



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KY 40601
(502) 696-5300
FAX: (502) 564-2894

February 19, 2019

Sent Via E-Mail

Hon. Robert Stivers II
Senate President
702 Capitol Avenue
Capitol Annex, Room 236
Frankfort, KY 40601
Robert.Stivers@lrc.ky.gov

Hon. Morgan McGarvey
Senate Minority Floor Leader
702 Capitol Avenue
Capitol Annex, Room 255
Frankfort, KY 40601
Morgan.McGarvey@lrc.ky.gov

Hon. Will Schroder
Chair, Senate Committee on State &
Local Government
702 Capitol Avenue
Capitol Annex, Room 209
Frankfort, KY 40601
Will.Schroder@lrc.ky.gov

Re: Senate Bill 41

Dear Gentlemen:

In our efforts to fight the drug epidemic, the Office of Attorney General has filed nine lawsuits against pharmaceutical companies for flooding Kentucky communities with dangerous prescription drugs. To effectively handle these cases, we have competitively bid and awarded

contracts to outside firms on a contingency basis. Senate Bill 41 unlawfully interferes with those efforts.

Specifically, Senate Bill 41 seeks to amend KRS 45A.717, enacted in the 2018 Regular Session, to provide the Secretary of the Finance and Administration Cabinet with “exclusive decision-making power regarding any settlement” in actions where an agency has contracted with an outside law firm on a contingency basis.

It is our firm belief that SB 41 violates the Kentucky Constitution’s separation of powers amongst constitutional officers and unlawfully interferes with the Attorney General’s constitutional role as the chief law officer for the Commonwealth. The Kentucky Supreme Court, as recently as 2016, recognized that the Kentucky Constitution establishes “the supremacy of the Attorney General as the chief law officer of the Commonwealth.” *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 364 (Ky. 2016). As the chief law officer, the Attorney General “inherently carries the power and the right to represent the state as the sovereign in all its operations[.]” *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 829 (Ky. 1942). Because of the “supremacy” of the office, the “inherent” powers of the office, “cannot be given to anyone else.” *Id.* at 826. In particular, the separation of powers amongst constitutional officers precludes the Attorney General from being subjected to the Governor’s “supervision and control.” *Brown v. Barkley*, 628 S.W.2d 616, 611 (Ky. 1982). The authority of the Attorney General to settle litigation for the Commonwealth is inherent to that role, and therefore, cannot be taken away and given to another, particularly not to a political appointee of the Governor without any legal training or expertise.

A recent opinion and order of the Franklin Circuit Court reflects this law. With respect to the contingency fee contracts necessary to fight the opioid epidemic mentioned above, the Franklin Circuit Court, in *Commonwealth v. Landrum*, 18-CI-43 (Franklin Cir. Ct. Feb. 20, 2018), invalidated the Finance Secretary’s attempt to cancel those contracts in part because, by doing so, he unconstitutionally interfered with the Attorney General’s inherent common law and express constitutional authority as the chief law officer of the Commonwealth. The Court further noted that “the office of the Secretary of Finance and Administration is a position that requires no legal training or expertise.” *Id.* at 9. It reasoned that “[t]o allow the Secretary to hold veto power over these contracts . . . would inappropriately inject the Cabinet into the Attorney General’s exercise of legal judgment, strategy, and tactics in discharging his fundamental constitutional duties.” *Id.* Providing the Finance Secretary with “exclusive decision-making power regarding any settlement” pursued by the Attorney General is in stark conflict with the legal reasoning and holding of the opinion and order of the Franklin Circuit Court.

Currently, this opinion and order regarding the Finance Secretary’s interference with the Attorney General’s duties as the chief law officer is before the Kentucky Supreme Court. It should be noted that the Deputy General Counsel in the Governor’s Office who represents the Finance Secretary in this matter is also the son of the sponsor of SB 41, raising ethical considerations which merit additional scrutiny.

Based on the foregoing constitutional concerns and ethical considerations, we urge that SB 41 not be considered by any committee and be rejected by the Senate. As the chief law officer of the

Commonwealth and the people's lawyer, I took an oath to protect the Constitution. Should SB 41 be passed into law, my duty is to initiate a suit to protect the public's constitutional interests. *See Beshear v. Bevin*, 498 S.W.3d at 362.

If you would like to discuss the concerns I have raised, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Andy Beshear". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Andy Beshear
Attorney General

Cc: Hon. David P. Givens, Senate President Pro Tempore
Hon. Damon Thayer, Senate Majority Floor Leader
Hon. Julie Raque Adams, Senate Majority Caucus Chair
Hon. Mike Wilson, Senate Majority Whip
Hon. Johnny Ray Turner, Senate Minority Caucus Chair
Hon. Dennis Parrett, Senate Minority Whip
Members, Senate Committee on State & Local Government
Hon. Stephen Meredith