LEGAL REVIEW NOTE

LC#: LC0507, To Legal Review Copy, as of January 11, 2015

Short Title: Revise laws regarding federal law enforcement communications with county sheriff

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Date: January 16, 2015

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC0507 provides that federal employees who are not Montana peace officers must obtain the written permission of a county sheriff to execute an arrest, search, or seizure in the county where the arrest, search, or seizure will occur, except under certain circumstances. The county sheriff may refuse permission for any reason. Federal employees may exercise one of the enumerated exceptions in the draft by requesting and receiving the written permission of the Montana Attorney General. Similarly, the Attorney General may refuse the request for any reason.

There are several consequences provided in the proposed legislation for noncompliance. For example, as drafted, any arrest, search, or seizure in violation of LC0507 would subject the federal employee to prosecution by the county attorney for kidnapping or various other offenses. A county attorney would be required to prosecute a claim by the county sheriff, and any failure to prosecute could subject the county attorney to recall by the voters and prosecution for official misconduct.

As drafted, LC0507 may raise potential legal issues regarding whether the proposed legislation complies with federal law. The Supremacy Clause of the U.S. Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const., Art. VI, cl. 2. The Supremacy Clause provides that if a conflict between state and federal law exists, federal law controls and state law is preempted. The U.S. Supreme Court has held that "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. National Solid Wastes Mang. Assoc*., 505 U.S. 88, 108 (1992). In addition, the U.S. Supreme Court has held that states must "enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law . . ." *Printz v. U.S.*, 521 U.S. 898, 913 (1997).

The proposed legislation could prohibit federal employees from investigating suspected violations of federal law and potentially enforcing federal law. As such, LC 0507 may raise conformity issues with the Supremacy Clause of the U.S. Constitution. If a federal statute required a federal employee to investigate and enforce a federal law, but the county sheriff refused to grant permission to the employee, the federal agent could not comply with both the state and federal law. The U.S. Supreme Court has held on several occasions that federal preemption exists when "compliance with both federal and state regulation is a physical impossibility". *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *See also McDermott v. Wisconsin*, 228 U.S. 115 (1913). LC 0507 may also prohibit or interfere with a properly issued warrant from a federal judge, which could directly impede federal law enforcement efforts.

The Attorney General of South Carolina provided a more detailed explanation of the legal issues associated with similar legislation introduced in that state in 2011. That opinion may be accessed at:
http://www.scag.gov/wp-content/uploads/2011/12/moore-j-b-os-9359-12-9-11-constitutional-validity-of-proposed-sheriffs-first-legislation.pdf

Requester Comments:

This Legal Note commits a fatal error of overt omission, an omission that leads to a wrong conclusion.

The "Supremacy Clause" of the U.S. Constitution, says, in part, "This Constitution, and the laws of the United States which shall be made *in pursuance thereof* ..." (emphasis added.)

The fatal omission of the Legal Note is the failure to account for or admit the import of the words "in pursuance thereof". These words control to the extent of allowing the Supremacy Clause to apply ONLY to federal laws made with authority granted in the Constitution, specifically in the "enumerated powers."

Alexander Hamilton, at New York's convention: "I maintain that the word *supreme* imports no more than this — that the Constitution, and laws made in pursuance thereof, cannot be controlled or defeated by any other law. The acts of the United States, therefore, will be absolutely obligatory as to all the proper objects and powers of the general government…*but the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding*" (emphasis added).

In Federalist #33, Hamilton added: "It will not, I presume, have escaped observation that it expressly confines this supremacy to laws made pursuant to the Constitution…."

Thomas McKean, at the Pennsylvania convention: "The meaning [of the Supremacy Clause] which appears to be plain and well expressed is simply this, that Congress have the power of making laws upon any subject *over which the proposed plan gives them a jurisdiction*, and that *those laws, thus made in pursuance of the Constitution*, shall be binding upon the states" (emphasis added).

James Iredell, at the First North Carolina convention: "When Congress passes a law consistent with the Constitution, it is to be binding on the people. If Congress, under pretense of executing one power, should, in fact, usurp another, they will violate the Constitution."

It is widely understood and accepted that the states did not delegate the "police powers" to the federal government in the Constitution, but reserved those to the states. If there were any question about this, one merely needs to observe that police powers are not among the enumerated powers the states delegated to Congress, and then refer to the Tenth Amendment to see that the police powers, not having been delegated, were reserved to the states and the people.

Thus, by reading the Supremacy Clause as if the words "in pursuance thereof" had been removed, the Legal Note arrives at an incorrect conclusion.

Another issue that may be raised by critics of the bill, also incorrectly, is that of "qualified

immunity." Under the theory of qualified immunity, federal officers may not be held accountable for any acts under state laws if such officers are acting in their official capacity.

Qualified immunity is a thinly-disguised effort to revive the notorious and discredited "Nurmberg defense" offered by Nazi concentration camp operators of "just following orders."

A qualified immunity objection to this bill will fail on two counts. First, it is no part of the "official capacity" of a federal officer to violate Montana's criminal laws. A federal officer may not rape or rob in Montana and get away with that just because of who the officer's employer may be. Those officers are accountable to Montana justice under Montana law.

Second, this principle was underscored by the Ninth Circuit court of Appeals in *State v Horiuchi*. FBI sniper Lon Horiuchi was charged by Idaho with manslaughter for killing Vicki Weaver at Ruby Ridge, Idaho. Federal attorneys immediately "removed" the case to federal court and pled qualified immunity for Horiuchi. The federal district court judge dismissed the case. Idaho appealed to the Ninth Circuit. The Ninth reversed the district and revived and remanded the case to Idaho for prosecution of Horiuchi. A new Boundary County Attorney had been elected who chose to not pursue the prosecution. However, the Ninth Circuit confirmed the principle that a federal employee may not escape the consequences of violating state criminal law with a claim of qualified immunity.

Provided by Rep. Nancy Ballance