because there are people who are getting out of the business. The corporate farming mentality which is making it hard for the family farmer to work is producing, I think, probably a glut of resources that, in fact, are on the marketplace. This is not a family farm. It doesn't have to have the economics of a family farm to succeed. And I think probably might have the opportunity to get some kind of efficiencies. Don't know but I'm just saying it's worth looking at.

SENATOR BOURNE: Senator Aguilar.

SENATOR AGUILAR: Thank you. Thank you for the legislation, Senator Landis. I think it really has merit. I think I'll just share with you a little different twist on your idea that happens in central Nebraska. A place called Platte Valley Academy. It's a Christian high school where the students only have to pay half as much tuition because they live on this facility that is also a dairy farm. They work half a day and they go to school half a day, and they have

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the opportunity not only to get educated at a very low cost but also to learn character by working for their keep, if you will. But just a little bit of twist on your idea and I think it's a really good idea. Thank you.

SENATOR BOURNE: Further questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Just to add a little bit to the record, Senator. It is one...and this is by the Nebraska Department of Correctional Services a couple of years ago. It's one-third the cost to build and one-third the cost to operate of a traditional prison, what you're talking about.

SENATOR BOURNE: Further questions? Seeing none, thank you.

SENATOR LANDIS: I waive...this is my closing.

SENATOR BOURNE: (laugh) That will conclude the hearing on LB 669. Senator McDonald to open on LB 703. As she makes her way forward, could I get a showing of hands of those testifying in support of LB 703? I see two. Those in opposition? I see none. Those neutral? I see none. Would the proponents make their way to the front and sign in, please? Senator McDonald, welcome.

LB 703

SENATOR MCDONALD: (Exhibit 10) Good to be here. Senator Bourne and members of the Judiciary Committee, I'm Senator Vickie McDonald representing the 41st Legislative District. I introduce LB 703 to begin a much-needed discussion about the manner in which terminally ill and permanently incapacitated inmates are handled within Nebraska's correctional system. LB 703 gives the Board of Parole authority to grant medical parole to a committed offender who is terminally ill or permanently incapacitated based upon their medical condition. Medical parole would be available to offenders who have served at least half of their sentence. Offenders under a sentence of death or life imprisonment would not be eligible for medical parole. LB 703 requires the Department of Corrections to identify offenders who may be eligible for medical parole based on their medical records. The Board of Parole then reviews

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their medical, institutional, and criminal records in addition to any other exams or investigations ordered by the board. The decision to grant medical parole and establish conditions of release belong solely with the Board of Parole. Conditions of release on medical parole may include placement for medical treatment. The term of medical parole is for the remainder of the offender's sentence. Medical parole may be revoked if a person's condition improves to the extent that he or she would not be eligible for medical parole. Medical parole may be revoked if the person violates any condition of release established by the board. If medical parole is revoked due to an improvement in the medical condition of a person, he or she may be considered for any other parole or release program for which they are eligible. Our inmate population is aging. We have mandatory sentencing for longer terms. The result is a growing population of inmates with special health needs including the elderly, the infirm, the chronically ill, and the terminally ill. Medical parole is a logical and compassionate response to the trends in a prison population and health problems associated with them. Hospice services is another. In certain cases, medical care and supervision can be provided in a more medically appropriate and cost effective manner than the Department of Corrections. Medical parole is an option that should be available by use by the Parole Board. Currently, medical condition is not an explicit factor considered by the Parole Board. Although I'm a newcomer to correction issues it seems to me that a common-sense approach to medical parole, one that protects the safety of the public while providing the appropriate end-of-life care for terminally ill offenders is a policy direction we must choose. I have an amendment, to correct the denial of good time on page 3, lines 4 and 5. It was not my intent to ever take away the good time earned by an inmate prior to medical parole. Thank you for your time and I'll answer any questions if I can.

SENATOR BOURNE: Thank you. Questions for Senator McDonald?
Senator Chambers.

SENATOR CHAMBERS: I was just going to say I'm a cosponsor and, Senator McDonald, as we look at the bill there may be some other massaging that will be done. But we'll keep you apprised of whatever happens.

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SENATOR MCDONALD: I appreciate that. I had a chance to be involved with a terminally ill prisoner in my district and that's why I brought this bill to this committee because it seemed like it was the right thing to do, and he was able to be paroled just a few months prior to his release because he was terminally ill. Called him the other day and he meets with his Parole Board person on a weekly basis. He is getting medical help through the VA so he's not costing the system anything at this point in time. So it's a cost savings also. And he's doing understandably well considering that he is terminally ill.

SENATOR BOURNE: Thank you. Further questions? Senator McDonald, you touched on my interest in that. Would the Department of Corrections still be responsible for the costs associated with that individual's medical care?

SENATOR MCDONALD: No, I don't believe so.

SENATOR BOURNE: Is a...I don't believe that a prisoner is eligible for Medicaid. Is a parolee eligible for Medicaid?

SENATOR MCDONALD: That I'm not sure of.

SENATOR BOURNE: Further questions? Thank you.

SENATOR MCDONALD: Um-hum.

SENATOR BOURNE: First testifier in support?

MARSHALL LUX: Mr. Chairman, members of the committee, my name is Marshall Lux, L-u-x. I'm the ombudsman for the state of Nebraska and I wanted to appear today in support of LB 703. Over the years, in the work that our office has done on inmate issues we've encountered a number of cases where it was apparent that it was in the interest of the state and in the interests of justice that an ailing inmate be paroled. Often these are cases where the inmate is terminally ill and clearly has very limited time left. And it really makes no sense to keep him or her in the institution. Unfortunately, when our office has confronted these cases and has taken the issue up to the Board of Parole, we have sensed, at times, that the Board of Parole is reluctant to grant paroles in these cases without specific direction in the law on how it should react to

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these kinds of cases and these kinds of circumstances. As I read it, LB 703 will correct that by creating a legal framework for medical paroles and so therefore it will definitely help in dealing with these kinds of difficult cases. I did have one suggestion for the bill. In the case of terminal illnesses, it's sometimes necessary for the Board of Parole to act quickly and we have seen situations where there was concern that there might not be enough time left to actually get the person paroled and out to his or her family before it was too late. So I would suggest that the committee consider adding a provision to the bill that would say that in the case of a terminally ill inmate the Board of Parole would be allowed to treat the hearing to consider the granting of the parole as an emergency meeting within the meaning of Section 84-1411(3) which is a provision of the open meetings law dealing with emergency meetings. Again, I'd like to encourage the committee to give favorable consideration to this bill. It's not something...these kinds of cases are not something that we see happen frequently but when they do happen they're definitely cases that cry out for attention and for action by the Board of Parole and this bill will help that. And I do think that you should consider that. As Dr. Kohl said, with an aging prison population, we're likely to see more of these kinds of cases come along as time goes by. Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Lux? Mr. Lux, I guess my concern is is if what good is a parole if you can't afford the medical care?

MARSHALL LUX: Right.

SENATOR BOURNE: And I don't believe a prisoner is able to qualify for Medicaid but is a parolee?

MARSHALL LUX: I don't know for certain what the answer to that question is. I'm sorry, Senator, I'm not sure. Usually these are cases where when they come to us, who comes to us is the family of the inmate and that's not their concern. They are...essentially, they're willing to take on that responsibility and these are usually cases, the ones that we see, where we're talking about a few weeks or months that are left and it's the family is willing to take on that responsibility.

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SENATOR BOURNE: I'm not against the bill at all. I'm just saying that, you know, end-of-life care on a terminal illness is horrendously expensive...

MARSHALL LUX: It can be expensive, yes, sir.

SENATOR BOURNE: I'm not...even an affluent family could not afford to do this without coverage. Further questions? Seeing none, thank you.

MARSHALL LUX: Thank you.

SENATOR BOURNE: Next testifier in support?

TIM BUTZ: (Exhibit 11) Good afternoon, Senator Bourne, members of the committee, Tim Butz, B-u-t-z, executive director ACLU Nebraska. I'm going to start by addressing your concerns, Senator Bourne, with the parolee eligibility. I don't know the answer to that either but I'll find out for you. Generally, there's a means test that's there. I don't know if being a parolee would disqualify you from being subject to that means test but we'll find out. I don't know how familiar you are with the Nebraska prison population. In my written statement I've got some statistics that I've pulled out from the statistical page of the Department of Corrections. Currently, we've got about 4,000 prisoners and less than 14 percent of them are in for what they call a Class I crime which is first or second-degree murder, manslaughter, first degree assault, sexual assault, or robbery. The rest of them are in for other types of offenses and the average period of incarceration is rather low. The average period of incarceration is about 25 months. And because of that, Senator McDonald already offered one amendment that cleared up a problem that we saw with the bill but there's another problem with this bill that we would like you to think about. And that is, limiting the availability of medical parole to people that have served only half their sentence or more. As Mr. Lux said, this isn't a situation that often comes up but when it does I think the state needs to act with compassion. And it would be a shame to limit parole to people that are half point or more beyond their sentence. If they're going to visit death's door death doesn't respect the matter of being there 13 months or 14 months and you're finally eligible. We don't punish families in this country. We don't have

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bills of attainder. We don't have laws that allow bloodline punishment. When someone faces death door and they're in prison it becomes punitive not just to the person to keep them in jail, but it becomes punitive to the family. And if any of you have been with a family member at the time of death as I have, you'll know what I mean. It's important for the family that medical parole be made available no matter what the person has done to deserve to be in prison. The family, at some point, has to come to grips with the fact that they've lost this person forever and if they can be with them at that time, if they can comfort them a little it makes life easier to go on. Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Butz?
Senator Combs.

SENATOR COMBS: Not a question, just a comment. I thank you for your support. I thank Senator McDonald for bringing this bill. I worked in hospice for six years and I never had the opportunity to take care of any prisoners, parolee type people but when you do get a terminal illness you've received a death sentence whether you're on death row or not. So I see this as the only kind and humane treatment of someone who is really just on death row. So I welcome this legislation.

TIM BUTZ: I'm glad you're able to support it and, you know, the bill doesn't create an absolute right. It really puts the power to make the determination about whether or not it's appropriate in the Board of Pardons and they're really equipped to make those decisions. And we really hope that this is something that the Legislature can act on.

SENATOR COMBS: Thank you.

SENATOR BOURNE: Further questions for Mr. Butz? Seeing none, thank you.

TIM BUTZ: Thank you.

SENATOR BOURNE: Other testifiers in support? Testifiers in opposition? Are there any neutral testifiers? Senator McDonald to close.

SENATOR MCDONALD: Just wanting to clarify some of your

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concerns. I think when the Parole Board utilizes the medical opportunity to parole a terminally ill patient or a prisoner, one of the questions will be is what type of care will be provided? Who will pay for that care? So I think will be part of that ongoing process. And as in hospice, all medical drugs, types of treatment to continue life, of course, is stopped. The only thing there is is to make that prisoner or that patient as comfortable as possible so there is no ongoing medical treatment to continue life. The other thing is as we deal with allowing them to serve at least half of their term, I think we need to be cognizant that, you know, in the Constitution I don't know that it allows us to allow them to be on parole if they have not served half of their terms. I think that's something you need to look into and you as well would know that situation.

SENATOR BOURNE: Thank you. Questions for Senator McDonald? Seeing none, thank you. That will conclude the hearing on LB 703. Senator Chambers to open on LB 757.

LB 757

SENATOR CHAMBERS: (Exhibits 12, 13) Mr. Chairman, members of the committee, I'm Ernie Chambers. I represent the 11th Legislative District in Omaha and this bill that I'm offering would deal with a category of persons known as deputy state sheriffs. Pursuant to Section 84-106, the governor may "appoint any number of persons necessary to assist the superintendent of the State Patrol to enforce the provisions of the criminal laws." Such appointees are called deputy state sheriffs and have the same powers as elected county sheriffs, authority to make arrests, interrogate suspects, search persons in their homes, and use deadly force, for example. Not all of these persons work "for" the State Patrol. Over the years, the use of such persons has expanded to agencies other than the patrol. For example, in 1973 the Legislature authorized these persons to be assigned to the Department of Agriculture whose power is restricted to enforcement of laws "within the jurisdiction of the Department of Agriculture." And if you look on page 3 of the green copy, in lines 1 and 2, you'll see the section that is authorizing these people for the Department of Agriculture. Now, because of this specific legislative authorization the department is exempted from the provisions

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of LB 757 as are the Office of Attorney General, the Brand Committee, and the state fire marshal all of which have enforcement duties and the Corrections Department has none of that. But if you want to consider statutory references to these people in connection with the Brand Committee, in Section 81-1021(2)(a) and I can give this to you later if you want it. You'll see that they're discussing in those provisions certain markings that have to be on state vehicles and it says that the vehicles exempted from the requirement that they have such markings would be, among others, deputy state sheriffs employed by the Nebraska Brand Committee and the state fire marshal for law enforcement purposes. So all those who have these deputy state sheriffs engage in law enforcement activities. Without any authority in 2003, two such persons were given positions on the staff of the Department of Corrections or people in the department were converted to these statuses by the governor and in 1999 you will see where there was a hearing before the Judiciary Committee where the department was asking that certain law enforcement authority be given to certain employees of the Department of Corrections which would be exercised only on the property of the Department of Correctional Services. This that has been done by way of circumventing the legislative process after the Legislature explicitly rejected such a thing, the power they're given is much broader than the department even asked for in that legislation. I gave you a copy of the hearing. I gave you the transcript of the hearing, the committee statement which shows that the bill was killed on an 8 to 0 vote and I believe six of the members of the committee who voted to kill that bill are on this committee. I do not take kindly to attempts to circumvent the Legislature and the law. These other departments which are mentioned in LB 757 would be exempted for the reasons that I gave. You will see an amendment attached that I'm offering so that it's clear that a designation known as railroad police will not be affected by this. These railroad police persons are authorized by federal law and they are authorized under federal law to exercise authority and powers that exist in the given state that law enforcement persons have. So it's to make sure that this is not an attempt to create a conflict between state law and federal law because we cannot take away what the federal law gave anyway. But in order that there not be any discussion of that to sidetrack what I'm attempting to do, this amendment, it's self explanatory but for the record

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here on page 2, line 23, after the word section, we would include the new language "except railroad police authorized by federal law." So that category is tightly defined and there is federal statutory language which creates these persons' position, talks about their authority in the given states. And my time is up. Thank you for yours.

SENATOR BOURNE: Thank you. Before taking questions from Senator Chambers, could I get a showing of hands of those wishing to testify in support? I see six. Those in opposition? None. Six to none.

SENATOR CHAMBERS: There aren't six people here.

SENATOR BOURNE: There are six proponents. I'm not kidding (laughter).

SENATOR CHAMBERS: Oh, proponents. Oh, (laughter) that all? (laugh)

SENATOR BOURNE: Proponents. Neutral (laugh). Neutral, I see one, two neutral testifiers. Questions for Senator Chambers. Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Senator Chambers, thank you, and I just...I know that you're aware that I am the employee assistance counselor at Nebraska thoroughbred racetracks.

SENATOR CHAMBERS: Yes.

SENATOR Dw. PEDERSEN: The racetracks should also be listed here because they also have deputy sheriffs who work with the...on the racetracks to make sure that the racetracks stay, you know, legal as far as...

SENATOR CHAMBERS: Are they deputy state sheriffs appointed by the governor?

SENATOR Dw. PEDERSEN: Yes, they are.

SENATOR CHAMBERS: Okay.

SENATOR Dw. PEDERSEN: And would you entertain an amendment to add them to it...

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SENATOR CHAMBERS: Sure.

SENATOR Dw. PEDERSEN: ...to make sure that the state...

SENATOR CHAMBERS: Sure.

SENATOR Dw. PEDERSEN: ...gambling, drugging horses and things like that...

SENATOR CHAMBERS: Right. Because they are in the enforcement area and the statute does say that these people are to be appointed to help in the enforcement of criminal laws so they are in the enforcement area. But the Department of Corrections is a custodial facility and does not enforce criminal laws and when they tried to get that authority we explicitly in this committee rejected it.

SENATOR Dw. PEDERSEN: I remember that.

SENATOR CHAMBERS: So when they tried to circumvent us with the complicity of the governor whether he was aware of what had been done or not means that we nevertheless have a situation which must be addressed. And the reason I only laid out what this bill does and didn't go into some of the problems created by the existence of these people is because I was sure there would be some testifiers who would do that. And I don't want them to be repetitious of anything that I would say and they are in a better position to speak from direct experience than I am on that aspect of it.

SENATOR BOURNE: Further questions for Senator Chambers? See none, thank you.

SENATOR CHAMBERS: Thank you.

SENATOR BOURNE: First testifier in support?

BILL PETERS: Mr. Chairman, members of the committee, my name is Bill Peters, P-e-t-e-r-s. I'm appearing here today as a registered lobbyist for BNSF Railway in support of the bill, particularly with the amendment that Senator Chambers has already suggested to you. Railroad police are commissioned officers, full law enforcement officers, commissioned we prefer by the state in which they're working

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which is our situation here. Quickly under the federal law, we just have to be commissioned by some state but as a company we think it's much better practice that we're commissioned and under some jurisdiction of the state in which we operate. I'd be happy to answer any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Peters?
Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Mr. Peters, are you aware or can you give me any information, and we don't have to do it here today, because of time, what kind of training these people go through and where do they get their training?

BILL PETERS: It varies with what kind of training but to be commissioned by Nebraska, you'd have to either complete the police academy at Grand Island or receive from the police academy at Grand Island a certificate of equivalent training.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you.

BILL PETERS: Thank you.

SENATOR BOURNE: Next testifier in support?

MARSHALL LUX: Mr. Chairman, members of the committee, my name is Marshall Lux, L-u-x. I'm the ombudsman for the state of Nebraska and I'm here to testify in support of LB 757. As Senator Chambers has mentioned, this is an issue that has a history. Back in 1999, LB 31 was introduced that would have given the Department of Corrections the power to designate some of its employees as law enforcement officers. When that bill was introduced in 1999 it was quite clear the bill was merely intended to allow the department to make arrests in cases of crimes committed at the correctional facilities. Basically, LB 31 was seen as a way of facilitating the arrest of visitors who tried to smuggle contraband into the facility. In fact, however, I have to tell you that now that the department has taken on this law enforcement authority and done so without legislative approval as Senator Chambers has explained, in practice, the

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employees of the department have gone far beyond the stated intent of LB 31 back in 1999 including engaging in search of private residences and interrogation of witnesses far away from correctional facilities. So their actual activities now as state deputy sheriffs is much broader and more comprehensive than was ever contemplated by the bill that the committee killed in 1999. Also, we've encountered at least two cases in our work where inmates made allegations that sexual crimes were committed against them by Department of Corrections staff and where the case was investigated by the department's own state deputy sheriffs and, in fact, a situation where the department was investigating itself and the alleged criminal wrongdoing of its own employees. In the past, investigations of that nature were typically conducted by State Patrol, thereby avoiding the possibility of a conflict of interest. We've also encountered cases where the department's state deputy sheriffs were used to investigate the department's own staff in what were essentially personnel matters. And not only does that blur the line between criminal and personnel matters but it also creates a situation where there has to be some concern that the associated criminal investigation is being done, will be tainted by the desire to find proof of wrongdoing in the personnel context. So what you're seeing is a situation where personnel issues and criminal issues are being confused, where the rights of the people who are being investigated are being compromised because they're losing their right to remain silent and so forth, many, many problems that have come as a result of this. And I would encourage the committee to support LB 757.

SENATOR BOURNE: Questions for Mr. Lux? Senator Chambers.

SENATOR CHAMBERS: Mr. Lux, you're an attorney, aren't you?

MARSHALL LUX: Yes, I am.

SENATOR CHAMBERS: Are you licensed to practice in Nebraska?

MARSHALL LUX: No, I am inactive.

SENATOR CHAMBERS: Okay, but you were trained in the law so you will understand legal type questions if I put them to you. I will not be taking advantage of you.

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MARSHALL LUX: I hope so. No.

SENATOR CHAMBERS: Okay. Now, if a criminal...if there's a criminal investigation and law enforcement wants to search a person's home, effects, papers, or whatever, there must first be probable cause, is that correct?

MARSHALL LUX: Correct, yes.

SENATOR CHAMBERS: So if these people were functioning as law enforcement persons they could not get into a person's home to search or interrogate or anything else without probable cause.

MARSHALL LUX: That's correct.

SENATOR CHAMBERS: If, on the other hand, they say they're investigating a personnel matter they could get around having to have probable cause...

MARSHALL LUX: Yes.

SENATOR CHAMBERS: ...and enter the home under the pretext of conducting a personnel investigation while really, in fact, pursuing a law enforcement activity.

MARSHALL LUX: That's correct, Senator, and they would also have the threat of being able to suggest that a personnel action could result from not cooperating with a personnel investigation. Whereas you know, a person who's being suspected of a crime has a constitutional right not to cooperate.

SENATOR CHAMBERS: Okay. And I just wanted that clearly in the record. I think it might have been obvious from what you said, but I wanted you to answer explicitly in response to the question.

MARSHALL LUX: Thank you.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

MARSHALL LUX: Thank you.

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SENATOR BOURNE: Next testifier in support.

JEFF HOYLE: (Exhibit 14) Hi, my name is Jeff Hoyle, H-o-y-l-e. I'm handing out copies of a memo. I'm going to briefly read from part of it. I wrote this before this was introduced. The date on there doesn't reflect the date that I actually wrote it. This is when I printed the new copies (inaudible). I was a network analyst for the corrections, I worked for them for 14 years before my supervisors decided to have the investigators come after me. The problems with the investigators actually started with problems in the IT section. The supervisors couldn't get along with each other so the assistant director decided all of us would attend dialogue. During our last dialogue we talked about having consultants come in and take a look at the supervisors. I was contacted by the person who facilitated the dialogue about finding a consultant. I was informed that that was granted on August 18 and I recommended that the consultants come in and study the management styles of the supervisors and I was also suggesting all database management be moved under new supervision. Two days later, on August 20, Geoff Britton, the state deputy sheriff for corrections, one of them, came to the wing and said he was doing an investigation and we were to give him the passwords for the local computers and go home for the rest of the day. Since the IT managers, Don Phares and George Wells had just attempted to get another IT person set up and fired for a personal picture a couple of weeks before that, I figured it was a continuation of the same incident. Geoff Britton and Don Phares conducted the search together and asked for the passwords that would allow them to search the computers. On Sunday, August 22, I was called by Barb McIntire of HR and informed I was placed on suspension. August 24 a search warrant was served by Geoff Britton on my house where he took two computers, software and books. Britton informed me that it was illegal to connect to e-mail while they're looking for, it was a picture of a monkey with my boss' face on it. And I reminded Britton that he did not ask for my e-mail password or anything about staying off the e-mail. He just mentioned local computers. Britton told me it didn't matter the words he used that it was all the same. I was later arrested and charged with two felonies for disrupting service while attempting to hide the monkey picture that was created by another person. I had been asking to get a copy of the log server for Notes 2 that

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would prove that doing anything to one of the servers wouldn't stop both servers anyway so there wouldn't be a disruption. So far I've been denied evidence. As the only person who took care of the e-mail servers and I know that they're set up in a way that if one fails, the other one will take over and no one will notice anything that happened. I have not been able to come up with the \$10,000 that my attorney, Mr. Redman, says I will need for the criminal charges but I paid my employment attorney, Mr. Boucher, who represented me during the first employment hearing. I believe I actually won that hearing but I'm not allowed to see the recommendations made as a result of the hearing. Instead, the director decided to review whatever evidence he had, fired me on two counts. One was for refusing to talk to an investigator without an attorney and the other was for shutting down the server. I'm not sure if the server was actually backed up but I know there was no disruption caused because of the backup server. Right now the employment decision is under appeal. I believe I'll win that case. After that, I'm thinking about going ahead with the criminal case because I believe I'd win that also. And I know the investigators were used by supervisors to get rid of me since I was the one pushing for the consultants in this case. Then they would have found out that they probably weren't qualified to actually run the IT department. Any questions?

SENATOR BOURNE: Do you have a final...do you want to...are you finished or...?

JEFF HOYLE: That's it.

SENATOR BOURNE: If you want to summarize or the final thought? Actually, Senator Pedersen will ask you a question. Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Mr. Hoyle, were you given your Fifth Amendment rights?

JEFF HOYLE: No, I don't think so. As far as I understand, I should have been allowed to get my attorney at a point where, where I was talking about where they tried to do some more investigation. There was at one point where I stopped talking to the investigators. I told them I wanted my attorney. A different person investigating called back and

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wanted to talk to me further to investigate it. I told him my attorney said no, not without him present. And that was one of the charges I was fired for. So as I understand it, yes.

SENATOR Dw. PEDERSEN: Do I have it right? This whole situation started over a monkey with an employee's face on it...

JEFF HOYLE: Yeah, well,...

SENATOR Dw. PEDERSEN: ...on a computer? Is that right?

JEFF HOYLE: Yeah, I believe that they thought I did that and they're going to use that to get rid of me. Ended up it was another employee, Tim Edmonds, who made the picture and he made somehow, I'm not good with, computers graphics but he made a picture of a monkey with my boss' face on it instead of the monkey's face. And so, I guess, once they found out that I had nothing to do with that they went after other things. One of the things I forgot to make copies of...I don't know if you can pass this around or not but one of the things that they tried to say I was trying to hide was that porn was actually Director Clarke's from his e-mail that I investigated for him. And his secretary testified in this affidavit that she was aware that I was investigating his porn but I'm not sure on the procedure for that since I didn't make copies...

SENATOR Dw. PEDERSEN: Did these investigators...they went out and got a search warrant from some judge around here and came to your house. Is that right?

JEFF HOYLE: Yes. I think from what I can understand, I think they made the issue sort of confusing in order to get search warrant because to me the real issue is I wasn't told to stay off of it. It is an administrative investigation for this picture. What I connected to had nothing to do with this picture of a monkey. And so I think they confused them with technical stuff in order to get a search warrant.

SENATOR Dw. PEDERSEN: Were you aware of these people who became investigators before they were investigators?

JEFF HOYLE: Yeah.

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SENATOR Dw. PEDERSEN: While they were employees of the department?

JEFF HOYLE: Yes, yes. I worked with Benny Noordhoek is one of them and the other one I've heard about but I hadn't...Geoff Britton, but I hadn't worked with him.

SENATOR Dw. PEDERSEN: And what was their experience prior to going to the academy?

JEFF HOYLE: Correctional experience only, no law enforcement experience.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: Further questions? Senator Chambers.

SENATOR CHAMBERS: Just an observation. This reminds me a little bit of a scene in Mutiny on the Bounty where Humphrey Bogart was playing a deranged Captain Queeg and he thought he had trapped some very dangerous malefactors because some strawberries, a serving or two of strawberries was missing and he said, oh, they were clever but when it came to the strawberries I got them. So although you're clearly saying what did happen, a lot of it makes little sense to me as to why something that started out as this apparently did, ballooned and mushroomed to where it is now. But if it had not been for these special state deputy sheriffs being given that power, none of this would have happened in the way it did, though, would it?

JEFF HOYLE: Correct.

SENATOR CHAMBERS: Okay.

SENATOR BOURNE: Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Just to add some more to the record. You've lost your job, is that right?

JEFF HOYLE: Yes.

SENATOR Dw. PEDERSEN: And how much does it cost you, do you

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have any idea, out of your pocket so far, what it's cost you to try and defend yourself against these charges?

JEFF HOYLE: I'm thinking around \$8,000 so far. I have to come up with another \$10,000 deposit though for...I agreed to a pretrial diversion, more of a way to put off the criminal...because I can get out of that any time until a year is up. Toney Redman, my criminal attorney, said that he needs a \$10,000 deposit to go ahead with this. And I just haven't come up with the money yet so.

SENATOR Dw. PEDERSEN: And there's no laws in this state that says that they have to pay if they lose, is that right?

JEFF HOYLE: Not that I'm aware of. I wish there was.

SENATOR Dw. PEDERSEN: I would support you in a lawsuit.

SENATOR BOURNE: So your lost wages aren't included in the \$8,000. That's your legal bills?

JEFF HOYLE: Oh, no, that's legal bills.

SENATOR Dw. PEDERSEN: That's ridiculous.

JEFF HOYLE: Mr. Boucher is more expensive than I anticipated.

SENATOR BOURNE: Further questions? Senator Flood.

SENATOR FLOOD: What were you charged with?

JEFF HOYLE: The exact warrant says...the exact name of the crimes I can't really remember. It's...but basically they're saying that I shut down a server and even though the server was going to be shut down that weekend anyway.

SENATOR FLOOD: Interfering with the investigation or (inaudible)...?

JEFF HOYLE: No. No, I was never charged with that. They said that the reason is disrupting service which I know the service wasn't disrupted but they refused to give me the evidence to show the backup server.

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SENATOR FLOOD: Felony?

JEFF HOYLE: Yes.

SENATOR FLOOD: Thank you.

SENATOR BOURNE: Thank you for your testimony. Further testifiers in support of LB 757? Welcome.

SARA HOYLE: Okay. I'm Sara Hoyle, H-o-y-l-e. And I'm here to testify as a former employee of the Nebraska Department of Correctional Services. I worked in their administration for approximately eight years. The year that these investigators were in the department, I was fortunate enough to have my office right across the hall from theirs so I've shared many stories with Senator Pedersen that I heard directly come from the investigators of how they mistreated staff and inmate families. The two concerns I want to share here with you today are the number one, is staff and inmates are confused as to what exactly these investigators are doing. Are they internal investigators investigating administrative matters or are they criminal investigators investigating criminal matters because it's not clear. They can start an internal investigation such as what happened to my husband and it can proceed to law enforcement investigation. They can switch hats just like that. Also, the other concern I have is the lack of experience that these two individuals have in law enforcement. These individuals graduated a little over a year ago from the law enforcement academy. They started right away investigating felonies. They didn't have any mentors that were seasoned working with them. They report to the emergency management supervisor who grew up in corrections and has no experience in law enforcement. In fact, I've heard him say to them on several occasions, well, you're trained in that. You know what to do when they've gone to him for advice. These investigators also have our legal staff who help them write their reports and help them prepare their testimony. Our attorney joked around with the affidavit and I have it here if anybody would like to see it, that Mr. Britton gave to the judge. It's very clearly, it's filled with legal jargon and was very clearly written by one of our attorneys, not from somebody right out of the law enforcement academy. In addition, they have direct contact with the county attorneys. They, on behalf of the department, have the

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power to say what crimes they would like to see prosecuted for the county attorney. Okay, the county attorney I know makes the ultimate decision but they have that power to call them directly and say that. They also are very...they go out to eat with the county attorneys. One admitted to me that they discuss cases over supper with one of the county attorneys in Johnson County. So the professional boundaries are not there with these individuals, and they shouldn't be expected to be there because they're not seasoned. They're not experienced in law enforcement. They're new people. I guess my plea to you would be if you cannot ensure me, an inmate in our system, that I would be investigated or that inmate would be investigated in the same manner that Assistant Director Hopkins would be or any other member of the good old boys club, then I don't think those investigators should be there. Thank you for your support.

SENATOR BOURNE: Thank you. Questions for Ms. Hoyle? I think we'll explore this a little bit. As a committee we will look into this. Further testifiers in support of the bill?

KARINA FREDRICKSON: My name is Karina Fredrickson. The last name is spelled F-r-e-d-r-i-c-k-s-o-n. I too have had a personal experience with these investigators. Basically, I wrote a memo to the director of corrections, Harold Clarke, at the time implicating that one of the lieutenants at the facility in which I worked was using a state computer to play fantasy football on. The captain knew that this was going on, would stand behind this lieutenant at his desk watching what they did. And so I wrote this memo to the director of our department. It was investigated by one of the investigators, Benny Noordhoek. The computer from the lieutenant was never confiscated. Nobody in the office was ever questioned about anything they saw and, in addition, I found out later that Benny Noordhoek and this particular lieutenant call each other at home. So I, too, have the same concerns that, you know, how are we to know who's going to be investigated and who's not based on what kind of friendships there are especially since both of these investigators did work at previous facilities. Another instance I would like to give you guys, there's an employee who was fired from the department several months ago. He couldn't be here today because he had to work but he was fired for an internal investigation at our facility.

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Basically what happened is one of the lieutenants was conducting an investigation and asked...again, it was the investigator, Benny Noordhoek, to go to the Diversion Services because there was something at Diversion Services on this particular employee. And as far as I know, Diversion Services' records are confidential. So Mr. Noordhoek went to Diversion Services, acting as a law enforcement officer and obtained this information for the lieutenant which then led to this employee being fired. So I guess what I'm worried about is I still work for the department. Okay, so me coming here to testify...I'm really afraid of that retaliatory action. If they can bring any charges they want, if they can come in and search my house acting as law enforcement officers, you know, what kind of protection do I have from this? And where does their authority end right now? It's wide open so that's all I have.

SENATOR BOURNE: Thank you. Appreciate your testimony, you're coming forward. Are there questions for Ms. Fredrickson? Seeing none, thank you.

KARINA FREDRICKSON: Thank you.

SENATOR BOURNE: Other testifiers in support?

JIM LIGHTNER: Senator Bourne, committee, my name is Jim Lightner. I'm the executive director for NAPE/AFSCME. We're the union that represents all the state employees including the correctional officers. I'm here in support of those who have testified before me. What I must tell you is, this is not the only case. There have been four that we know of that have happened before this. What we feel is that this bill should be supported and that these people will be able to have their dignity and respect restored. It's a shame that it's got this far and if criminal investigations need to happen there are other agencies that can do these investigations.

SENATOR BOURNE: Thank you. Questions for Mr. Lightner? Mr. Lightner, is this...do you feel and it sounds like you have some background or history in other individuals who have been treated in this regard. Is this something unique to these several investigators or is this something that's pervasive in the Department of Corrections?

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JIM LIGHTNER: It's pervasive in the department.

SENATOR BOURNE: And it's exacerbated by these investigators?

JIM LIGHTNER: Yes, it is.

SENATOR BOURNE: Okay. Further questions? Thank you. Next testifier in support? Are there testifiers in opposition? Are there neutral testifiers? Come forward. Are we signing in on the...

BRAD HANSEN: Yes, I signed in.

SENATOR BOURNE: Okay, thank you.

BRAD HANSEN: (Exhibit 15) Good afternoon, Chairman Bourne and members of the Judiciary Committee. My name is Brad Hansen, H-a-n-s-e-n, and I'm the emergency management supervisor for the Nebraska Department of Corrections. My job duties include supervising the emergency preparedness program, the ION and canine drug interdiction programs, and the two department investigators. I'm here today to provide information on how the Department of Corrections utilizes deputy state sheriffs. The Department of Correctional Services has five appointed state deputy sheriffs. Two are designated as department investigators, two are designated as transportation officers, and one is designated as a canine sergeant. The department investigators are charged with investigating criminal activity in the department. These two investigators are playing a pivotal role by assisting the State Patrol with their ongoing caseload of investigations for cases involving the department. The department investigators are law enforcement certified and have the authority to arrest and detain. However, there are restrictions to that authority. According to department administrative regulation 215.01 and in an agreement with the Nebraska State Patrol, the Nebraska State Patrol will be the lead investigator concerning deaths, attempted homicides and assaults involving serious bodily injury to inmates, visitors, and staff. The Nebraska State Patrol would investigate all malfeasance of office of high-ranking officials should the situation arise. The investigators are not allowed to go into the community to arrest without the

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direction and assistance of the Nebraska State Patrol. In 2004 the Department of Corrections' investigators conducted 114 investigations. Out of the 114 investigations, there were 44 investigations that were referred to the local county attorneys for criminal prosecution. The corrections extradition and warrant officer is a position assigned to the Special Services Unit, a section within the department's Administrative Services Division. The Special Services Unit was created in 1983 to provide detainer administration and to conduct high-risk prisoner transportation. The special services manager supervises two nonuniformed, full-time employees classified as Corrections Extradition and Warrant Officers. These officers are responsible for serving detainers, arrest warrants and subpoenas against escapees and parole violators, transferring department inmates between facilities and returning escapees, parole violators and absconders to department custody. The department requests for deputy state sheriff consideration are submitted in accordance with the procedures set forth by the superintendent of the Nebraska State Patrol. Corrections extradition and warrant officers routinely coordinate with local, state, and federal law enforcement officers in the apprehension and return of persons wanted by the department and the Nebraska Board of Parole. High-risk prisoner transportation requires the use of specialized equipment and training. Use of deputy state sheriff commission by corrections extradition and warrant officers is strictly limited. These officers do not serve search warrants, they do not conduct custodial interrogations in criminal investigations, and they are not involved in the investigation or arrest of department employees or the general public. The unique role of the corrections extradition and warrant officer assists the Nebraska State Patrol by eliminating the need and expense of assigning state troopers in the time-consuming task of extraditing fugitive prisoners. I would be glad to answer any questions you may have.

SENATOR BOURNE: Thank you. Questions for Mr. Hansen?
Senator Pedersen.

SENATOR DW. PEDERSEN: Thank you. Thank you, Senator Bourne. Mr. Hansen,...

BRAD HANSEN: Um-hum.

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SENATOR Dw. PEDERSEN: You mentioned in your testimony there that they are not to do search warrants?

BRAD HANSEN: Are you talking about the investigators or the...

SENATOR Dw. PEDERSEN: Yeah.

BRAD HANSEN: ...transportation officers?

SENATOR Dw. PEDERSEN: The investigators.

BRAD HANSEN: No, not by themselves. The State Patrol has to go with them and assist them and direct them in any kind of search warrant.

SENATOR Dw. PEDERSEN: In the case of Hoyle's, did they have assistance from the highway patrol?

BRAD HANSEN: State Patrol was with them.

SENATOR Dw. PEDERSEN: And they got this search warrant from a judge.

BRAD HANSEN: Yes.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: Further questions? Senator Chambers.

SENATOR CHAMBERS: Mr. Hansen, do you have a law degree?

BRAD HANSEN: No, I do not.

SENATOR CHAMBERS: Do you have law enforcement training?

BRAD HANSEN: No, I do not.

SENATOR CHAMBERS: Are you the person who supervises these individuals?

BRAD HANSEN: I supervise the day-to-day activities, time-off leave. I'm instrumental in making sure of the ethical and moral responsibilities of law enforcement

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officer. But any questions, any questions for law enforcement they direct all their questions to State Patrol investigators for their assistance in...

SENATOR CHAMBERS: Who supervises them at the pen?

BRAD HANSEN: The pen?

SENATOR CHAMBERS: They're not under anybody's direct supervision?

BRAD HANSEN: They're under my direct supervision.

SENATOR CHAMBERS: So then you do supervise them?

BRAD HANSEN: I do.

SENATOR CHAMBERS: If they are going to leave the facility to go...do they conduct...let me scratch that and start on a new tack. Do they conduct administrative investigations?

BRAD HANSEN: They will on occasion, yes.

SENATOR CHAMBERS: Do they conduct criminal investigations?

BRAD HANSEN: Yes, they do.

SENATOR CHAMBERS: Do they get permission from you before they leave the grounds of the institution to go into a residential area to conduct an investigation?

BRAD HANSEN: They inform me if they're going to go out to talk to an individual in a residential which is not very often but they would inform me, yes.

SENATOR CHAMBERS: Do they tell you the nature of the investigation, meaning that it's administrative as opposed to criminal or vice versa?

BRAD HANSEN: Yes.

SENATOR CHAMBERS: Have they told you or received your permission to conduct any criminal investigations off the grounds of the facility?

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BRAD HANSEN: Not to conduct criminal investigations. They may, as part of a criminal investigation that we are doing on the grounds within the Department of Corrections, they may go out and talk to individuals off-grounds as part of that investigation but it wouldn't be because of an investigation on the street. It would be because they're conducting an investigation...

SENATOR CHAMBERS: But some criminal...

BRAD HANSEN: ...that occurred within the Department of Corrections.

SENATOR CHAMBERS: ...but some criminal investigation work is done off the grounds of the institution.

BRAD HANSEN: Some interviewing, yes.

SENATOR CHAMBERS: Do they ever investigate any conduct which is considered criminal which occurred off the grounds of the institution but which the authorities at the facility think impact on the institution?

BRAD HANSEN: No.

SENATOR CHAMBERS: So the only crimes that anybody would be investigated for would be one that allegedly occurred on the site of the institution?

BRAD HANSEN: Is occurring or did occur, yes.

SENATOR CHAMBERS: If something was done in a person's home that involved a computer, that would not be investigated by these people that you have who are state deputy sheriffs?

BRAD HANSEN: That's correct.

SENATOR CHAMBERS: The only kind of alleged criminal conducted related to computer use would have occurred on the premises of the institution. Is that what you're saying?

BRAD HANSEN: Well, in the particular case you're talking about...

SENATOR CHAMBERS: How do you know which case I'm talking

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about? I haven't told you.

BRAD HANSEN: Correct. I apologize for that.

SENATOR CHAMBERS: Okay, that's quite all right.

BRAD HANSEN: It could...if an individual had access to state computers from home, it might go to the point if we think criminal activity occurred at the institution. Because of the remote log-in from a computer on the outside, we would request the assistance of the State Patrol and we may go out and obtain a search warrant for that, yes.

SENATOR CHAMBERS: Would there be...excuse me, any discussions conducted with a person at his or her residence about something that occurred in that residence which might be deemed to be of a criminal nature without the State Patrol being present at that interview?

BRAD HANSEN: Not if there's a criminal investigation going on, probably not.

SENATOR CHAMBERS: So if we determine from our review of this...let me back up, you're telling the committee and I want to make this as explicit as I can so you won't feel you've been entrapped.

BRAD HANSEN: Okay.

SENATOR CHAMBERS: You're telling the committee that no criminal investigatory work will be done away from the institution unless the State Patrol is accompanying the investigator. Is that what you're saying?

BRAD HANSEN: Either accompanying or we have informed and they have given us instruction or advice on how to proceed.

SENATOR CHAMBERS: Now I'm going to ask you a follow-up question.

BRAD HANSEN: Okay.

SENATOR CHAMBERS: So they do conduct criminal investigatory work away from the institution without being accompanied by a member of the State Patrol. True or false?

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BRAD HANSEN: They would conduct interviews and if that's part of the criminal investigation, they could do that outside without...

SENATOR CHAMBERS: Without being accompanied (inaudible)...

BRAD HANSEN: ...yes, without a State Patrolman there. That has occurred.

SENATOR CHAMBERS: Now when an affidavit is sought from a judge in order to procure a search warrant,...

BRAD HANSEN: Um-hum.

SENATOR CHAMBERS: ...somebody has to make certain statements under oath. Who makes the statement under oath to the judge on which is based the issuance of a search warrant, the State Patrol or the investigator?

BRAD HANSEN: Well, I'm not sure we've ever asked for a search warrant to tell you the truth. But if we were talking about an arrest warrant, we would...the investigators sign the affidavit, the department investigators.

SENATOR CHAMBERS: And that would be based on the personal knowledge or observation of the investigator.

BRAD HANSEN: Yes.

SENATOR CHAMBERS: Are you aware of any search warrants that were obtained based on the affidavit of somebody other than a state trooper?

BRAD HANSEN: Not that I know of but I...

SENATOR CHAMBERS: Is Geoff Britton spelled G-e-o-f-f B-r-i-t-t-o-n a state trooper or one of these state deputy sheriffs?

BRAD HANSEN: State deputy sheriff.

SENATOR CHAMBERS: I have in my hand what purports to be an affidavit for a search warrant and the affiant is Geoff

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Britton. So you would be mistaken in what you said before...

BRAD HANSEN: Yes, I would, but that would have been under the direction of the State Patrol.

SENATOR CHAMBERS: Well, you don't know that. We're going by what is here.

BRAD HANSEN: Okay.

SENATOR CHAMBERS: If you supervise these people they would seek a search warrant without telling you about it, is that what you're telling me because you didn't know about this? They didn't tell you about this one that Geoff Britton was going to seek, did they?

BRAD HANSEN: They may have. It's been...

SENATOR CHAMBERS: But you don't know that...you don't recall that they did, did you?

BRAD HANSEN: It's been...unless I looked at the file, I wouldn't know.

SENATOR CHAMBERS: Because you wouldn't know about this and refuse to tell me in response to my question, would you?

BRAD HANSEN: I would not refuse to tell you anything, sir.

SENATOR CHAMBERS: So you didn't know about this before I mentioned it to you at this time, is that true?

BRAD HANSEN: That's correct.

SENATOR CHAMBERS: How many search warrants do you think Geoff Britton has obtained?

BRAD HANSEN: Well, I wouldn't have known about that one unless I would have looked at the record. But I think on the outside, that would be the only one.

SENATOR CHAMBERS: Do you think your record will disclose that he is the one who sought this?

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BRAD HANSEN: Yes, the file was. It would. I have the file.

SENATOR CHAMBERS: When we talk about your record, who puts that record together, you or somebody else?

BRAD HANSEN: The...it's the investigative record that comes from the two investigators.

SENATOR CHAMBERS: Do you look at what they submit to you?

BRAD HANSEN: Yes, I do.

SENATOR CHAMBERS: Then would this have been submitted to you by Geoff Britton in what he was submitting to you for your records?

BRAD HANSEN: It would have been part of the record.

SENATOR CHAMBERS: So then you saw it...

BRAD HANSEN: Probably saw it but I don't remember it. As I said before, we've had several investigations.

SENATOR CHAMBERS: Well, are search warrants obtained by Mr. Britton so common that you just don't remember this particular one?

BRAD HANSEN: I don't remember that particular one.

SENATOR CHAMBERS: Well, if this happens to be the only one, would it not be remarkable enough to you for you to recall it?

BRAD HANSEN: I don't think it would be remarkable to me. They are trained investigators, law enforcement investigators and...

SENATOR CHAMBERS: Well, if it wouldn't be remarkable...I'm not trying to be argumentative...

BRAD HANSEN: Sure.

SENATOR CHAMBERS: ...why would you tell us that none of these people would be the one who would swear out the

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affidavit? If you saw such an affidavit it would have been remarkable because you would have remembered it since it doesn't happen on a regular basis. But let me not be argumentative.

BRAD HANSEN: Sure.

SENATOR CHAMBERS: Who instructed you to come over here today?

BRAD HANSEN: Department of Corrections,...

SENATOR CHAMBERS: No, no, that's...

BRAD HANSEN: Mr. Clarke.

SENATOR CHAMBERS: Okay. And what did he tell you you should do when you came here?

BRAD HANSEN: Just to give information on how we operate the program.

SENATOR CHAMBERS: And did he say you should be in a pro, anti, or neutral position?

BRAD HANSEN: Neutral.

SENATOR CHAMBERS: But in being neutral on the bill, you do have as a part of your responsibility to provide a justification for what the department is doing and to defend it.

BRAD HANSEN: Yes.

SENATOR CHAMBERS: And that's what you're attempting to do here, correct?

BRAD HANSEN: Yes.

SENATOR CHAMBERS: And I'm not condemning you,...

BRAD HANSEN: Sure.

SENATOR CHAMBERS: ...I just want it clear what your role is.

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BRAD HANSEN: Sure.

SENATOR CHAMBERS: Did you hear the testimony of the Hoyle's?

BRAD HANSEN: Um-hum.

SENATOR CHAMBERS: Had you been aware of what they spoke of before you heard it today?

BRAD HANSEN: Yes.

SENATOR CHAMBERS: Without asking you specifically what it is, are there things they related to us that based on your knowledge were untrue?

BRAD HANSEN: Most of what they said, I believe, is untrue.

SENATOR CHAMBERS: But we do have an affidavit on which a search warrant was granted.

BRAD HANSEN: Correct.

SENATOR CHAMBERS: Who carried out the search?

BRAD HANSEN: That would have been Geoff Britton I know was involved and a State Patrol person but I don't know the name.

SENATOR CHAMBERS: Did you attend the search?

BRAD HANSEN: No.

SENATOR CHAMBERS: How do you know a state trooper accompanied Mr. Britton?

BRAD HANSEN: I...because he told me. And it's a part of the report and it's part of the rules and regulations that they're supposed to follow.

SENATOR CHAMBERS: You knew about all that but you didn't know about the search warrant that was underlying all of this.

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BRAD HANSEN: (laugh) You're correct.

SENATOR CHAMBERS: Okay. So at least when they told us, the Hoyle's that there had been a search warrant and their residence was searched, that was true, wasn't it?

BRAD HANSEN: True.

SENATOR CHAMBERS: And they knew more of the truth than you did, didn't they because they knew about the search warrant and you didn't?

BRAD HANSEN: That's correct on that aspect, that piece of fact, yes.

SENATOR CHAMBERS: Well, if we have something here which is established by objective evidence which you didn't know about...

BRAD HANSEN: Right.

SENATOR CHAMBERS: ...on what basis without saying that you deliberately mislead, on what basis could I believe that you are correct when you say something they said is not accurate and you have nothing in the way of documentary evidence to back you up? The only document we really have is a search warrant affidavit which you didn't know about...

BRAD HANSEN: Um-hum.

SENATOR CHAMBERS: ...and which before it was presented to us and to you at this hearing, you said would not occur in this fashion. So you don't know the procedures that these two people operate under even though you supervise them. You did not know that they had sworn out, they had sworn to the affidavit that led to a search warrant.

BRAD HANSEN: Um-hum.

SENATOR CHAMBERS: Yet you want me to believe that these other things that you say you know about you really know about.

BRAD HANSEN: I didn't realize I was going to come in and testify on a particular case. If I had known that, I could

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have refreshed my memory. But there are certain things I do remember. It was a very difficult case. It was a tough one and particularly when it's according to Sara Nelson...Sara Hoyle was there. She's a heck of an employee. I have a lot of compassion for her and the job she's done and it was very difficult. And my point is I think if I'd have been able...if I knew I was going to come in and testify over certain cases, I could have refreshed my memory.

SENATOR CHAMBERS: You don't prepare yourself to deal with the issues that a bill relates to? Had you read this bill,...

BRAD HANSEN: Yes, sir.

SENATOR CHAMBERS: ...you know that it deals with deputy state sheriffs.

BRAD HANSEN: Right.

SENATOR CHAMBERS: You know who the deputy state sheriffs are at the department.

BRAD HANSEN: Yes, sir.

SENATOR CHAMBERS: You know the kinds of activities they engage in.

BRAD HANSEN: Yes, sir.

SENATOR CHAMBERS: And it didn't occur to you to examine the types of cases which you felt might be presented to us when this bill was going to be discussed?

BRAD HANSEN: Not in detail.

SENATOR CHAMBERS: Did it occur to you that maybe the case of the Hoyle's would be presented?

BRAD HANSEN: I did not realize that.

SENATOR CHAMBERS: But you're familiar with their case?

BRAD HANSEN: I'm familiar with parts of it.

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SENATOR CHAMBERS: You know that there was such a case.

BRAD HANSEN: That, I was not familiar with it, yes.

SENATOR CHAMBERS: You know there was such a case.

BRAD HANSEN: Yes.

SENATOR CHAMBERS: And you know Geoff Britton was the investigator...

BRAD HANSEN: I do know that and...

SENATOR CHAMBERS: ...who was deeply involved.

BRAD HANSEN: ...and I also know the State Patrol was deeply involved through the computer division of the State Patrol and the investigative division of the State Patrol.

SENATOR CHAMBERS: Name me one trooper who is involved.

BRAD HANSEN: Sergeant Reinhart who is in investigation and I can't remember the name of the people from the computer division.

SENATOR CHAMBERS: Do you know whether Sergeant Reinhart is the one who accompanied Mr. Britton, if somebody, in fact, did.

BRAD HANSEN: I don't believe he was.

SENATOR CHAMBERS: Okay. And I've gotten almost as most out of you as I want but I wanted to do it in a series of questions...

BRAD HANSEN: I understand.

SENATOR CHAMBERS: ...so that it's not me making a long statement and then asking you at the end, is that true or not?

BRAD HANSEN: Sure.

SENATOR CHAMBERS: And you could be answering to any one of a number of things.

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BRAD HANSEN: I understand.

SENATOR CHAMBERS: If this bill or any other methodology were used to get rid of these people who hold this position as deputy state sheriffs at the Department of Corrections right now, if there is alleged criminal activity that implicates employees or inmates, the same means for investigating those alleged events will exist that existed prior to the implementation of this state deputy sheriff program out there. Is that true?

BRAD HANSEN: You're correct.

SENATOR CHAMBERS: And who would be investigating alleged criminal misconduct?

BRAD HANSEN: Those would be referred to the Nebraska State Patrol.

STATE CHAMBERS: And you gave it as your opinion that these deputy state sheriffs free up members of the State Patrol to do other things. Is that correct?

BRAD HANSEN: They assist the State Patrol in criminal activity, investigating criminal activity that occurs within the Department of Corrections, yes.

SENATOR CHAMBERS: Did the State Patrol ask that these deputy state sheriffs be appointed at the Department of Corrections?

BRAD HANSEN: I don't know that because I wasn't involved in the decision-making.

SENATOR CHAMBERS: Are you familiar with the bill that I discussed earlier that had been introduced in 1999 where the department was seeking law enforcement status for certain of their employees?

BRAD HANSEN: Only familiar because I read it before I came in.

SENATOR CHAMBERS: Were you here in 1999?

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BRAD HANSEN: Yes, I was.

SENATOR CHAMBERS: Okay. But having read it, you know that this committee unanimously rejected that proposition by voting to kill it. You're aware of that?

BRAD HANSEN: I understand that from testimony today, yes.

SENATOR CHAMBERS: And the one who brought that bill was the Speaker of the Legislature so despite the fact that the Speaker brought it and that Mr. Clarke when he testified said they were only interested in conduct that occurred on the premises. They did not want to leave the premises or go into the community or anywhere else. Even with those assurances we voted to kill it. Now, if these positions are taken away from the Department of Corrections, what will be the role and function of the persons currently serving in those positions?

BRAD HANSEN: They would...I don't know. I wouldn't be the decisionmaker there but my anticipation would be that they would be, go back to be able to bid into other duties.

SENATOR CHAMBERS: As corrections people.

BRAD HANSEN: Sure.

SENATOR CHAMBERS: And that's what they were before they went to train at the Law Enforcement Academy?

BRAD HANSEN: Both were. Um-hum.

SENATOR CHAMBERS: And how long after they received their training did they embark upon their investigatory work?

BRAD HANSEN: They started training June 1, 2003. I think they started somewhere in the middle of October, first of November, somewhere, about the time that we met with the State Patrol and worked out an agreement with them on who's going to be lead investigators under what circumstances?

SENATOR CHAMBERS: So how long after they finished their law enforcement training would you say that was?

BRAD HANSEN: A month, month and a half.

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SENATOR CHAMBERS: A month? And sometimes they were just let loose to investigate as they saw fit.

BRAD HANSEN: They would...we would get indications or information from the institutions of possible criminal activity and then we would assign them a case.

SENATOR CHAMBERS: Would there be occasions when an inmate may have filed a complaint with the ombudsman's office and one of these investigators would say or Mr. Green would say, there is a criminal investigation underway by our state deputy sheriff so we're not going to reveal information to you on that case? Has that occurred?

BRAD HANSEN: Criminal activity, if it was an ongoing case, yes.

SENATOR CHAMBERS: Now in the old days if the State Patrol was conducting an investigation, it would be for the State Patrol to say whether or not their investigatory findings or their investigation would allow them to release information to the ombudsman's office. Is that true?

BRAD HANSEN: Yes.

SENATOR CHAMBERS: The department could not speak for the State Patrol in that regard, could they?

BRAD HANSEN: No, we couldn't.

SENATOR CHAMBERS: So even though there was an independent criminal investigation by the State Patrol, the ombudsman would still be entitled to information to investigate the complaint of the inmate even if he were the subject of this other investigation, isn't that true?

BRAD HANSEN: It's true.

SENATOR CHAMBERS: But now by having these people declared deputy state sheriffs, they can be the ones conducting the investigation and tell the ombudsman's office since we have this criminal investigation going, we will not release this information. Isn't that true?

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BRAD HANSEN: It's true.

SENATOR CHAMBERS: And that's about all that I will ask you. Mr. Hansen, thank you, you've been cooperative.

BRAD HANSEN: Thank you.

SENATOR CHAMBERS: I think to the best of your knowledge and understanding, you've been forthright.

BRAD HANSEN: Thank you.

SENATOR BOURNE: Other questions? Senator Combs.

SENATOR COMBS: I just want to say, I've learned a lot about this and I appreciate it. And I got to say because I want this on the record, that this angers me, it sickens me and it scares me. What I know about corrections from the visits I've made there with Dwite and talked to people that work there, that this could happen to someone if this is, in fact, the facts as they were given. How many cases similar to this have you handled as a result of the investigations of your two deputies?

BRAD HANSEN: Similar to?

SENATOR COMBS: This situation.

BRAD HANSEN: This one here?

SENATOR COMBS: Yeah.

BRAD HANSEN: There's nothing similar to that one.

SENATOR COMBS: So, in his questioning as to knowing what you would be prepared to talk about, would it not seem appropriate if you only have one situation that this bill is drafted to address, that that would be it, the Hoyle's case?

BRAD HANSEN: Well, we've had other staff that we've conducted criminal investigations on but this particular case, what I was talking about, there's nothing, when it involves computer we haven't had anything...

SENATOR COMBS: Okay.

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BRAD HANSEN: ...that rise to that level. That's what I meant by that.

SENATOR COMBS: Okay.

BRAD HANSEN: We have investigated other staff. In fact, it can be an issue within the Department of Corrections, staff committing criminal activity as I know the senators realize that. And one of the things I know as a department, staff like that can really cause security issues within the department. And really as employees, our professionalism is attacked, I think, when we have staff who are dirty. So, yes, we have had other staff investigations, yes. But not like that.

SENATOR COMBS: Any questionable ones. This is a problem situation. How many problem situations? I know you do things and you investigate and they're guilty and whatever. But how many problem situations similar to the Hoyle case have you had?

BRAD HANSEN: Of criminal investigations, I suppose every employee would think it'd be a problem case if you got the opinion of the employee. Lots of...

SENATOR COMBS: I guess legally...

BRAD HANSEN: ...lots of cases that we've investigated, the employee has admitted criminal activity so that's not...

SENATOR COMBS: So that you didn't get into the legal realm. Is this the only situation based on their activity that's ended up in the legal realm?

BRAD HANSEN: No, we've had lots of people who have gotten felony time, in particular, staff who have had sex with inmates which is a felony and bringing contraband into the institutions.

SENATOR COMBS: I think that's all but I do want to say one more thing for the record and that is, I'm very disappointed. I hope that with new people coming into the corrections system that something can happen to turn around just the things that I have seen and, you know, I stand to

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be corrected but this is a great injustice that I've heard here today if the facts are as they have been stated. Thank you.

BRAD HANSEN: Um-hum.

SENATOR BOURNE: Further questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. A couple things. One of them, two of them are investigators and the others are what?

BRAD HANSEN: Transportation officers.

SENATOR Dw. PEDERSEN: Is not by law your people that work for you and the guards able to carry guns?

BRAD HANSEN: Not the officers who work in the institutions, no.

SENATOR Dw. PEDERSEN: But they are trained to use guns.

BRAD HANSEN: Yes.

SENATOR Dw. PEDERSEN: When they escorted inmates to court hearings and medical appointments and stuff to that, prior to these deputy sheriffs they carried sidearms.

BRAD HANSEN: Um-hum. You mean the correctional officers who transported?

SENATOR Dw. PEDERSEN: Yes.

BRAD HANSEN: No, they don't carry sidearms.

SENATOR Dw. PEDERSEN: Did they carry any kind of arms?

BRAD HANSEN: No. If there was a high-risk inmate like from a secure institution that they were taking to court, we would ask the State Patrol to have a chase vehicle provide armed support. These particular people are transporting...picking up escapees and inmates who are being extradited from other states.

SENATOR Dw. PEDERSEN: Who did that before we had the...

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BRAD HANSEN: I don't know. They've been in existence since 1983.

SENATOR Dw. PEDERSEN: What happened with the inmate in Tecumseh, the guy that was doing life who escaped?

BRAD HANSEN: Inmate McGuire?

SENATOR Dw. PEDERSEN: Was there a chase car in that event?

BRAD HANSEN: Not from the department. There was a department vehicle, two staff that were taken hostage.

SENATOR Dw. PEDERSEN: Was there a highway patrol called because he was a high-risk inmate?

BRAD HANSEN: No, they were taking him down, and he was not considered...apparently. I guess I shouldn't answer for that because the warden makes that decision. But there was not armed escort on that particular case.

SENATOR Dw. PEDERSEN: How long have you been with the department?

BRAD HANSEN: Since 1977.

SENATOR Dw. PEDERSEN: And what has been your background?

BRAD HANSEN: I started as a correctional officer and then was an administrative assistant, then was a unit administrator at the penitentiary and Lincoln Correctional Center. And then in 1995, we started the Emergency Preparedness Program and I got assigned to that duty.

SENATOR Dw. PEDERSEN: With your type of background and training, wouldn't you have probably indicated that that man was a serious criminal?

BRAD HANSEN: (laugh) I don't know.

SENATOR Dw. PEDERSEN: High risk?

BRAD HANSEN: I just hate to...I don't know the classifications to...

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SENATOR Dw. PEDERSEN: He escaped before, didn't he?

BRAD HANSEN: Yes, I do know that he escaped from the penitentiary four years ago. But I don't know...I just would hate to speculate because I don't know what his record was from that point to this point and those kinds of issues.

SENATOR Dw. PEDERSEN: Coming back to this case, I just wanted to know if you were aware of these officers calling up family members of inmates and threatening them?

BRAD HANSEN: I know nothing of that.

SENATOR Dw. PEDERSEN: I'll give you a case and I won't give you the name to protect him but it's a young man whose mother came to visit him at OCC, Omaha Correctional Center.

BRAD HANSEN: Um-hum.

SENATOR Dw. PEDERSEN: And she was abruptly taken out and searched because there was some indication that she might have been bringing tobacco into the facility. And she was sent home and then she was called two different times and told when to come out there and she didn't come out there. They were going to put her son in the hole, in the control unit. Intimidated her. Said they would come down to north Omaha, grab her and arrest her and then put her son in the hole. Do you think that's good practice?

BRAD HANSEN: No.

SENATOR Dw. PEDERSEN: That did happen.

BRAD HANSEN: Was that one of our two...

SENATOR Dw. PEDERSEN: Yes.

BRAD HANSEN: ...certified?

SENATOR Dw. PEDERSEN: Your two investigators.

BRAD HANSEN: Okay.

SENATOR Dw. PEDERSEN: She was wanting to come here and

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testify today but she was too intimidated.

SENATOR BOURNE: Thank you. Further questions? Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Thank you for your testimony this afternoon. What are the names of these two investigators?

BRAD HANSEN: Geoff Britton, G-e-o-f-f B-r-i-t-t-o-n and Benny Noordhoek, N-o-o-r-d-h-o-e-k.

SENATOR FLOOD: And you testified earlier that you're their direct supervisor. Is that correct?

BRAD HANSEN: Yes, sir.

SENATOR FLOOD: How often do you evaluate Mr. Noordhoek and Mr. Britton in a one-year period?

BRAD HANSEN: One year. That's what we're required to evaluate employees every year.

SENATOR FLOOD: And how long have these two individuals been under your supervision as a supervisor?

BRAD HANSEN: Well, since they started in June of 2003.

SENATOR FLOOD: How many times have you had the opportunity to evaluate Mr. Britton and Mr. Noordhoek?

BRAD HANSEN: It should have been twice, yes.

SENATOR FLOOD: And approximately when were those evaluations?

BRAD HANSEN: Mr. Britton's is coming up for his second one within the month. We do it according to their hire date with the Department of Corrections and I...

SENATOR FLOOD: So you've only interviewed Mr. Britton once and you're anticipating another one.

BRAD HANSEN: Yes.

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SENATOR FLOOD: So you'd like to correct your testimony that you evaluated them twice.

BRAD HANSEN: Well, yes, okay. If...if...you're correct. Yeah.

SENATOR FLOOD: Okay. And during these evaluations, what types of matters do you discuss with Mr. Britton and Mr. Noordhoek?

BRAD HANSEN: We talk about the ethical conduct, the kind of reports they do, how they react to cases and meeting with State Patrol. Now that's the formal evaluation. I meet with them basically daily because they have an office right next to me.

SENATOR FLOOD: Have you ever shared any concerns about their ethical performance or job responsibilities or duties with Mr. Britton or Mr. Noordhoek, either at an evaluation or on any day that they've been under your supervision?

BRAD HANSEN: No.

SENATOR FLOOD: You've never had a problem with these two individuals?

BRAD HANSEN: No.

SENATOR FLOOD: Have you ever received a complaint other than those lodged today from the Hoyle family with regard to Mr. Hoyle's criminal predicament?

BRAD HANSEN: I have never received a complaint.

SENATOR FLOOD: Did this matter with Mr. Hoyle really start with a picture of a monkey?

BRAD HANSEN: This matter started with the Information Services Department. There was a...the picture is right...

SENATOR FLOOD: I guess maybe I should rephrase.

BRAD HANSEN: Okay.

SENATOR FLOOD: When I ask you a yes or no question, if you

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could respond in a yes or no fashion, that would be appreciated. Did this start with the picture of a monkey?

BRAD HANSEN: Yes.

SENATOR FLOOD: Okay. Thank you. Do you see...okay, if you take a look at the testimony we've received today and it is possible we received one-half of the story. Do you see where this committee could make a decision that there is some value to having an independent agency conduct law enforcement investigations inside that prison rather than the state deputy sheriff arrangement that we currently have in place? Do you see any value to that? Would you imagine we would see value to that given what we've heard?

BRAD HANSEN: I do see value in that and that's the way our policy is written up too.

SENATOR FLOOD: But I think it's been your testimony today that the independent services of the State Patrol take a backseat to the investigations performed by the state deputy sheriffs. Is that true?

BRAD HANSEN: It doesn't take a backseat. We receive direction from the State Patrol. They're informed on what we're doing and they say, okay, go ahead and do it.

SENATOR FLOOD: But yet you're the supervisor, is that correct?

BRAD HANSEN: Yes.

SENATOR FLOOD: Do you know what the...okay, I should ask you, what crime was Mr. Hoyle charged with?

BRAD HANSEN: I couldn't tell you the exact statute but it was, as he said, it was the stoppage of services within the Department of Corrections for computers.

SENATOR FLOOD: But you don't know what crime he was charged with?

BRAD HANSEN: Not the exact statute, no.

SENATOR FLOOD: Could you see where maybe I, as a state

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legislator, would be interested in you knowing facts about a case that you supervised the investigators of?

BRAD HANSEN: I could see that, yes.

SENATOR FLOOD: And you don't know what felony Mr. Hoyle was charged with?

BRAD HANSEN: Not the state statute, no, I don't.

SENATOR FLOOD: Okay. There was some testimony earlier today from state employees and they were asking us, I believe, and maybe they were just making the statement that they were concerned about retaliation.

BRAD HANSEN: Um-hum.

SENATOR FLOOD: With you on the record at this time, would it be your position that they will not face any retaliation for their testimony here today?

BRAD HANSEN: That's my position that they will not.

SENATOR FLOOD: Okay. Thank you. I have no further questions and I thank you for your honesty.

BRAD HANSEN: Thank you.

SENATOR FLOOD: Appreciate it.

SENATOR BOURNE: Further questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: I have one more, Senator Bourne. Sir, did your department have anything to do with investigating the fiasco about the lady who was allowed to embezzle half a million dollars from the Department of Corrections?

BRAD HANSEN: That was the federal government that investigated that.

SENATOR Dw. PEDERSEN: Your department and these investigators had nothing to do with that.

BRAD HANSEN: The department, federal government, asked for

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some assistance on just some records and things like that but it was not our investigation, and we did not participate in it.

SENATOR DW. PEDERSEN: Thank you.

SENATOR BOURNE: Further questions? Mr. Hansen, how many Department of Correction employees are there system wide?

BRAD HANSEN: About 1,500.

SENATOR BOURNE: And these two, in your written testimony, there's five appointed state deputy sheriffs. Two are designated as department investigators and then in the third paragraph it says the department investigators are charged with investigating criminal activity in the department. And so, that would mean those two state deputy sheriffs are charged with investigating the 1,500 correction employees? Is that...?

BRAD HANSEN: If there's criminal activity. There is some, as I said before,...

SENATOR BOURNE: But, I'm sorry,...

BRAD HANSEN: Yes.

SENATOR BOURNE: ...when it says, investigating criminal activity in the department, that means employees. It does not mean if there's criminal activity by the inmates so...?

BRAD HANSEN: No, they investigate inmate criminal activity...

SENATOR BOURNE: As well.

BRAD HANSEN: ...also. Yes.

SENATOR BOURNE: Okay. Further questions? Seeing none, thank you.

BRAD HANSEN: Thank you.

SENATOR BOURNE: Next testifier. Appreciate your testimony. Next testifier in a neutral capacity?

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STEVEN SHAW: (Exhibit 16) Senator Bourne and members of the Judiciary Committee, my name is Steven J. Shaw, S-h-a-w, and I am chief legal counsel for the Nebraska State Patrol, testifying today in a neutral capacity on this bill to provide a little bit of background about the deputy state sheriff commissions in this state. The concept dates back for many years but has been used in recent years to enable personnel of various governmental units to carry out the duties imposed on them. There are several agencies having no arrest powers to carry out their statutory duties to enforce provisions of the law. In fact, even state troopers rely on commissions as deputy state sheriffs for enforcement of certain misdemeanors which are not traffic related. In addition to these agencies, commissions have been granted to tribal police involved in cross-deputization programs, officers involved in multicounty task force operations, to campus police and railroad detectives. And I know Mr. Peters has already testified about the railroad detectives. They're the only nongovernmental people who are appointed as deputy state sheriffs. If an officer holding one of these commissions were no longer able to hold the commission, state troopers or patrol investigators would have to investigate many of the criminal acts which are more within the special expertise of some persons such as a railroad detective or campus police. LB 757, as written, would appear to eliminate most of these commissions. One of the most useful purposes of the commissions is the ability for deputizing individuals to perform enforcement duties outside of their normal jurisdiction. As an example, we currently have agreements with the Winnebago and the Sac and Fox tribal police and are nearing agreements with the Omaha, Santee, and Pine Ridge tribal authorities. As an agency, the State Patrol would suggest any modification of this program include transferring authority to those needing the power conveyed by this commission. If the use of deputy state sheriff commissions is to be limited or eliminated, each of the agencies holding commissions should be properly enabled by the Legislature to carry out their statutory responsibilities. Thank you for giving me this opportunity to testify and I'd be glad to try to answer any questions you may have.

SENATOR BOURNE: Thank you. Questions for Mr. Shaw?
Senator Chambers.

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SENATOR CHAMBERS: Mr. Shaw, from the testimony you've heard today it's clear what the problem is perceived to be that led to the introduction of this bill. Might a simpler approach be to state that no, the Department of Corrections shall have no deputy state sheriffs or something like that and then leave everything else like it is? And we don't have to find out all of the agencies or institutions that currently have these people since they are not the problem that came to us today. And if we did that, we would simply go back to the State Patrol investigating the types of things they investigated prior to these people coming on with the Department of Corrections. Correct?

STEVEN SHAW: That is correct.

SENATOR CHAMBERS: I know you're testifying in a neutral position and I've known you for many years. I think what I first met you, your hair like mine may not have been gray. Have we known each other that long?

STEVEN SHAW: (laughter) Yes, we have, Senator.

SENATOR CHAMBERS: Okay. So I just want people to know that I'm not bushwhacking you or something like that and you know kind of the way I operate. If you were presented, and you don't have to answer this, naturally. But if you were presented with the alternatives of this bill as it's drafted now with maybe an attempt to specify all those agencies that can continue to have these deputy state sheriffs, knowing that we might miss some and if we missed them they couldn't have them. Would you prefer that method or a determination to be made by the Legislature that if these sheriffs, these deputy state sheriffs, at the Department of Corrections are the problem then that should be addressed specifically and leave the rest of it as it is, not that you'd like it.

STEVEN SHAW: My view would really be that the latter would be preferable. If in your determination, there should not be deputy state sheriffs at the Department of Corrections that's something you have the power to do and our only concern is that we have them in a number of other places and with the tribal police, for example, we think that's a really good program. We just hate to see that sort of thing jeopardized and so we'd like to keep those things in place

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if we can.

SENATOR CHAMBERS: So if we would exercise the same kind of discretion the courts do when they say, if you raise a constitutional issue but we can resolve this dispute without getting into the constitutional issues we will because we don't want to go any further than we have to go to solve this problem.

STEVEN SHAW: That would seem like a good plan.

SENATOR CHAMBERS: I'm going to be quite frank with you. Now I don't want you to go out of here and you have to get a bigger size hat (laughter) but I had not seriously considered that approach until I listened to your testimony and you mention so many other areas where these people operate. So I think...I'm of a mind to modify this bill and then maybe undertake a study of the deputy state sheriff operation so at least we can be informed of how widely they're used and it may be a set of circumstances where we want to impose some kind of training or other regulatory requirements since they are so broadly used so that we don't have some instances where like railroad police, they're taking all kinds of training and maybe with some of these others they are. But there could be other situations where they're just there because I don't think the statute even though it gives them the powers of a sheriff, require them to take law enforcement training.

STEVEN SHAW: It does in most instances, Senator. There is an exception for people that do not participate over, I think, it's a hundred hours a year or something. But as a practical matter, we have just had a policy of not deputizing people if they weren't already certified law enforcement officers.

SENATOR CHAMBERS: And your agency is the only one that can do that, I mean that deputizing.

STEVEN SHAW: Yes.

SENATOR CHAMBERS: Okay.

STEVEN SHAW: Well, the governor actually signs those but...

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SENATOR CHAMBERS: Well, yeah, I know, I know, but I meant it's not where an agency says, we want these people and you rubber stamp the fact that they want it. You want to look and be sure that the ones you're deputizing in this fashion have the requisite training as law enforcement people.

STEVEN SHAW: Absolutely.

SENATOR CHAMBERS: I didn't even know that. Thank you.

SENATOR BOURNE: Thank you. Further questions? Excuse me, I'm sorry.

SENATOR CHAMBERS: That's all I have.

SENATOR BOURNE: Further questions for Mr. Shaw? I didn't mean to cut you off.

STEVEN SHAW: No.

SENATOR BOURNE: Seeing none, thank you. Appreciate your testimony.

STEVEN SHAW: You're welcome.

SENATOR BOURNE: Are there further testifiers in a neutral capacity? Senator Chambers, would you mind closing? I think there might be a couple of questions.

SENATOR CHAMBERS: Oh, sure. I mean, yes, I'll close. I don't mind closing. And with the Chair's permission, may I take with me information relative to the next bill?

SENATOR BOURNE: Certainly.

SENATOR CHAMBERS: Ouch. The chair is hot (laughter). I have a chance to see what it's like on this side of the table.

SENATOR BOURNE: Are there any questions for Senator Chambers? Senator Chambers, I have...the state deputy sheriff situation doesn't disturb me as much as the sheriffs at the Department of Corrections.

SENATOR CHAMBERS: Right. Me too.

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SENATOR BOURNE: And I'm struggling as to what to do. I think that, you know, on one hand, you know, the Hoyle's have the means by which to protect themselves but, on the other hand, I think that, you know, we have some obligation to look into this and some people say that you know the legislative rules better than anyone else. Do standing committees of the Legislature have the power to conduct investigations?

SENATOR CHAMBERS: They do and they can issue subpoenas and the rules contain the steps that have to be gone through...

SENATOR BOURNE: But there is a mechanism in our rules that would allow us to look into a situation that...

SENATOR CHAMBERS: Right. I believe so.

SENATOR BOURNE: Thank you. Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Senator Chambers, because this has brought up all the evidence and things we have today and with your knowledge of the law with all the years you've been here, is there anything emergencywise that we can do to ask them to do to suspend this practice immediately until we get a law passed?

SENATOR CHAMBERS: They wouldn't have to do that and my preference is that we go ahead and enact a law because by our specifically rejecting their request did not stop them from circumventing the Legislature. So we've been put in the position where I think the only way we're going to bring the Department of Corrections into the line it ought to be in is to pass a law so I'm going to continue to push for the statute. I'm not sure if I included the emergency clause but if I didn't I will add that to the bill.

SENATOR Dw. PEDERSEN: But you're not concerned with what might happen between now and the time it takes to get a bill passed?

SENATOR CHAMBERS: I'm not going to request them to do anything because they may choose not to. Mr. Chairman, may I take a moment to sign a document that's time-sensitive?

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SENATOR BOURNE: Certainly. If you want me to sign it, I'd be happy to.

SENATOR CHAMBERS: And let (inaudible) know, not one thing more than what I agreed to.

CYNTHIA GRANDBERRY: Yes, sir (laughter).

SENATOR BOURNE: Senator Pedersen.

SENATOR Dw. PEDERSEN: Just to continue, I think it's important why Mr. Hansen is still in the room that this committee is very concerned about what's going on and that they should hopefully take a look at letting this go on any longer than what it's already gone until we can get something done. I say that only as a statement, Senator Chambers.

SENATOR CHAMBERS: Okay.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: Further questions? Senator Chambers, thank you.

SENATOR CHAMBERS: Thank you.

SENATOR BOURNE: That will conclude the hearing on LB 757. Senator Chambers, to open on LB 320.

LB 320

SENATOR CHAMBERS: Thank you. And if there are people who need to leave the room even while they're leaving, I can go on, if you don't mind. I'm Ernie Chambers. I represent the 11th Legislative District. And this bill is LB 320. It is introduced ironically at the request for the Nebraska Department of Correctional Services. But as they say, even a broken clock is right twice a day. This bill was one that I was willing to bring because a situation exists which I think is legitimately addressed by the request of the department. When inmates come into the institution there is existing a list of communicable diseases for which they must be screened. Some of them if a person tests positive for

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would not require an exit screening because they're going to remain positive. The viruses will not leave the system. The current law requires the entry screening and the exit screening. If a person did not test positive upon entering into the custody of the department then upon exit screening that person can be...I mean, upon exiting the custody that person can be screened. But from information that I have, the inmates by and large do not choose to undergo that screening. Since they are leaving the custody of the department there is no coercive force that can be brought to bear to compel them to undergo this screening. The opportunity to be screened will still remain. So if the inmate is interested that can be done. But such screening upon exiting will occur only with the inmate's consent and only if the person has not tested positive prior to leaving. There will be testimony going into the details and specifics of what is behind this and there may be more that you want to know than what I've told you. But if you have questions of me I'm prepared to answer them.

SENATOR BOURNE: Thank you. Questions for Senator Chambers? Seeing none, thank you. First testifier in support.

RANDY KOHL: (Exhibit 17) Hello again. Good afternoon, Chairman Bourne and members of the Judiciary Committee. My name again is Dr. Randy Kohl, K-o-h-l and I'm the medical director for the Department of Correctional Services. I appear before you today in support of LB 320. I would like to thank you, Senator Chambers, for introducing the legislation on behalf of the department. In 2001 the Nebraska Correctional Health Care Services Act was created which created the medical director of the Department of Correctional Services to develop and implement medical treatment protocols for the detection and treatment of communicable diseases. This included provisions requiring inmates to be screened for communicable diseases on entering the department and upon leaving the department's custody. These diseases that were specifically identified in the act for screening are the human immunodeficiency virus, hepatitis A, B, and C, tuberculosis, and sexually transmitted diseases. The department has fully implemented the provisions requiring screening for all communicable diseases upon entry to the department as required by statute and is working to fully implement the screening provisions required on exit. As a medical doctor it is my professional

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opinion that it is not medically indicated to do testing on exit for some of these diseases if an inmate previously tested positive for them such as for HIV, hepatitis B, and hepatitis C. And in the case of tuberculosis, if an inmate previously tested positive as well as if an inmate had been tested within the immediate preceding year, by the way, which is required as part of that bill. The basis for my opinion is that once one of these diseases is contracted an individual will persistently demonstrate positive laboratory findings. It is also my professional opinion that there is no medically indicated reason to test on exit for hepatitis A since this is a disease that is contracted through food and the environment and has a limited period of contagion. The department is experiencing some difficulty with the requirement to test inmates on exits since there are some inmates who are refusing to do so. The department supports exit testing for public health reasons and will endeavor to test all inmates upon exit as appropriate. However, we are seeking to amend the statute to state that screening on exit will not be conducted without inmates' consent so that, in effect, we would only test those inmates who wish to be tested. I'd be happy to answer any questions.

SENATOR BOURNE: Thank you. Questions for Dr. Kohl? Seeing none, thank you. You got off easy (laughter).

RANDY KOHL: I sure did (laughter).

SENATOR BOURNE: Further testifiers in support?

TIM BUTZ: Senator Bourne, members of the committee, Tim Butz, ACLU Nebraska. I'll be honest with you, I'm still reeling from the last public hearing and I'm not going to take up a lot of your time. This bill reflects the reality of prison life. We'd like to believe that there are no diseases communicated in prison but there are. And this bill is consistent with the discussions we had yesterday about DNA testing and how testing, taking samples from people should always be voluntary so with that, if you have any questions. Thank you.

SENATOR BOURNE: Thank you. Any questions for Mr. Butz? Seeing none, thank you. Further testifiers in support? Testifiers in opposition? Testifiers neutral? Senator

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LB 320

Chambers has waived closing. That will conclude the hearing on LB 320 and will conclude the hearings for today. Thank you.