

CRIMINAL LAW AND PROCEDURE SUBCOMMITTEE

Senator Jerry Moran, Chairman

SB 618 - written notice to parents of under 18 drivers of traffic offenses

Senator Yost explained the bill. See Attachment I.

Subcommittee recommended adopting the proposed amendments and report the bill favorably as amended.

SB 629 - criminal procedure; relating to certain traffic infraction cases; method of trial

Requested by Douglas County Judges and others.

No Conferees.

Staff explained the bill.

Jack Pearson, Chiefs of Police, in support.

Subcommittee took no action and had no recommendation.

SB 687 - relating to definition of sodomy

Kyle Smith, Assistant Attorney General. See Attachment II.
Mary Murquia, Assistant District Attorney, Wyandotte County

Subcommittee recommended the adoption of the two proposals and to report the bill favorably as amended.

SB 688 - frisking a suspect

Kyle Smith, Assistant attorney General. See Attachments III & IV.

Subcommittee recommended adoption of the proposed amendment.

SB 711 - creating the crime of criminal battery

Bill Kennedy, Riley County Attorney. See Attachment V.

Subcommittee recommended referring the bill to the Criminal Code Advisory Committee at the Judicial Council.

SB 713 - law enforcement officer use of force in making arrest

Kyle Smith, Assistant District Attorney. See Attachments IV & VI.

Subcommittee recommended the bill favorably.

SB 715 - creating the crime of construction fund fraud

Proponents

Alan Alderson, Mid-America Lumbermen's Association.
See Attachment VII.

Ben Swank, Mid-America Lumbermen's Association.
See Attachment VIII.

James F. Mahoney, Mission Lumber Company, Olathe, Kansas.
See Attachment IX.

Harold Baalman, Mid-America Lumbermen's Ass'n, Wichita, Kansas
See Attachment X.

Art Brown, Mid-America Lumbermen's Association, Kansas City, Missouri

Opponents

Tom Slattery, Associated Contractors of Kansas

Karen France, Kansas Association of Realtors

See Attachment XI.

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February 26, 1990

Senator Eric R. Yost
Vice President of the Senate
Room 128-South
State Capitol Building
Topeka, Kansas 66612

Dear Senator Yost:

I appreciate your prompt response to my concerns regarding notification of parents of minors arrested for traffic offenses. I have reviewed the draft of Senate Bill 618, and have two suggestions.

First, I believe the time and expense of reporting every traffic offense is too great. As the bill is worded, notice would have to be mailed to parents for parking violations. I think that the notification requirement should be confined to serious traffic offenses. (K.S.A. §§8-1566 - 1568 describe serious traffic offenses.) If not confined to serious traffic offenses, the notification requirement ought to be limited to moving violations.

Second, if the notification requirement is limited to serious traffic offenses, I believe it would be most appropriate for the bill to stand alone as K.S.A. 8-1568a, under the "Serious Traffic Offenses" section. If the notification requirement is confined to moving violations, I think the bill logically belongs in K.S.A. 8-2101 to K.S.A. 8-2110, regarding arrests and issuance of citations for traffic violations. I think the bill would fit appropriately as a new subsection (e) to K.S.A. 8-2104 (1989 Supp.).

Although I think parents ought to be notified if their minor child receives any kind of traffic citation, I also think that local law enforcement will oppose a measure that would require such notification on the basis of time and expense. Limiting the bill's notification requirement

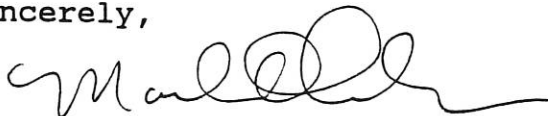
Attach. I
Judiciary Sub Committee
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Senator Eric R. Yost
February 26, 1990
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to serious traffic offenses, or at least moving offenses, should be a compromise that provides parents with the notice they need to exercise the supervision required in the circumstances, yet does not place such a heavy burden on local law enforcement.

Again, thank you for your prompt action. I think this is a bill that will get a lot of support from M.A.D.D. and S.A.D.D. If I can be of any further assistance, please let me know.

Sincerely,



Mark A. Ohlsen
For the Firm

MAO/niw



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
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TESTIMONY

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KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
ON BEHALF OF ROBERT T. STEPHAN, ATTORNEY GENERAL
BEFORE THE SENATE JUDICIARY SUBCOMMITTEE
REGARDING SENATE BILL 687
FEBRUARY 28, 1990

Mr. Chairman and Members of the Subcommittee:

I am Kyle Smith, Assistant Attorney General for the Kansas Bureau of Investigation. On behalf of Attorney General Robert Stephan and his Victims Rights Task Force, I thank you for the opportunity to address you in support of Senate Bill 687.

Senate Bill 687 would amend K.S.A. 21-3506 to specifically delineate those offenses which constitute sodomy to include oral-genital stimulation.

I would encourage you to amend this bill to clarify that the perpetrator could be male or female by deleting on line 26 "of the male" and changing the second "the" to "a" in order to cover female perpetrators of this crime.

This amendment comes to us as the result of a recent Supreme Court Opinion, State v. Moppin, in which our court concluded oral-genital contact, commonly known as cunnilingus, with a five year old girl could not be charged under the aggravated sodomy statute, a class B felony, but could instead only be charged under the indecent liberties statute, a class C felony.

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While this conclusion may be justified based on a dictionary definition of sodomy there is no reason that oral sex with a child should be a different crime with different penalties, depending on the gender of participants.

We ask that you pass Senate Bill 687 and allow this conduct to be charged along with the similar types of conduct described in the sodomy statute. Thank you.

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BEFORE THE SENATE JUDICIARY SUBCOMMITTEE
REGARDING SENATE BILL 688
FEBRUARY 28, 1990

Mr. Chairman and Members of the Committee:

On behalf of Attorney General Robert T. Stephan, I am here in support of Senate Bill 688, which like Senate Bill 713, can be described as a remedial update of a Kansas statute to bring it into compliance with current case law. K.S.A. 22-2402, commonly referred to as a 'stop and frisk law', is a codification of the U.S. Supreme Court's holding in Terry v. Ohio, a 1968 case providing for a pat-down for weapons of a person temporarily detained where the officer reasonably suspects that personal safety requires it. However, in that codification, the statute refers to a "search" of the person rather than a pat-down or frisk.

This variance with the case law was brought to the attention of the Attorney General's Office by Larry Welch of the Kansas Law Enforcement Training Center and Victor Marshall, Director of Public Safety in El Dorado. The concern is that the term 'search' suggests a much broader authority than what is really granted under the constitutional requirements of a Terry stop. To avoid the possibility of an officer conducting a full search of a suspect rather than the pat-down or frisk

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that is authorized, we have requested this change in K.S.A. 22-2402 so that the extent of the intrusion authorized is made clear.

I would be happy to answer any questions.

III 2/2



February 28, 1990

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Region V
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DARIEL HINSDALE
Region VI
Liberal

The Honorable Wint Winter
Kansas Senate
State Capitol, 120-S
Topeka, Kansas 66612

Dear Senator Winter,

My purpose in writing is to convey to the Senate Committee on Judiciary that the Kansas Association of Chiefs of Police supports the passage of Senate Bills 688 and 713. Both of these bills represent changes of a technical nature in the existing statutes, which will bring the law into compliance with court rulings.

Senate Bill 688 amends K.S.A. 22-2402 concerning "stop and frisk". If enacted, the change would reduce the level of intrusion on the person and property of an individual stopped by a police officer. The law is necessary for the safety of the law enforcement officer, but should not be worded to allow a complete search of the citizen.

Senate Bill 713 amends K.S.A. 21-3215 concerning the use of force in making an arrest. These changes clearly articulate that an immediate threat to the life of the officer or a citizen must be present to employ lethal force.

Because these bills are technical in nature, I did not feel it necessary to actually provide testimony during the hearing. But, I did want the Committee to be aware of the Association's stance on these issues.

Sincerely,
Jack C. Pearson
Jack C. Pearson
Legislative Chairman

Attachment IV

2-28-90



GABRIELLE M. THOMPSON
SUE L. LAKE
BREN ABBOTT
Assistant Riley County Attorneys

Office of the Riley County Attorney

WILLIAM E. KENNEDY III
Riley County Attorney

Carnegie Building
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Manhattan, Kansas 66502
(913) 537-6390



GENIECE A. WRIGHT
Legal Specialist

2-28-90

February 27, 1990

Senate Hearing Committee
Jerry Moran, Chairperson
Topeka, Kansas

Re: Senate Bill 711

MEMORANDUM OF TESTIMONY

Aggravated battery, K.S.A. 21-3414, a C Felony, is often a difficult statute to prove in Court as it is a "specific intent" crime. Very often this element of specific intent becomes very difficult to prove in hindsight, especially in the typical bar fight scenario. In Riley County we have had several cases wherein different prosecuting attorneys have failed to convince the Jury of the specific intent element. The result of this has been that the defendant has been found guilty of simple battery, a B level misdemeanor.

The intent of the statute of criminal battery is to delete the element of specific intent, yet to allow the trier of fact to infer felonious behavior upon proof of (a) unlawful touching or application of force; (b) to the person of another; (c) in a manner whereby great bodily harm, disfigurement, dismemberment, or death can be inflicted. The crime becomes especially applicable in cases such as street fights, where as so often happens in Aggieville, A hits B, and B falls, striking his head on concrete, or where A becomes suddenly angered and outraged at something that B does and strikes B with something such as a mug or a bottle.

In my opinion, Senate Bill 711 would also be greatly appropriate if a case is in a plea bargaining posture, as it would allow a prosecutor to permit a first time defendant to plead guilty to a felony in a case where the specific intent of aggravated battery is not clearly present, rather than the prosecutor being required to reduce the charge all the way down to a B misdemeanor from a C felony.

The act is similar in philosophy to involuntarily manslaughter, "the unlawful killing of a human being, without malice, which is done unintentionally in the wanton commission of an unlawful act not amounting to a felony, or in the commission of a lawful act in an unlawful or wanton manner," a class D felony, and to aggravated vehicular homicide, K.S.A. 21-3405(a), "the unintentional killing of a human being, without malice, which is done while committing a violation of K.S.A. 8-1566, 8-1567, or 8-1568". The act is appropriately placed one level below those two crimes in seriousness, being currently classed as a E felony.

Senate Bill 711 is subject to similar defenses as the crime of aggravated battery, except for the specific intent mode. By its existence it puts people on notice that vicious actions which could result in great bodily harm are felonious.

Attachment I

2-28-90

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KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
ON BEHALF OF ROBERT T. STEPHAN, ATTORNEY GENERAL
BEFORE THE SENATE JUDICIARY SUBCOMMITTEE
REGARDING SENATE BILL 713
FEBRUARY 28, 1990

Mr. Chairman and Members of the Committee:

I am pleased to appear in support of Senate Bill 713 which can be described as a remedial update of K.S.A. 21-3215. This statute sets out the criteria to be used by law enforcement officers in applying force to make arrests. However, in 1985 the United States Supreme Court in the case of Tennessee v. Garner ruled as unconstitutional a similar Tennessee statute. Like K.S.A. 21-3215 the Tennessee statute authorized the use of lethal force in apprehending any fleeing felon. The court ruled that the Fourth Amendment prohibits the use of deadly force to prevent the escape of a suspected felon unless the officer has probable cause to believe that the suspect poses a danger to the officer or others. In other words, that the fleeing felon has committed a dangerous felony.

Senate Bill 713 simply brings the Kansas statute into compliance with this constitutional mandate and cleans up some of the gender-based language that currently appears in the statute.

I would be happy to answer any questions.

Attachment VI

2-28-90

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2-28-90

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MEMORANDUM

TO : Members of the Senate Judiciary Subcommittee on Criminal Law
and Procedure
FROM : Alan F. Alderson, Attorney, Kansas Lumber Dealers Association
RE : Senate Bill No. 715
DATE : February 28, 1990

In order to appropriately use the time allotted to us at this subcommittee hearing today, I want to provide you with an opportunity to hear from those persons who are present today and who are in a better position than I to tell you why this legislation is necessary.

I would first like to introduce Mr. Ben Swank, an attorney practicing in Kansas City, Missouri who represents the Association. Mr. Swank is an expert on mechanic's lien laws and understands and can explain the purpose and need for Senate Bill No. 715. Mr. Swank will also present some minor amendments to clarify Senate Bill No. 715 and is prepared to answer questions regarding the substance of the bill.

Following Mr. Swank's presentation, he will introduce some lumber dealers who are present to testify today and who can explain to you the factual situations which necessitate this type of legislation. Finally, Art Brown, Regional Director for the Association, will summarize and entertain further questions. We thank you for this opportunity to appear today and we urge your favorable consideration of Senate Bill No. 715.

Attachment VII

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Proposed amendment

SENATE BILL No. 715

By Committee on Judiciary

2-20

Attachment IIII
11
09-8-90
2-28-90

9 AN ACT concerning crimes and punishment; creating the crime of
10 construction fund fraud; prescribing penalties therefor.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) Construction fund fraud is the willful and knowing
14 failure of an owner, contractor, owner-contractor or subcontractor to
15 pay invoices received from or contractual obligations to its contrac-
16 tors, subcontractors, materialmen or laborers for materials, work or
17 labor furnished for real property improvement within 30 days of final
18 receipt of all construction funds due such owner, contractor, owner-
19 contractor or subcontractor.

20 (b) As used in this section, construction funds shall include con-
21 struction loans to owners and owner-contractors and all sums paid
22 or to be paid to contractors or subcontractors.

23 (c) Failure to pay an invoice or contractual obligation shall not
24 be considered a violation under this section if within the 30-day
25 period provided in subsection (a) the invoice or contractual obligation
26 is the subject of a good faith detailed written notice of dispute served
27 by certified or registered mail, return receipt requested, on [the
28 project [owner] and the claiming contractor, subcontractor, materi-
29 alman or laborer, or the obligor has filed a proceeding under the
30 United States bankruptcy act.

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owners

31 (d) If the owner, contractor, owner-contractor or subcontractor
32 is a corporation or any entity other than an individual, such cor-
33 poration and other entity and its managing officers shall be respon-
34 sible for adhering to the requirements of this section and shall be
35 subject to the provisions of subsection (f).

36 (e) Nothing in this section shall replace or in any manner affect
37 the mechanic's or materialmen's lien remedy provided by law nor
38 shall the filing of a lien affect the requirements of this section.

39 (f) Construction fund fraud in an amount in excess of \$5,000 on
40 any one project is a class E felony. Construction fund fraud in the
41 amount of \$5,000 or less on any one project is a class A misdemeanor.

42 Sec. 2. This act shall take effect and be in force from and after
43 its publication in the statute book.



2-28-90

Mission LUMBER COMPANY

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February 28, 1990

Judiciary Committee
Jerry Moran, Vice Chairman
Lana Oleene, Member
Paul Feleciano, Member
Frank Gaines, Member
Marge Petty, Member
Dave Kerr, Member

Re: Senate Bill No. 715

Dear Senators,

I am in favor of Senate Bill No. 715 because:

The obligation of the debt would be on the party that made the charges.

This bill would limit the parties involved in construction to more responsible types.

Bill 715 would reduce the number of Mechanic Liens that have to be filed on innocent property owners.

This bill would improve the quality of workmanship going into housing projects.

Yours truly,

James F. Mahoney
James F. Mahoney
Vice President

See
Attachment IX
2-28-90

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I

GOOD AFTERNOON, MY NAME IS HAROLD BAALMANN AND I AM THE CHAIRMAN OF THE KANSAS LEGISLATIVE COMMITTEE OF THE MID AMERICA LUMBERMANS ASSOCIATION. I HAVE BEEN IN THE WHOLESALE AND RETAIL LUMBER BUSINESS FOR TWENTY-TWO YEARS. DURING THE LAST 14 YEARS I HAVE OWNED AND OPERATED THE B & B LUMBER COMPANY, INC. IN WICHITA, KANSAS.

MY BUSINESS IN WICHITA DOES A MULTI MILLION DOLLAR ANNUAL SALES VOLUME, OF WHICH 65% IS CONTRACTOR SALES AND 35% IS OVER THE COUNTER OR DO IT YOURSELF TYPE SALES.

MANY ISSUES HAVE BEEN DISCUSSED IN OUR LEGISLATIVE COMMITTEE MEETINGS AND OF THOSE ISSUES NONE HAS EVEN COME CLOSED TO PROVOKING THE DISCOMFORT CAUSED BY CONSTRUCTION FUND FRAUD.

OUR MOTIVE IS SIMPLE: WE WANT TO GET PAID FOR OUR MATERIAL AND SERVICES AND PAID ONLY FOR WHAT IS DUE US. FILING LIENS OR INITIATING A SUIT ON A CONSUMER WHO HAS ALREADY PAID HIS BILLS IS WRONG AND UNFAIR. MANY CONSUMERS TODAY DEMAND THAT A JOB BE BID COMPLETE. THEY ACTUALLY ARE HIRING THE CONTRACTOR'S EXPERTISE TO PURCHASE MATERIALS. CONTRACTORS IN TURN BID TURN KEY JOBS, THAT IS, GIVE ONE PRICE FOR THE COMPLETED JOB AND DO NOT SEGREGATE MATERIALS AND LABOR CHARGES FOR THE CONSUMER. WHEN THE CONSUMER PAYS THE CONTRACTOR AT THE COMPLETION OF THE JOB HE SHOULD HAVE EVERY RIGHT TO EXPECT THAT THIS FULFILLS HIS OBLIGATION AND RESPONSIBILITY TO ALL PARTIES INVOLVED. GENTLEMEN, I FOR ONE AM SICK AND TIRED OF HAVING TO EXPLAIN TO A CONSUMER THAT THE LAWS IN THE STATE OF KANSAS GIVES ME LITTLE RECOURSE BUT TO FILE LIEN ON

Attachment X
2-28-90 1/3

HIS PROPERTY TO INSURE PAYMENT WHEN HE, THE CONSUMER, HAS ACTED IN GOOD FAITH AND PAID THE CONTRACTOR FULLY. THIS IS SIMPLY NOT RIGHT, BUT IN TODAY'S BUSINESS CLIMATE LENDING INSTITUTIONS, ETC. ARE GIVING US VERY LITTLE CHOICE. WE MUST KEEP OUR ACCOUNTS RECEIVABLES CLEAN AND TAKE ACTIONS TO PROTECT OURSELVES.

THE BOTTOM LINE IS SIMPLY THIS: THERE ARE MANY MANY GOOD REPUTABLE CONTRACTORS IN KANSAS. FEW IF ANY OF THESE CONTRACTORS BAT A THOUSAND AND MAKE MONEY ON EVERY JOB THEY DO. BUT, REGARDLESS THEY PAY THEIR BILLS ON TIME AND KEEP GOOD BUSINESS RELATIONSHIP WITH THEIR SUB CONTRACTORS AND MATERIAL SUPPLIERS AND CUSTOMERS. ALONG WITH THESE REPUTABLE CONTRACTORS THERE ALSO EXIST A CERTAIN GROUP WHO CALL THEMSELVES CONTRACTORS AND LOW BID THE REPUTABLE CONTRACTOR THEREBY DEPRIVING HIM OF WORK. THEY SOON FIND OUT THAT THEY UNDERBID A JOB OR SPENT TOO MUCH OF THEIR CONSTRUCTION LOAN ON PERSONAL ITEMS OR OTHER JOBS IN ORDER TO KEEP THEM AFLOAT. THEY RUN OUT OF CASH AND DELIBERATELY COLLECT MONEY FROM THE HOMEOWNER AND DO NOT PAY THE SUPPLIERS OR SUB CONTRACTORS. THEY SIMPLY LET THE CONSUMER HOLD THE BAG.

ONE LUMBER DEALER FROM A SMALL TOWN IN WESTERN KANSAS TOLD US IN COMMITTEE HOW HIS TOWN WAS SWAMPED WITH ROOFING CONTRACTORS AFTER A HAIL STORM. HE WOUND UP HAVING TO FILE LIENS ON SOME OF HIS NEIGHBORS HOUSES BECAUSE NON PAYMENT OF BILLS. IT TURNS OUT THAT THE CONSUMER HAD PAID THE ROOFERS BUT THE ROOFERS SIMPLY MOVED ON WITHOUT PAYING THE SUPPLIER. DUE TO THE COST OF COLLECTING THE MONIES CIVILLY THE DEALER HAD LITTLE RECOURSE BUT TO FILE THE LIENS AND

III

AND HAVE HIS NEIGHBORS PAY HIM. THIS IS NOT FAIR.

THE PERSON RESPONSIBLE, THE CONTRACTOR, IS JUST AS GUILTY AS IF HE HAD
STOLEN THE MONEY FROM THE CONSUMER OR FROM THE DEALER.

SENATE BILL 715 IS NOTHING MORE THAN A CONSUMER PROTECTION LAW.

I KNOW THIS IS AN EXTREMELY BUSY SESSION OF THE LEGISLATURE. I URGE YOU TO
PASS THIS LAW FOR CONSUMER PROTECTIONISM. IT HELPS ONLY YOUR CONSTITUENTS
WHO ARE HONEST. IT PROTECTS THEM THROUGH A CRIMINAL LAW FROM UNSCRUPULOUS
INDIVIDUALS WHO CALL THEMSELVES CONTRACTORS BUT ACTUALLY ARE COMMON
THIEVES.

SENATE BILL 715 IS A BILL THAT YOU CAN BE PROUD OF AND YOU WILL HAVE SERVED
THE PEOPLE OF KANSAS WELL BY IMPLEMENTING IT INTO LAW.

SENATE
JUDICIARY SUBCOMMITTEE ON CRIMINAL LAW AND PROCEDURE
SB 715

FEBRUARY 28, 1990

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

My name is Janet Stubbs, Executive Director of the Home Builders Association of Kansas, a trade association representing approximately 2000 members statewide.

I am appearing in opposition to SB 715 and the provision establishing a requirement that one segment of the business community be required to operate in a different manner than other segments.

That requirement is payment of an invoice within 30 days or be subject to a class E felony for invoices over \$5,000 or a class A misdemeanor for the same violation, if the amount due is \$4,999 or less.

Our opposition is not an endorsement of contractors not paying their bills, but rather to the singling out of one industry or one type of purchase.

Ignoring the target of this legislation, the contractors, and turning our attention to the individual citizen who purchases material, misses paying his invoice within 30 days only to find that he/she is subject to confinement in the county jail for a maximum of 1 year or a minimum of 1 to 5 years imprisonment.

I do not believe the customers of a supplier or sub-contractor should be subject to criminal penalties for invoices outstanding for over 30 days unless customers of other merchants or manufacturers are treated in the same manner. Prudent business practices should be exercised by all businesses whether they are dealing with contractors or some other type business.

I urge you to take no action on S.B. 715.

Attachment VI
2-28-90
1/1