LEGAL REVIEW NOTE

Bill No.: HB 439

LC#: LC 894, To Legal Review Copy, as of December 17, 2024

Short Title: Creating sheriffs' first initiative for cooperation and communication.

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Date: February 10, 2025

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

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.

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).

Legal Reviewer Comments:

HB 439 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 the legislation would subject a 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, HB 439 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.

If a federal agent is charged with a violation of state law, the federal agent can assert a Supremacy Clause immunity defense. In a United State Supreme Court decision dating back to 1890, a federal officer was released from a state criminal charge where the alleged crime arose during the performance of federal duties. *In re Neagle*, 135 U.S. 1, 75-76, 10 S. Ct. 658 (1890). The case law has been expanded since 1890, but ultimately once a Supremacy Clause immunity defense is established the prosecution has no basis upon which to prosecute a federal agent. *Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir. 1977). The defense is established by showing that a federal agent "employed means which he could . . . honestly consider reasonable in discharging his duties." *Id.* at 730.

Likewise, the Supremacy clause immunity defense does not exist when a federal agent "was acting outside the scope of his authority or ... [when] he employed means which he could not honestly consider reasonable in discharging his duties. *Id.* The defense also does not exist if a federal agent acts out of "out of malice or with some criminal intent". *Id.* at 728.

The proposed legislation may hinder federal agents from reasonably discharging duties while enforcing federal law. *See, e.g.,* 18 U.S.C. §§ 3052, 3107 (subpoena enforcement and arrests by FBI agents). As such, HB 439 may raise potential conformity issues with the Supremacy Clause of the U.S. Constitution.

Requester Comments:

This Legal Note makes several errors fatal to its argument.

First, the Note ignores the prime principle of our form of government, dual sovereignty. The Note assumes, as may be taught in law schools favoring a limitless federal government, that the Supremacy Clause empowers the federal government to exercise any power it wishes, notwithstanding state powers and laws. If this were correct, all employees of the federal government would be exempt from state laws criminalizing murder, rape, robbery, and other prohibited conduct. They are not so exempt because of dual sovereignty and states' retention of police powers. There are substantial limits on application of the Supremacy Clause consistent with dual sovereignty.

Second, the Note conveniently ignores the fact that the Supremacy Clause was amended. The effect of an amendment is to change or modify the underlying law that it amends. Whatever the

Supremacy Clause may have meant when adopted, that meaning was amended and changed forever by the Ninth and Tenth Amendments. Those two amendments clarify and assert substantial restraints on application of the Supremacy Clause, an effect the Legal Note seeks to ignore or wish away. That wish is unimpressive as a legal argument.

Third, the 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 Congress 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.

In *Printz v.U.S.,* 521 U.S. 898, 913 (1997), the U.S. Supreme Court declared:

"It is incontestible that the Constitution established a system of 'dual sovereignty.' *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text*, Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Texas v. White*, 7 Wall. 700, 725 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, §3; the Judicial Power Clause, Art. III, §2, and the Privileges and Immunities Clause, Art. IV, §2, which speak of the 'Citizens' of the States; the amendment provision, Article V, which requires the votes of three fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, §4, which 'presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their

sovereign and reserved rights,' *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, §8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' "

The Ninth Circuit Court of Appeals said in *Idaho v. Horiuchi*:

"Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. If [the people's] rights are invaded by either, they can make use of the other as the instrument of redress.

The Federalist No. 28, at 181 (Alexander Hamilton) (C. Rossiter ed., 1961).

We have grown accustomed to relying on the federal government to protect our liberties against the excesses of state law enforcement. Federal prosecutors may bring criminal charges against state police who violate the rights of citizens. See, e.g., *Koon v. United* States, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). Those citizens may also seek redress by bringing private suits in federal court. See 42 U.S.C. §1983. While state prosecutions of federal officers are less common, they provide an avenue of redress on the flip side of the federalism coin. When federal officers violate the Constitution, either through malice or excessive zeal, they can be held accountable for violating the state's criminal laws."

Concerning the issue of qualified immunity for federal officers raised by the Note, that also is not without limits. The reader is referred to the U.S. Supreme Court's decision in *Groh v. Ramirez*, 540 US 551 - Supreme Court 2004. In that decision, SCOTUS clarified that qualified immunity depends on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U. S. 194, 202 (2001). Thus, a federal officer violating the law is not entitled to qualified immunity as a defense against a state prosecution.

In conclusion, by reading the Constitution as if Supremacy Clause words "in pursuance thereof" had been removed, as if the Ninth and Tenth Amendments were absent, and by ignoring the prime principle of dual sovereignty, the Legal Note arrives at an incorrect conclusion. This view may be favored by those who prefer a strong federal government of limitless power, but it is not correct. The Legal Note that relies on the legal philosophy of limitless federal power is also incorrect.