

MINUTES  
**SENATE JUDICIARY & RULES COMMITTEE**

**DATE:** Wednesday, March 09, 2022

**TIME:** 1:30 P.M.

**PLACE:** Room WW54

**MEMBERS PRESENT:** Chairman Lakey, Vice Chairman Ricks, Senators Lee, Anthon, Thayn, Zito, Burgoyne, and Wintrow

**ABSENT/ EXCUSED:** Senator Lodge

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CONVENED:** **Chairman Lakey** called the meeting of the Judiciary and Rules Committee (Committee) to order at 1:33 p.m. and said the first order of business was to vote on the two Gubernatorial reappointments.

**GUBERNATORIAL REAPPOINTMENT:** **Senator Ricks** moved to send the Gubernatorial reappointment of Dr. Michael Johnston to the Sexual Offender Management Board to the floor with recommendation that he be confirmed by the Senate. **Senator Lee** seconded the motion. The motion carried by **voice vote**.

**GUBERNATORIAL REAPPOINTMENT:** **Senator Lee** moved to send the Gubernatorial reappointment of Philip Reberger to the Idaho Judicial Council to the floor with recommendation that he be confirmed by the Senate. **Senator Anthon** seconded the motion. The motion carried by **voice vote**.

**H 658** **Relating to Execution.** **Mark Kabinski**, representing the Attorney General's office (AG), stated that it was the policy of the State of Idaho to provide for capital punishment in appropriate cases. The problem the state faced was the inability to carry out those sentences due to not being able to protect the identity of those who provide the chemicals and those who are involved in the execution process.

**Mr. Kabinski** said the AG's office had two responsibilities with respect to the issue. They were:

- ensure that the verdicts of Idaho's juries were defended through the appeals process and were carried out, including capital punishment cases;
- ensure the ability to defend the policy pronouncements of the Legislature.

**Mr. Kabinski** said **H 658** amended two statutes. It allowed for confidentiality in the process and the Public Records Act. These amendments were meant to operate in tandem to ensure that the confidentiality in these circumstances was protected. There were tactics that were being used in opposition to the death penalty, so a policy needed to be in place for the state to go forward in protecting the identities of those who provided the chemicals and those assisting in the execution process.

**DISCUSSION:**

**Senator Burgoyne** questioned as to why the word "execution" appears before the word "lawful" on pages 1 and 2 of the legislation and wondered if it would affect a defendant's rights. **Mr. Kabinski** replied that it was inferred in the statute that it was lawful and the state would not proceed with an execution if it wasn't. **Senator Burgoyne** asked if a family brought a lawsuit because a lethal injection execution was not properly carried out, how would they be able to prove it in court with this confidentiality provision. **Mr. Kabinski** replied that it was not considered with this statute and would need to be addressed in court.

**Senator Lakey** inquired as to what other states have done in this regard. **Mr. Kabinski** said 19 states have a version of a confidentiality statute and Idaho's was drafted after looking at the other states' versions.

**Vice Chairman Ricks** asked if other methods were used for executions. **Mr. Kabinski** said that prior to 2009, there was a provision in the statute that authorized the use of firing squads, in addition to lethal injection.

The discussion then centered around which states made the drugs that were used for lethal injection executions. **Mr. Kabinski** said the director of the Department of Correction determines the type of chemical to be used. **Senator Burgoyne** asked if the Department makes it known in advance which drugs were going to be used for a personal execution. **Mr. Kabinski** said he was aware that some did know ahead of time.

**Josh Tewalt**, Director, Idaho Department of Correction, thanked the Committee for the way they approached this issue. Transparency was available in this process and part of that procedure outlined what was to occur. It defined personnel, credentials, and which chemicals were going to be used. **Mr. Tewalt** said the identity of key people needed to be protected. The department has had a hard time getting people to help because there was a lack of confidence in the process. The department had been unable to secure the chemicals because there was also a lack of confidence from the people who provided them.

**Mr. Tewalt** said the policy question was whether or not the public had an entitlement to that specific information of who supplies chemicals for this particular process. When asked about his thoughts on hanging, the gas chamber, or firing squad, **Mr. Tewalt** said he was not here as an advocate for capital punishment. He was here as the person who was assigned by Idaho Code to develop procedures and policies to carry out that particular process. The lethal drug process had been vetted and upheld by the Supreme Court multiple times. **Mr. Tewalt** stated that when we start looking at whether or not it is appropriate to authorize other methods of execution, consideration must be made on the potential impacts on the people who would have to carry out those executions.

**TESTIMONY:**

**Anne Taylor**, Chief Public Defender, said she serves on the Board of Idaho Association of Criminal Defense Lawyers and is qualified in capital defense as lead counsel to represent those facing a case where the state seeks the death penalty. **Ms. Taylor** explained the procedure she applied in the court cases.

Opposing **H 658** were **Ken Burgess**, representing the Idaho Press Club; **Teresa Molitor**, representing the Idaho Association of Criminal Defense Lawyers; and **Lauren Bramwell**, policy strategist, ACLU.

**Ronald Bush**, a retired federal judge, shared some experiences while serving as a judge. He suggested that the Committee hold off on taking any action and have an interim committee hear from the people who produce the drugs.

**Robert Dunham**, Executive Director, Death Penalty Information Center, said they do not have a position for or against the death penalty, but were critical of the way it was administered (see Attachment 1).

**Mr. Kabinski** concluded the discussion by saying this legislation merely protected the identity of those who supplied chemicals and participated in the trainings and preparations for those executions and asked the Committee to pass the legislation.

**MOTION:**

**Senator Anthon** moved to send **H 658** to the floor with a do pass recommendation. **Senator Lee** seconded the motion.

**SUBSTITUTE MOTION:**

**Senator Burgoyne** moved to hold **H 658** in Committee. **Senator Wintrow** seconded the motion.

**ROLL CALL VOTE:**

**Chairman Lakey** called for a roll call vote on the substitute motion. **Vice Chairman Ricks, Senators Zito, Burgoyne, and Wintrow** voted **aye**. **Chairman Lakey, Senators Lee, Anthon and Thayn** voted **nay**. The motion **failed**.

**ROLL CALL VOTE:**

**Chairman Lakey** called for a roll call vote on the original motion. **Chairman Lakey, Senators Lee, Anthon and Thayn** voted **aye**. **Vice Chairman Ricks, Senators Zito, Burgoyne, and Wintrow** voted **nay**. The motion **failed**.

**MOTION:**

**Senator Anthon** moved to hold **H 658** until tomorrow's meeting. **Senator Ricks** seconded the motion. The motion **carried**.

**ADJOURNED:**

**Chairman Lakey** announced that **S 1340** would be heard tomorrow. There being no further business at this time, **Chairman Lakey** adjourned the meeting at 3:00 p.m.

---

Senator Lakey  
Chair

---

Sharon Pennington  
Secretary

---

Juanita Budell  
Majority Staff Assistant