

3-23-2022

**Sharon Pennington**

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**From:** Don Burnett <dburnett224@hotmail.com>  
**Sent:** Wednesday, March 23, 2022 11:42 AM  
**To:** Sharon Pennington  
**Subject:** Opposition to House Bill 782

Dear Ms Pennington:

The following is the text of a letter I have sent to Chairman Lakey. Similar letters were sent to other Committee members.

Don Burnett

I write respectfully and urgently to express my concerns about HB 782 (the Judicial Council bill) which has been transmitted to the Senate. By way of identification, I am a retired dean of the University of Idaho College of Law, and a former judge of the Idaho Court of Appeals. In my early law practice I was a part-time executive director of the Idaho Judicial Council. The views stated in this letter are strictly my own.

Idaho state courts must be fair, impartial, and independent – and must be perceived that way by Idaho citizens. Since 1967, the Judicial Council has been the nonpartisan centerpiece of Idaho’s merit selection system for appointing justices and judges to fill vacant positions on the district court bench, the Court of Appeals, and the Supreme Court. The Council is also responsible for investigating claims of judicial misconduct and making recommendations to the Supreme Court for discipline, removal, or other appropriate action. The Council is further charged to conduct studies from time to time on improvements in the administration of justice.

The Legislature created this multi-purpose Council as part of a comprehensive court modernization and reform effort that won national recognition from the American Judicature Society. Subsequently, Idaho received an award from the U.S. Supreme Court (presented in person by then-Chief Justice Warren Burger) for timely and efficient administration of justice. Idahoans can be proud of our widely respected state judicial system.

Unfortunately, HB 782 would make problematic changes to that system:

- It would diminish the merit selection function of the Judicial Council by empowering the Governor to reject an entire slate of merit-screened nominees, thereby requiring the Council to re-open the application process and submit an entirely new set of names. Although in some instances this might encourage a reluctant but well-qualified new candidate to come forward, it is more likely that the second-round applicants will be less qualified, on the whole, than the first-round applicants. More troubling is the likelihood that such a two-round process would give rise to a public perception (fairly or unfairly) that the Governor is “playing politics” by looking for the names of friends or individuals favored by influential interest groups. Indeed, a capable Governor could receive *unwelcome* pressure to do so. Of course, this can happen to a lesser degree in the current system; but the prospect of a two-round scenario would greatly compound the problem by increasing the power and leverage of the Governor’s office and eroding the fundamental purpose of merit selection.
- HB 782 would also require the Judicial Council to submit the names of at least three candidates to the Governor, as opposed to the two-to-four range provided in the current law. Some district judge vacancies, especially in rural districts, attract few applicants and in some circumstances the number of well qualified applicants may be fewer than three or four. In that circumstance the current law authorizes the Judicial Council to submit the names of just two well-qualified candidates; but HB 782 would abolish this authority and compel submission of a third name even if the Council found no third candidate to be well qualified. This would further erode the purpose of merit selection.

- HB 782 would profoundly alter the composition of the Judicial Council itself. This gets a little complicated. Currently, the Council consists of seven members: the Chief Justice; two lawyers and one district judge, each appointed by the commissioners of the Idaho State Bar with the consent of the Senate; and three nonlawyer citizens appointed by the Governor with the consent of the Senate. (A magistrate judge is added as an “adjunct” member when, and only when, the Council hears a *disciplinary* complaint against a magistrate.) Thus, in performing its judicial selection function, the Council contains a balance of lawyers (three, including the district judge, appointed by the Bar) and citizen members (three, appointed by the Governor), plus the Chief Justice. HB 782 would increase the size and change the balance of the Council. The size would increase to eleven members by making the “adjunct” magistrate judge a full member of the Council and by adding two more lawyers plus one more citizen member. The Council then would consist of the Chief Justice, six lawyers (including the district judge and magistrate judge), and four citizen members. The dilution of citizen membership (from three out of seven to four out of eleven) could be problematic, not only in light of the value we place on citizen participation in the merit selection process but also in view of the value we ascribe to citizen perspectives relating to the Council’s other functions: recommending discipline and removal of judges for misconduct, and undertaking studies on improving the administration of justice.
- The change in the Judicial Council’s composition under HB 782 would be accompanied by an enlargement of the Governor’s power to determine who serves on the Council. This issue, too, is a little complicated. Currently, as noted, the Chief Justice serves *ex officio*; the district judge and two lawyers are appointed by the Idaho State Bar with the consent of the Senate; and the three citizen members are appointed by the Governor with the consent of the Senate. Thus (and this is fundamentally important), no single appointing authority (the Bar or the Governor) controls a majority of the Council. This in turn means that no member of the Council needs to feel beholden to the appointing authority for delivering preferred outcomes. In contrast, HB 782 provides that the Governor would appoint ten of the eleven Council members. The four citizen members would be appointed by the Governor with the consent of the Senate. The four lawyers would no longer be named by the Bar but would be appointed by the Governor from lists of names submitted by the Bar. The district judge and the new magistrate member would also be appointed by the Governor, upon nomination by the Supreme Court. The Chief Justice, who serves *ex officio*, would be the only Council member not appointed by the Governor. Although the Governor’s discretion in appointing Council members would be constrained by the Bar’s submission of lists from which lawyer members would be appointed, and by the Supreme Court’s nomination of the district judge and magistrate judge, the strength of any such constraint must be weighed against the sheer magnitude of the Governor’s expanded power to appoint nearly all the people who will be submitting to him/her the names of prospective judges as well as carrying out the duties of judicial discipline and conducting studies for improving the administration of justice. The Council would no longer be the anchor of our widely respected merit selection system.
- Operational issues also lurk in HB 782:
  - The bill subdivides the four lawyer members of the Judicial Council, requiring that each of them must have practiced “predominantly” – during five years immediately preceding their appointment – in one of four designated subject areas: representing civil plaintiffs, representing civil defendants, prosecuting criminal cases, and representing criminal defendants. These practice categories apparently leave no room for general practitioners, or lawyers whose practices are largely transactional, or lawyers whose work is a blend of litigation and transactional work; yet these could be among the most valuable potential members of the Council.
  - HB 782 combines the enlarged size of the eleven-member Judicial Council with a requirement that eight (not a majority of six) members must concur for any action to be taken. This requirement – which doubles the number of concurrences needed under the current law (four) – would apply not only to the Council’s merit selection function but also to the discipline function and the Council’s duty to conduct studies on improving the administration of justice. Although a diversity of viewpoints is useful to a multi-purpose body like the Judicial Council, imposing a super-majority requirement for any action to be taken may prove unduly cumbersome.

- HB 782 does make a useful contribution toward transparency by clarifying what information gathered about applicants by the Judicial Council is public information as well as whether and how such information should be disclosed by the Council to the applicants themselves during the merit selection process. This is a worthy topic to address.
- Unfortunately, HB 782 also includes a non-germane section establishing a salary structure for judges and justices, and providing salary increases of approximately 2%. Apart from any debate over the levels of Idaho judicial salaries, the insertion of this section into a bill addressing the composition and duties of the Judicial Council gives the regrettable appearance of a hard ball attempt to dissuade members and supporters of the judiciary from questioning whether HB 782's changes to the Council are sound policy and should be enacted.

There is a better way to achieve consensus on the future of the Judicial Council. The Idaho Supreme Court has announced that it is appointing a special committee to examine ways to improve judicial recruitment in Idaho, including the processes of the Council. The Committee is designed to include two members each appointed by the Governor, the President pro tem of the Senate, and the Speaker of the House. The special committee is also expected to include two Idaho attorneys, a district judge, a magistrate judge, and two members of the public. The committee will be directed to conclude its work in 2022, in time for recommendations to be considered in the next legislative session. This process would be inclusive and deliberative, resembling the process that culminated in Idaho's acclaimed court modernization and creation of the Judicial Council in 1967. This should be our path forward.

Respectfully submitted,

Don Burnett

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