

SUBJECT: Court notice to attorney general of constitutional challenge to state laws

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Smithee, Farrar, Gutierrez, Hernandez, Laubenberg, Neave, Schofield

1 nay — Rinaldi

1 absent — Murr

SENATE VOTE: On final passage, May 1 — 30-1 (Hall)

WITNESSES: *On House companion resolution, HJR 45:*  
For — (*Registered, but did not testify:* Lee Parsley, Texans for Lawsuit Reform)

Against — (*Registered, but did not testify:* Charles Williams, Disabled Vet Child Support Info Group)

On — Amanda Cochran-McCall, Office of the Attorney General;  
(*Registered, but did not testify:* Shannon Edmonds, Texas District and County Attorneys Association)

BACKGROUND: Government Code, sec. 402.010(a) requires courts to notify the attorney general when a petition, motion, or other pleading is filed challenging the constitutionality of a Texas statute. Under sec. 402.10(b), courts must wait 45 days after this notice is provided before entering a final judgment holding a Texas statute unconstitutional.

Courts do not have to make the notification if the attorney general is a party to or counsel involved in the litigation. Parties to the litigation challenging the constitutionality of a statute must file a form with the court indicating which pleading in the case should be in the notice to the attorney general. A court's failure to notify the attorney general or a party's failure to file the required form does not deprive the court of

jurisdiction or forfeit an otherwise timely filed claim or defense based on the challenge to the constitutionality of the law.

In *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013), the Texas Court of Criminal Appeals held that Government Code, secs. 402(a) and sec. 402(b) violated the separation of powers provision in Tex. Const., Art. 2.

**DIGEST:** SJR 6 would authorize the Legislature to require a court to provide notice to the attorney general when a party to litigation files a petition, motion, or other pleading challenging the constitutionality of a state statute if the party notifies the court of the challenge. SJR 6 also would authorize the Legislature to establish a reasonable period of up to 45 days after receiving the notice during which a court could not enter a judgment holding the statute unconstitutional.

SJR 6 would include a temporary provision that would make Government Code, sec. 402.010 validated and effective on approval of the constitutional amendment and would make the section apply only to a petition, motion, or other pleading filed on or after January 1, 2018.

The proposed constitutional amendment would be submitted to voters at an election on November 7, 2017. The ballot proposal would read: "The constitutional amendment authorizing the legislature to require a court to provide notice to the attorney general of a challenge to the constitutionality of a state statute and authorizing the legislature to prescribe a waiting period before the court may enter a judgment holding the statute unconstitutional."

**SUPPORTERS SAY:** SJR 6 would ensure that the state had an opportunity to defend Texas laws from constitutional challenges by clarifying that courts can be required to notify the attorney general when a suit challenges those laws. In 2013, the Texas Court of Criminal Appeals struck down the Texas law establishing that requirement, and SJR 6 is needed to restore the law.

It is important that the state, through the attorney general, has an opportunity to weigh in when someone is challenging the constitutionality

of a law. This protects the prerogative of the Legislature to pass laws on behalf of Texans and to have those laws maintained. SJR 6 would help protect that prerogative by amending the Constitution to make it clear that the Legislature may request notice from courts and may establish a reasonable period for the attorney general to respond.

The proposed amendment would not alter the state's separation of powers doctrine nor restrict the ability of courts to strike down laws enacted by the Legislature on constitutional grounds. SJR 6 would be in line with a similar provision relating to federal law and would not deny anyone relief in state courts.

The proposed constitutional amendment would not change the authority of the attorney general's office over criminal matters and would not cause confusion. It simply would provide the attorney general with notice so that the attorney general could offer assistance or file amicus briefs to defend a state law from a constitutional challenge.

The attorney general's current system for receiving notices and deciding how the office should respond to a challenge to Texas law works well. SJR 6 would allow that process to continue so that the state at least would know when its laws were being challenged.

**OPPONENTS  
SAY:**

The Constitution should not be amended in a way that could undermine the state's separation of powers doctrine. The doctrine helps ensure that the branches of government can exercise their powers without interference from another branch, and the Legislature should not be authorized to enact laws that might erode the doctrine.

The Legislature should not be empowered to establish procedures that could delay relief for those challenging a law as unconstitutional. Texans should be able to pursue and receive relief from unconstitutional laws without courts being subject to a waiting period to make a ruling.

The constitutional amendment proposed by SJR 6 could create confusion regarding the attorney general's role in criminal cases. In these cases, the

prosecutor represents the state and can defend the constitutionality of a law. The state prosecuting attorney also is charged with representing Texas before the Court of Criminal Appeals. Under current law, the attorney general, with a few statutory exceptions that require the consent of local prosecutors, is not authorized to represent the state in criminal cases. Because of this lack of authority, it would be unnecessary to provide notice to the attorney general in those cases. If prosecutors feel that they need the attorney general's assistance in a pending case, they easily can request it.

NOTES: According to the bill's fiscal note, the cost to the state for publishing the resolution would be \$114,369.