

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Wednesday, March 23, 2022

TIME: 1:00 P.M.

PLACE: Room WW54

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

ABSENT/ EXCUSED: None

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 Senate Judiciary and Rules Committee (Committee) to order at 1:00 p.m.

GUBERNATORIAL REAPPOINTMENT VOTE: **Senator Thayn** moved to send the Gubernatorial Reappointment of Jeffery Bates to the Sexual Offender Management Board with a recommendation that he be confirmed by the Senate. **Vice Chairman Ricks** seconded the motion. The motion carried by **voice vote**.

JUDICIAL APPOINTMENT VOTE: **Senator Burgoyne** moved to send the Judicial Appointment of Michelle Points to the Judicial Council with a recommendation that she be confirmed by the Senate. **Senator Wintrow** seconded the motion.

SUBSTITUTE MOTION: **Senator Lee** moved to send the Judicial Appointment of Michelle Points to the Judicial Council with a recommendation that she not be confirmed by the Senate. **Senator Ricks** seconded the motion.

DISCUSSION: **Senator Burgoyne** added Ms. Points would be a wonderful addition to the Council and she was being considered under the current law. She is a person who had personal and intellectual integrity and she stood up for what she believes. **Senator Lee** stated she had concerns because the appointment was made by the Bar Commission directly through the Judicial Council, was heard in this Committee, and no one else had a chance to vet the appointment. **Senator Lee** will not support the appointment.

ROLL CALL VOTE - SUBSTITUTE MOTION: **Chairman Lakey** called for a roll call vote on the Substitute Motion to not confirm Ms. Points to the Judicial Council. Voting **aye** were **Vice Chairman Ricks, Senator Lee, Senator Anthon, and Senator Thayn**. Voting **nay** were **Chairman Lakey, Senator Lodge, Senator Zito, Senator Burgoyne, and Senator Wintrow**. The motion **failed**.

ROLL CALL VOTE - ORIGINAL MOTION: **Chairman Lakey** called for a roll call vote on the Original Motion to confirm Ms. Points to the Judicial Council. Voting **aye** were **Chairman Lakey, Senator Lodge, Senator Zito, Senator Burgoyne, and Senator Wintrow**. Voting **nay** were **Vice Chairman Ricks, Senator Lee, Senator Anthon, and Senator Thayn**. The motion carried to confirm Ms. Points to the Judicial Council.

H 782

Senator Lee introduced **H 782** and explained the proposed changes to fill judicial vacancies. The legislation changes the term of appointment from six (6) years to four (4) years. It also does the following: (1) It changes the way the members of the Judicial Council are chosen. The judicial members would be selected by the Supreme Court, the non-judicial attorney members would be appointed by the governor from a list of three from the Idaho State Bar, and there would be no change to the manner of approving public members. (2) It changes the membership from seven members to eleven members to add a magistrate judge as a member of the Council; changes the number of non-judicial attorney members to four with requirements for diversity and parity among practice areas; and increases the number of non-attorney members to four. (3) This legislation also allows the Governor to reject a slate of nominees provided by the Judicial Council to fill a judicial vacancy. (4) It makes public information concerning the applicants to fill a judicial vacancy who are on a slate of applicants provided to the Governor for appointment. (5) It allows applicants to see survey comments which were solicited from Idaho State Bar members and the public, which previously were withheld from applicants, but provided that comments are not public. (6) It changed the salary of the supreme court justices to \$163,655 per year and adjusted the pay scale of lower courts from a fixed amount to a percentage to prevent compacting the pay scales. (7) Finally, it removed an exception allowing the judicial branch to submit their annual budget request a month later than other state agencies.

DISCUSSION:

Senator Wintrow suggested that the survey comments being shared may inhibit the people's comments or inhibit people from applying. **Senator Lee** explained the survey results would discuss the person's strengths and weaknesses and the report would be delivered to the Governor. In addition, the applicants would have access to the comments if they were requested not less than 48 hours prior to the interview. It would disclose any written information or comments provided to the Judicial Council as part of the application process. If the respondent included their name on the survey, it was provided to the applicant. If there was something submitted that was already public record, it remains public even though it was submitted as part of the comments.

TESTIMONY:

Representative Ron Nate testified against the passage of **H 782**. **Representative Nate** indicated he had served on the Judicial Council for six years, and was a gubernatorial appointee and went through the Senate approval process. He shared it was an enlightening experience and gave him an opportunity to see the Idaho Judiciary in another view. **Representative Nate** stated Idaho has excellent judges and attorneys statewide. He was impressed with the nonpolitical nature of how the Judicial Council operated. The goal was always to find the best candidate to serve in the judgeships. **Representative Nate** said he had a concern with the legislation because it would change the composition. The balance of power would change in relation to the governor's appointments, and in the number of prosecutorial attorneys versus defense attorneys serving on the Council. He stated he feels the current process was working and a change was not needed.

DISCUSSION:

Senator Wintrow asked Representative Nate to explain his main points of concern. **Representative Nate** stated they include: (1) The change in the composition was a huge shift in power. (2) The disclosure of comments. The pattern of comments were important in choosing the judges and they often gave a feeling of how that person would behave as a judge. **Representative Nate** stated he was concerned about sharing the survey information because it may inhibit the respondents from being candid in their responses.

TESTIMONY: **Ken McClure, representing Idaho Liability Reform Coalition,** testified in favor of **H 782** and urged passage of the legislation. **Mr. McClure** stated there was a lack of accountability for filling judicial vacancies. The legislation improves the process by having the Bar Association, rather than simply naming someone to serve on the Council subject to Senate confirmation. It allowed the Judicial Council to be populated by an attorney who was nominated by the board from a list of three names which was very similar to the current process. The second improvement was **H 782** adds transparency so that the public can have a better understanding about the Judicial Council make up and why it was done that way. **Mr. McClure** summarized saying this bill nominated people to the Judicial Council through a public process, explained the decision for filling the vacancy, and offered an opportunity to have a wide variety of views from all involved stakeholders.

TESTIMONY: **Mark Masarik** testified against **H 782**. **Mr. Masarik** stated that his two areas of concern were covered by Representative Nate. He reiterated that this legislation would give too much influence to the executive branch and the judicial process. He suggested it seemed that there really was not anything broken with the current process. He said he would like the legislature to take more time to assess this legislation and consider any restructuring next year.

TESTIMONY: **Diane Minnich, Executive Director, Idaho State Bar,** explained the Idaho Board of Commissioners was created by statute and they were a self-governing state agency. She stated she was testifying to give information to the Committee and was not supporting either opinion on the legislation. The Board of Commissioners was made up of plaintiffs lawyers, defense lawyers, judges, small firms, large firms, and governmental lawyers. Everyone who was involved in the judicial process and was a member of the Idaho State Bar had participated on the Commission at some time or another in all different areas of law. **Ms. Minnich** added she was concerned that 50 percent of the bar was made up of firms with three or less people. Almost all of those people would be ineligible to serve because they would not be able to meet the criteria in the statute with the increasing number. These are the attorneys who do their work as general practitioners. A broader representation of different areas of law makes sense, as does having more lawyers and people because of size. This legislation would eliminate many lawyers who would not be eligible to apply and it would not broaden the scope of who is eligible. **Ms. Minnich's** biggest concern was the Idaho State Bar wanted lawyers to be able to participate on the Council but this legislation had the potential to limit the number who would be able to do so.

TESTIMONY: **Juneal Kerrick, Senior District Judge,** appearing on behalf of the Idaho Supreme Court, was against passage of this legislation. **Judge Kerrick** was concerned that **H 782** may have unintended consequences. Her concerns focus on the following issues: 1) Will the changes hinder rather than help recruitment? 2) Will the specificity of the practice areas limit the rural general practitioners from participating? 3) Will revealing the comments about the candidates hinder the application pool? 4) Will the results lead to recusals or disqualifications? 5) Will the council get honest feedback from the survey participants? 6) The salaries of the judiciary should not be included in a bill relating to organizational issues. The judiciary deserve a bill of their own that values their work. 7) Will salary compression between the district and magistrate judges reflect negatively on judicial candidates? The court seeks to do whatever they can to help the governor have a robust field of experienced candidates to chose from to become Idaho judges. **Judge Kerrick** cautioned the Committee to take time to gather the needed information, involve all of the stakeholders in the process, and make good decisions to avoid unintended consequences.

- DISCUSSION:** **Senator Wintrow** asked what data Judge Kerrick had showing why people were not applying for the judicial positions. **Judge Kerrick** stated the Bar survey in 2009 was focused on judicial salary and recruitment. Both of those issues were reasons that cause people to not want to be judges. Another reason that has been noted was the challenge of going through the appointment process. The differences in district and magistrate judges complicates salary issues. Contested elections were another concern. They were usually self-funded and there was no guarantee one would win the election. If a judge had to return to private practice and start over, it makes the opportunity to serve as a judge less inviting. **Senator Wintrow** asked Judge Kerrick how much collaboration she had with the bill's sponsors and the Courts. **Judge Kerrick** stated she had not had a lot of communications. The meetings and discussions that were held did not result in the same language included in the bill. She suggested getting more information from a broader base.
- TESTIMONY:** **Hyrum Erickson** submitted written testimony and spoke virtually against passage of **H 782** (see Attachment 1).
- TESTIMONY:** **Laura Burri** stated she opposed passage of **H 782**. **Ms. Burri** explained she had practiced law for 36 years in Idaho. She had attended hundreds of Judicial Council interviews in the process of helping women prepare for those interviews. **Ms. Burri** commented the Council was very professional, efficient, nonpartisan and more than competent to select some of the best candidates to be selected to go to the Governor's Office. She added that the candidates were all treated fairly.
- TESTIMONY:** **Don Burnett, retired Dean, University of Idaho, College of Law**, and part time Executive Director of the Idaho Judicial Council submitted written testimony and spoke virtually against passage of **H 782** (see Attachment 2).
- DISCUSSION:** **Senator Wintrow** asked if it would be possible to change the definition of "qualified" in Idaho Code to reflect more characteristics of potential judges. **Mr. Burnett** stated the Council looked for quality of the applicants. Characteristics such as intellectual honesty, courtesy to others, diligence, and quality of scholarship and knowledge are at the heart of the Judicial Council's function and that was why they were referenced in the surveys.
- TESTIMONY:** **Terri Pickens Manweiler** stated he was against passage of **H 782**. **Mr. Manweiler** stated he was concerned about the executive branch having too much power. He said it will narrow down the applicants even further because the Council would be politicized and it would result in the candidates also being politicized. **Mr. Manweiler** explained that making the surveys public would have a negative impact on what the people are willing to say. The current survey process had been used to help determine the temperament and credibility of those who were to be selected for judges. By making it public, people will not want to fill it out.
- TESTIMONY:** **Alicia Abbott, representing Voter to Voter Outreach Organizer for The Idaho 97%**, testified they were against passage of **H 782**. **Ms. Abbott** said her organization supported the makeup and procedures currently used by the Idaho Judicial Council. She stated they were concerned about nonpartisan process risks, court packing by the executive branch, and devaluing of co-equal branches of government.
- TESTIMONY:** **Tim Gresback** listed the many legal positions he had held in the past 35 years of being an attorney in Idaho. He assured the Committee that the lawyers in the State of Idaho were very pleased with the quality of the Idaho Judiciary. He implored the Committee to reject passage of **H 782**.

TESTIMONY: **Darrin Fuchs** testified against passage of **H 782**. **Mr. Fuchs** suggested there were many questions relating to this legislation and suggested more study should be done. He was very concerned that the law would not be applied in a nonpartisan manner with the passage of **H 782**.

Senator Lee asked to have the record reflect that she stated Idaho has an extraordinary and enviable judiciary and she was not unhappy with the Judicial Council. She commented that possibly someone who was a transactional attorney may not be the best choice to sit in judgement of judges or to sit on a council to recruit judges. The salary issue was heavily negotiated and Senator Lee was supportive of raises. **Senator Lee** added this was a process to replace elected officials. Our constitution states these were elected positions and the structure of the Judicial Council followed that process. She concluded with clarification of the survey comments. Those comments were still going to be private. If the source is listed, it is given. If not, it was still confidential. **Senator Lee** reiterated that she believes it evens out the playing field to have access to the survey comments.

MOTION: **Senator Anthon** moved to send **H 782** to the floor with a do pass recommendation. **Senator Thayn** seconded the motion.

DISCUSSION: **Senator Burgoyne** explained he had applied to be on the Judicial Council many years ago, and he did not make the cut to go on the Governor's list. He commented he had an exceptional experience in front of the Judicial Council. He stated Idaho had the best judiciary he had seen in his career.

Senator Wintrow stated she was concerned about rushing this important decision. She was not convinced this was the right time to make the change. The legislation would overhaul a power dynamic and the Judiciary. The perception was that it was an intent to shift power. **Senator Wintrow** concluded it was important to keep an independent judiciary at all costs.

Senator Lodge complimented Senator Lee on her work and all of the time spent studying the concerns of the people. She stated she appreciated the judiciary and the independence they have shown. **Senator Lodge** mentioned she was concerned about district judge recruitment and the pay issue. Attorneys in private practice can make a lot more money with much less hassle in their lives. She was also concerned about attaching judiciary salaries to the other legislation in **H 782**. Her comment was to bring this legislation back next year.

Chairman Lakey added he thought there was some misunderstanding of the legislation. He stated he believed the vetting process would result in better vetted candidates. In his opinion, the Bar surveys were definitely a lobbied process. **Chairman Lakey** commented he did not like the judicial salaries added into the legislation. He would also like to see the distance between the district and magistrate judges maintained because of the level and types of cases they handle. **Chairman Lakey** felt the added diversity on the Council was a positive addition by providing different perspectives. He indicated that it was more appropriate to not have the Bar send the candidates directly to the Senate. There are three branches of government involved in the selection process to keep an even balance.

Senator Ricks stated he could see some advantages to the legislation and would support a motion to send **H 782** to the floor.

Senator Zito said she would support the original motion and would like all the senators to have a chance to be involved in the decision.

SUBSTITUTE MOTION: **Senator Burgoyne** moved to hold **H 782** in Committee. **Senator Wintrow** seconded the motion. The substitute motion failed by **voice vote**.

MOTION VOTE: The motion to send **H 782** to the floor with a **do pass** recommendation passed by **voice vote**. **Senator Burgoyne** and **Senator Wintrow** asked to be recorded as voting nay.

S 1414 **Chairman Lakey** stated this was a follow up to the correction bill on infamous crimes against nature. Some defects were found relating to out of state residents and the sex offender registry.

MOTION: **Senator Anthon** moved to send **S 1414** to the **14th Order** for possible amendment. **Chairman Lakey** seconded the motion. The motion passed by **voice vote**.

PAGE RECOGNITION: **Chairman Lakey** thanked Shay Richardson for her service to the Idaho Senate and the Senate Judiciary and Rules Committee. The Senate was shorthanded this year and Shay stayed for the entire session. The Committee appreciated her help during the second half of the session.

ADJOURNED: There being no further business at this time, **Chairman Lakey** adjourned the meeting at 2:35 p.m.

Senator Lakey
Chair

Sharon Pennington
Secretary