HOUSE
RESEARCH
ORGANIZATION bill analysis 4/17/89

HB 1923
Hury

SUBJECT: Separate legal representation of the Legislature

COMMITTEE: State Affairs: favorable, without amendment

VOTE: 12 ayes--Guerrero, Tallas, Cain, Gibson, Harrison, Hilbert, Hury, Jones, Oakley, Perez, Saunders, T. Smith

0 nays

1 present, not voting--Laney

WITNESSES: For--None

Against--None

On--Steve Collins, Legislative Council

BACKGROUND: Art. 4, sec. 22 of the Texas Constitution provides that the attorney general shall represent the state in all state Supreme Court cases to which the state is a party.

Sec. 402.021 of the Government Code provides that the the attorney general shall prosecute and defend all actions in which the state may be interested before the Texas Supreme Court and the courts of appeal. The attorney general also defends employees, members and other officers of state agencies, institutions or departments in certain civil liability actions.

DIGEST: HB 1923 would allow the Legislature to hire outside counsel, or to authorize counsel of a legislative agency, to represent it in state or federal court. The Legislature could authorize these attorneys to file suits, intervene in pending legislation, or take other action to represent its interests. Such representation would require approval by the speaker of the house and president of the Senate or by a concurrent resolution of both houses. The authorization would not apply to representation of the Legislature before the Texas Supreme Court in violation of Art. 4, sec. 22 of the Constitution.

SUPPORTERS SAY: HB 1923 would give the Legislature the option of hiring its own counsel in certain situations involving important issues affecting the state or in matters that present a conflict of interest between the

Legislature and the attorney general. It would not divest the attorney general of the authority to represent the state before the courts but would allow the Legislature to have its own legal representative in appropriate circumstances.

HB 1923 is the same bill as HB 2331 by C. Harris, which the House approved last session. It would not be used to replace or circumvent representation by the attorney general, nor is it intended as criticism of the performance of the current, or any past, attorney general. It specifically would not apply to representation of the interests of the Legislature before the Texas Supreme Court in violation of Art. 4, sec. 22 of the Texas Constitution, so by definition the authority granted by the bill could not be used in cases where it would conflict with the attorney general's constitutional responsibility to represent the state.

As a separate branch of government, the Legislature should not have to obtain permission from the attorney general, a member of the executive branch, when it wants to hire outside counsel. This requirement is based on statutory interpretation; it is not a constitutional requirement.

The upcoming redistricting process presents a situation in which the Legislature might need to use separate counsel to express its point of view. Should the Legislature fail to enact a valid House or Senate redistricting plan during the 1991 regular session, the Legislative Redistricting Board would meet to adopt a plan. Under the Constitution, this board consists of the speaker, the lieutenant governor, the attorney general, the land commissioner and the secretary of state, all representing diverse interests. Those interests could clash if the plans are challenged in federal court -- the attorney general may advocate views that conflict with those of the Legislature and would not be the best party to represent the Legislature's position before the courts.

HB 1923 would also allow the Legislature to express its opinion through friend-of-the-court briefs in major federal lawsuits involving the state. In major cases involving years of litigation, such as the cases affecting the prison system and the mental health and mental retardation systems, attorneys general may be

locked into positions taken by their predecessors. Using outside counsel or legal staff from legislative agencies like the Legislative Council, the Legislature could take positions and raise issues no longer open to the attorney general. Since it is the Legislature that must find the money to pay for any remedies ordered by federal courts, it should at least have the chance to have its say.

The attorney general would still be the official attorney for the state -- HB 1923 would simply allow the Legislature to ensure that its own position is heard through the best possible representation. Having more than one voice at the courthouse would not weaken the state's position. For example, in a recent ruling involving the Public Utility Commission, the Texas Supreme Court agreed that one division of the attorney general's office can represent the PUC in appeals of electric rate decisions, while another division of the same office can challenge those decisions in representing state-agency electric consumers. The courts are more than capable of sorting out the various positions presented and would benefit from hearing a diversity of views.

Although HB 1923 would give the Legislature the option of hiring counsel for a wide range of situations, financial considerations alone would limit the situations in which this authority might be used. It would make no sense for the Legislature to hire trial lawyers for every case in which it is involved when it is being adequately represented by the attorney general. In most cases, the Legislature would likely use in-house counsel already employed by the Legislative Council.

Allowing the speaker and the lieutenant governor to approve legal representation for the Legislature when it is not in session would simply provide a vehicle for making those decisions when the Legislature is not in session, as is done in many other circumstances.

OPPONENTS SAY:

HB 1923 could violate the separation of powers provision of the Texas Constitution and the well-established rule that the attorney general speaks for the state in cases before the courts. In numerous cases the courts have held that the intent of the framers of the Constitution was for the Legislature to pass laws and for the attorney general to represent the

state in court. If the Legislature wants to change this long-standing practice, it should propose an amendment to the Constitution to allow any state body to have its own representation.

The bill could set the stage for a direct conflict between actions of the attorney general, a member of the executive branch, and those of an outside lawyer purporting to represent the legislative branch. This could cause confusion in the courts about who actually represents the people of the state of Texas, which could undermine the state's position. A fragmented state voice in federal court would really be no voice at all.

If the Legislature perceives a conflict of views in a particular situation, it should follow the channels already established for such situations. The Legislature can request the attorney general to allow it to hire outside counsel when there appears to be a conflict of interest or some justification. This is an important check to ensure that the Legislature's actions do not conflict with those of the attorney general, who is the primary legal representative of the state.

In the recent Texas Supreme Court decision involving PUC electric rate cases, the attorney general proved that his office can fairly represent two sides of an issue without creating a conflict of interest. If two sides can be represented by different attorneys within the attorney general's office, then surely that same office can represent the Legislature even when a conflict does arise.

In the case of redistricting, the Legislature has two out of the five representatives on the Legislative Redistricting Board to reflect its interests. The mere possibility that a plan might be challenged in federal court, and that the attorney general would fail to exercise his or her duty to defend it, is an insufficient justification for challenging constitutional precedent and tradition.

Outside representation could be costly for the Legislature if an expensive firm were chosen. Then-Atty. Gen. Mark White drew considerable criticism for hiring outside counsel to write what came to be

known as the "million-dollar brief," and this bill could cause a similar drain on the legislative budget.

Allowing the speaker and lieutenant governor to decide independently to seek outside counsel, even when the Legislature is in session, would put too much power in their hands. There is no guarantee, especially in redistricting cases, that most of the members of the Legislature would hold the same position as the speaker and the lieutenant governor. If Legislature wants to use outside counsel, it should at least be required to put each proposal to a vote of the Legislature as a whole or to some special commission, such as the Legislative Budget Board, with broader representation of the members.

NOTES: The companion bill, SB 1048 by Haley, has been referred to the Senate State Affairs Committee.

Last session the House passed a nearly identical bill, HB 2331 by C. Harris, by voice vote, with 22 members recorded voting nay on third reading. The bill was reported favorably by the Senate State Affairs committee, but it died after a motion to suspend the regular order of business failed by 18-11 to receive the necessary two-thirds vote.