



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MEMORANDUM

DATE: April 27th, 2015
TO: Honorable Val Hoyle, Chair
FROM: Aaron Knott, Legislative Director
SUBJECT: HB 3331 – Authorizing Legislative Assembly to appoint independent counsel

This testimony is presented in opposition to HB 3331.

BACKGROUND

Heightened accountability for Executive Branch officials is a laudable policy goal. HB 3331, as written, creates procedural, substantive and constitutional issues which run the risk of judicial unenforceability.

HB 3331 may create a constitutionally impermissible delegation of authority. The United States Constitution contains no provision that explicitly separates the powers of government. It simply creates three separate branches of government, provides what powers shall be vested in each, and leaves unsaid the notion that the powers assigned to each branch must be kept strictly separate. Unlike the federal constitution, Oregon makes an explicit provision for the separation of powers which mandates strict compartmentalization between the branches. HB 3331 instructs the legislature to order the executive as to how to carry out a function traditionally left to that branch's sole discretion – who to investigate, and why. The curative language at Sec. 1 (4)(a) of the bill, leaving the ultimate discretion with the Attorney General as to whether to proceed following an investigation, does not change the nature of the delegation of power to the legislative branch.

The investigatory procedure required by HB 3331 will impede prosecution. The Attorney General is subject to several procedural constraints in determining the form and extent of an investigation as required by HB 3331. This includes a requirement that the Attorney General make a determination and report the results to the Legislative Assembly not later than the 60th day following the joint resolution commanding the investigation. This creates at least two problems: First, it is not always possible to determine whether a prosecution will be viable within 60 days. Witnesses need to be located, served with process and interviewed, potentially voluminous evidence must be gathered and assessed. While an investigation *may* be completed within 60 days, HB 3331 hazards requiring disclosure of an incomplete investigation. Secondly, the disclosure itself has the potential to be damaging to the viability of any subsequent prosecution. Sec. 3 requires that any disclosure to the legislature be made public by the Attorney

General. This disclosure is required independently of whether it is being made in the best interest of the prosecution, and regardless of how close the case is to indictment. Generally speaking, materials prepared in anticipation of litigation or prosecution are not subject to public records requests (ORS 192.501). This prevents the state from being compelled to disclose the existence of witnesses, evidence and legal strategies to the party being investigated. HB 3331 compels this result prior to an indictment, essentially providing the prosecutor's playbook to the person to be prosecuted and providing easy opportunity for witness tampering and the destruction of evidence.

The required appointment of independent counsel makes neither strategic nor financial sense. HB 3331 requires the circuit court to appoint independent counsel after a preliminary investigation by the Attorney General. Under current law, the Attorney General appoints independent counsel only in the instance of a conflict or in those instances where the Attorney General determines that the specific expertise of an independent counsel makes that person well suited to address an unusual legal problem. The Attorney General retains sole discretion over this appointment. HB 3331 requires the appointment of independent counsel after the completion of a preliminary investigation. The natural assumption is that this step is required out of fear that the Attorney General may not be unbiased. But the Attorney General is already required by ethical standards to appoint a Special Assistant Attorney General (SAAG) in all cases where the Department of Justice is unable to investigate a case without bias. This operates, and will continue to operate, independently of HB 3331. Even assuming, as HB 3331 seems to, that the Attorney General's office cannot be trusted to investigate public corruption cases, HB 3331 nevertheless requires the Attorney General to conduct the initial investigation and then empowers the Attorney General to discontinue that investigation. In this light, it is not clear by what logic the appointment of a special prosecutor is necessary. If the Attorney General is trustworthy, this is a needless expense. If the Attorney General is biased, that bias may still pollute a preliminary investigation or decision to terminate an investigation. The Attorney General has the technical capacity and professional objectivity necessary to investigate public corruption on behalf of the State of Oregon.

The procedure outlined in HB 3331 is likely to damage any investigation initiated on its terms, and at great financial cost. The Department of Justice opposes HB 3331 as written.

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