

# **2024 Senate Select Committee on Judicial Oversight and Reform**

## **Draft Organizational and Planning Outline**

### **Structure and formation**

Senate President Jason Ellsworth is appointing the Senate Select Committee on Judicial Oversight and Reform pursuant to Senate Rule S30-10(4).

Funding: \$35,000 is available via a line item in Program 21 for a select committee on the judiciary. Additional funding sources can be tapped if needed.

### **Membership**

#### **Voting members**

##### *Republicans:*

Sen. Jason Ellsworth (chair)  
Sen. Barry Usher (vice chair)  
Sen. Daniel Emrich  
Sen. Carl Glimm  
Sen. Wendy McKamey  
Sen. Tom McGillvray  
Sen. Steve Fitzpatrick  
Sen. Mark Noland  
Sen. Steve Hinebauch  
Sen. Chris Friedel

##### *Democrats:*

Senate President is consulting with Minority Leader about Democratic members

#### **Non-voting ad hoc members may be added to the select committee**

### **Committee Objectives**

- Create legislation to rein in Montana courts' abuse of power
- Restore coequal power among the three branches of government
- Create legislation to provide more oversight of the judiciary
- Propose changes to legislative rules relevant to court decisions, strengthen Legislative Branch procedure
- Create legislation to improve court processes, ensure fair tribunals, have efficient hearings & decisions on constitutional matters, improve voter information, provide for establishment of good factual records and adherence to constitution on legal questions

### **Initial Topics for Committee's Consideration**

*All items listed as legislation are suggested for discussion, not formal proposals for bills at this point*

#### **1. Committee education and issues overview**

- A. Compare Montana to other states' judicial systems

- B. Review legislation from past few sessions addressing judicial branch issues
- C. Review 2021 Legislature's Special Select Committee on Judicial Accountability and Transparency's report(s)
- D. Review Frontier Institute's analysis of judicial branch problems
- E. Review court decisions on ballot initiative issues in past ~10 years
- F. Review frequency of Montana courts being overturned by federal courts compared to other states

## **2. Authority of Legislative Branch**

### **A. Legislative Rules**

- Why are our rules in statute?
- Bill(s) on timing of vetoes and veto overrides
  - Define exactly when a chamber has possession of a bill
  - Bill defining what qualifies as Legislature being "in" or "not in" session
  - Constitutional amendment on veto override process?
  - Clarify appropriate notice to Legislature regarding a bill being vetoed, method of delivery to the Legislature
  - Clarify chain of custody of every phase of official copy of a bill

### **B. Strengthening legislative oversight/involvement**

- Staffing and legal assistance needs
- Funding and processes for intervening in court cases
  - Are bills passed in 2023 adequate?
- Fix gap in the law identified by the Supreme Court in the recent abortion initiative. Amend Section 13-27-228(1), MCA to make it clear that legislative interim committees always review initiatives, whether an AG finds them legally sufficient or whether they are approved for signature gathering by another method (such as a court order)

## **3. Authority of Judicial Branch**

### **A. Judicial branch involvement in legislative rules**

- Bill to clarify judicial branch lacks authority to interpret or enforce legislative rules unless the rules in question violate the constitution
- Bill to require judiciary to first defer to Legislative Rules Committee or ask committee for a ruling before court can render an opinion on a legislative rules issue
- Bill clarifying the "bad faith" analysis is limited to conduct in the litigation process and not involve legislative process. Also prohibiting evidence of legislative rule violations as part of any "bad faith" analysis
- Bill prohibiting the award of attorney fees for violations of legislative rules

### **B. Forward Montana case award of attorneys fees**

- Cut judicial branch budget?

### **C. Reining in judicial branch power**

- A bill modifying the recall provisions for Supreme Court justices to include situations where a Montana Supreme Court justice voted in favor of a decision which was reversed in whole or in part by the U.S. Supreme Court
- Further revisions to Judicial Standards Commission? (review 2023 legislation)
- Standards for retired judges hearing and deciding cases (also, retirement cannot be end of JSC complaints or other accountability measures, if that retired judge may later hear cases?)
- Separate Montana Bar from judicial branch?
- Prevent “court shopping” and provide for more robust initial district court-level fact-finding, evidentiary records, legal conclusions, etc.
- Clarifying or changing judicial branch’s decisions in ballot initiative matters

### **D. Voter education of judicial candidates**

- Possible bill to allow judicial candidates to run on a partisan basis (all judicial candidates? Supreme Court only? Optional or required?)

## **4. Authority of Executive Branch**

- Bill to prevent recess appointments without confirmation hearings

## **Background on relevant legislative authority**

**5-5-106. Scope and application of legislature investigative powers.** (1) (a) Pursuant to Article V, section 1, of the Montana constitution, the legislative power is vested in the legislature consisting of a senate and a house of representatives.

(b) The constitutional legislative power includes the legislature's broad power to investigate any subject related to enacting law, the implementation of enacted law, and the expenditure of money appropriated by the legislature.

(c) The presumption of constitutionality of legislative actions applies to legislative investigations.

(2) The broad scope and application of the legislature's investigative powers include but are not limited to the power to investigate:

(a) any subject regarding information in connection with the proper discharge of the legislature's function to enact, amend, or repeal statutes, appropriate money, audit state and local government finances and programs, or perform any other act delegated to the legislature by the constitution;

(b) any subject in which there is a legitimate use that the legislature can make of the information being sought;

(c) the management of state institutions and public agencies, as defined in 2-6-1002;

(d) matters concerning the administration of existing laws, proposed laws, or potentially necessary laws; and

(e) matters concerning defects in any social, political, or economic system to remedy those defects.

(3) The application and exercise of the legislature's investigative power must protect the rights of all persons and adhere to all state and federal constitutional protections related to privacy, life, liberty, and property.

**5-5-107. Subpoenas — witnesses — records.** (1) A subpoena requiring the attendance of any witness before either house of the legislature, a committee of either house, a committee established under legislative rules, or a statutory committee or an interim committee may be issued by the president of the senate, the speaker of the house, or the presiding officer of any committee before whom the attendance of the witness is desired.

(2) A subpoena compelling attendance of a witness is sufficient if:

(a) it states whether the proceeding is before the house of representatives, the senate, or a committee;

(b) it states the legislative purpose for issuing the subpoena;

(c) it is addressed to the witness;

(d) it requires the attendance of the witness at a time and place certain; and

(e) it is signed by the president of the senate, the speaker of the house, or the presiding officer of a committee.

(3) (a) In the discharge of its duties, either house of the legislature, a committee of either house, a committee established under legislative rules, or a statutory committee or an interim committee may issue a subpoena to compel the production of a record that is fixed in any medium and is retrievable from a person that is in possession, custody, or control of the record.

(b) A subpoena compelling the production of a record is sufficient if:

(i) it states whether the proceeding is before the house of representatives, the senate, or a committee;

(ii) it states the legislative purpose for issuing the subpoena;

(iii) it provides a description of the records being compelled for production;

(iv) it is addressed to a person;

(v) except as provided in subsection (3)(c), it requires the production of a record at a date and place certain, but not later than 10 business days from receipt of the subpoena; and

(vi) it is signed by the president of the senate, the speaker of the house, or the presiding officer of a committee.

(c) (i) A person that is served a subpoena to produce records that may include confidential information shall notify the presiding officer that signed the subpoena and submit a written notice of denial and a written explanation for the denial pursuant to 2-6-1009.

(ii) A person served a subpoena under subsection (3)(c)(i), may request additional time to produce the records pursuant to subsection (3)(b)(v).

(4) For the purposes of this section:

(a) "confidential information" has the meaning provided in 2-6-1002; and

(b) "person" has the meaning provided in 2-5-103.