

SENATE JUDICIARY
COMMITTEE NO. 12
DATE 1/21/11
BILL NO. SB 106

Jason S. Priest

From: O'Connell, Sue [SOConnell@mt.gov]
Sent: Tuesday, December 21, 2010 4:01 PM
To: 'Jason Priest for Senate'
Subject: LC 1483 Concern

Hi, Sen.-Elect Priest,

As mentioned in an e-mail sent yesterday, I've been looking into the issue of whether your request for a bill requiring the attorney general to join the Florida lawsuit would be a violation of the constitutional separation of powers. That concern was raised by the attorney general's office.

In looking into this matter, I didn't find a court case that would appear to set a precedent on this question.

However, it appears that an argument could be raised that the bill would violate the separation of powers provision in Article III, Section 1 of the Montana Constitution. This article states that "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Article VI, Section 4 outlines the duties of the executive branch. Subsection (4) of this section states: "The attorney general is the legal officer of the state and shall have the duties and powers provided by law."

It's possible that a question could arise over whether your bill attempts to exercise or override the attorney general's powers as the legal officer of the state. However, the duties of the attorney general are also spelled out in law, in 2-15-501. Among other things, the attorney general is "to perform all other duties as required by law." (Subsection 9)

LC 1483, if passed, would be law requiring the attorney general to perform a specific duty. So while an argument could be made that it violates the separation of powers, it also appears as if the Legislature has the ability to outline the duties the attorney general should perform. In addition, bills have been introduced in past sessions instructing the attorney general to take legal action.

I wanted to make sure you had this information before I sent the bill to legal review. If you have any questions, please give me a call or send an e-mail. Or, if you'd like to proceed to legal review, you can just let me know that via e-mail, as well.

Thanks,

Sue O'Connell
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