

MINUTES  
**SENATE JUDICIARY & RULES COMMITTEE**

**DATE:** Wednesday, March 01, 2023

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

**PLACE:** Room WW54

**MEMBERS PRESENT:** Chairman Lakey, Vice Chairman Foreman, Senators Lee, Anthon, Hart, Hartgen, Wintrow, and Ruchti

**ABSENT/ EXCUSED:** Senator Ricks

**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 1:30 p.m.

**S 1023** **OFFICE OF ADMINISTRATIVE HEARINGS (OAH), Brian Nickels**, Office of Administrative Hearings, stated there were four substantive changes being offered in **S 1023**. They included the following: 1) It included the Office of Administrative Hearings in the self-governing agencies list, and it updated the statute outlining non-classified employees to include personnel which was similar to other lawyer type agencies. This would permit OAH employees to use outside counsel which would give them more independence. 2) It clarified the salary of the Chief Administrative Hearing Officer. 3) This legislation would allow judges and hearing officers to represent themselves if need be and additionally work with family members if there's a need to review or draft a document. It would not permit hearing officers to act as lawyers, but would allow those same sorts of lawyering activities that judges were permitted to do. 4) A new public records exemption would be added that would exempt any writings, drafts, notes or working memoranda related to decision making in any proceeding before the OAH. Records that come in and out of OAH would remain in the same character.

**DISCUSSION:** **Senator Hart** asked what type of records would be included in the exemption. **Mr. Nickels** stated that first drafts of decisions, notes taken by officers in evaluating evidence, and notes from discussions with witness used to create a final order to go to the agency head. This legislation was being requested to clear up those questions relating to concluding a hearing and issuing either a preliminary or a recommended decision to an agency head.

**TESTIMONY:** **Ken Burgess**, Veritas Advisors, speaking on behalf of the Idaho Press Club First Amendment Committee. **Mr. Burgess** stated that the Idaho Press Club had no basic issue with the legislation. The one concern they expressed related to the records exemption regarding the term "any writings" being overly broad. There had been discussions among Betsy Russell, President of the Association, Mr. Nichols, and some Committee members about a possible amendment. The proposed amendment was to replace the term "any writings" with an amendment that read on the first line any "pre-deal writings, drafts or notes." And then on line 42, relating to decision making in any "specific proceeding." **Mr. Nichols** responded by explaining why they felt the term "any writings" was more appropriate for the legislation language. Pre-decisional was an undefined term that discussed items open for public consideration. That could lead to ambiguity that "any writings" does not. The other concern was that OAH's work continues after the decisions were made. **Mr. Nickels** explained that they continued to monitor their decisions to see if reversals

were made at any stage of the process. He stated that the core of his concern was one of his statutory charges was to ensure the decisional independence of his hearing officers. He did not want a public records request to be made and it appear that he was attempting to influence the selection of a hearing officer. Such a situation was banned by statute, but it would not preclude someone from trying to appear to make a disqualification request based on those post decisional writings.

**MOTION:** **Senator Lee** moved to send **S 1023** to the floor with a **do pass** recommendation. **Senator Anthon** seconded the motion. The motion carried by **voice vote**.

**H 52** **Jason Spillman**, Legal Counsel, Administrative Office of the Courts, explained **H 52** was a court defect bill relating to grand jury proceedings. Those allowed to attend such proceedings were limited to the jurors themselves, witnesses that were called, interpreters that were required and prosecutors that were present to participate in the process. There were two additional potential people who may have needed to participate in the proceedings. The first was a person who must be designated to report the proceedings after the guilty party had been indicted by a grand jury. The other person that may have needed to participate was a support person for a child witness as they were testifying. **H 52** would add these two positions to those who were able to attend grand jury proceedings.

**MOTION:** **Senator Anthon** moved to send **H52** to the floor with a **do pass** recommendation. **Senator Lee** seconded the motion. The motion carried by **voice vote**.

**S 1087** **Senator Doug Okuniewicz** stated that **S 1087** would require that any individual convicted, or who plead guilty to any crimes against children, made the property and the assets they may have employed or garnered as a result of a sale to forfeit, in the same way that drug laws do. This legislation was supported by the Fraternal Order of Police (see Attachment 1). The Idaho Prosecutors Association was consulted and the Attorney General's Office worked closely with the creators of this bill.

**DISCUSSION:** **Senator Foreman** stated he was troubled by the asset forfeiture aspect of the legislation. He commented he had heard from numerous constituents suggesting that the criminal and the crime need to be separated from personal property. **Senator Foreman** was uncomfortable with someone having to prove their innocence in order to retain their property.

**TESTIMONY:** **Neil Uhrig**, Detective, Post Falls Police Department. **Mr. Uhrig** operated the only full service digital forensics lab in North Idaho and much of his work involved child pornography and child exploitation. Under current Idaho law when an offender is prosecuted, the digital devices they used to commit the crime were taken as evidence but must be forensically wiped and returned to them at the conclusion of their sentence. **S 1087** provided a mechanism for forfeiture of these devices, making it so computers are not returned to child molesters. This legislation used the criminal forfeiture process. The person had to be convicted. If an offender was found not guilty, they got their property back. Under this bill, digital devices containing child pornography would be destroyed after court proceedings were concluded. This bill contained language that safeguarded the rights of third party owners. The language provided a way for them to be heard in court and to recover property or the value of the property.

**DISCUSSION:** **Senator Wintrow** asked several questions relating to property ownership and the relationship to the crimes. There was a detailed discussion with several different scenarios given. The common consensus was that many of the decisions would be based on the judge's discretion because of the variables involved.

**MOTION:** **Senator Anthon** moved to send **S 1087** to the floor with a **do pass** recommendation. **Senator Lee** seconded the motion.

**DISCUSSION:** **Senator Foreman** stated that he would vote no on **S 1087**. He suggested it would be better to return the property and keep it separate from the crime so that would not create a burden on innocent people. **Senator Ruchti** said he had always been critical of civil forfeiture processes. He mentioned that rarely law enforcement had been accused of realizing that it was a cash cow for them because they could keep or sell the property and use the proceeds to help with budgets. He said he would not be supporting the bill. **Senator Ricks** stated that he was not sure how he was going to vote. He had a concern about what would happen if the person was exonerated or the charges were dropped and the computer equipment had already been destroyed. Would there be a way to reimburse the victim? **Mr. Uhrig** responded that he had not considered that scenario.

**Senator Okuniewicz** closed by stating that the legislation contained provisions on how someone who had a right to the property had to be given notice and time to respond to make their claim. They had to establish ownership to have the ability to acquire that property.

**Chairman Lakey** commented that the Committee should keep in mind that there was a difference between civil and criminal forfeiture. This legislation required a conviction where the civil forfeiture did not. **Senator Lee** added that these kind of crimes were difficult to convict because they were crimes against children. She would like to send a message that the tools people use to commit these horrible crimes against the most vulnerable were not going to be preserved and returned back upon release from prison. **Senator Hart** stated he was not ready to vote on **S 1087**. **Senator Wintrow** added she does not want to harm any victims in the process unintentionally. **Senator Lakey** added he felt the criminal forfeiture process worked and he would support the motion.

**ROLL CALL VOTE:** A roll call vote to send **S 1087** to the floor with a **do pass** recommendation carried by **voice vote**. **Vice Chairman Foreman**, and **Senators Hart** and **Ruchti** voted nay.

**1058** **Senator Linda Hartgen** explained that Idaho had many instances of people using handheld devices which were already illegal, resulting in reckless and distracted driving. This bill tried to get some justice and compensation for the victims of the crimes. Two specific crimes were addressed. One was reckless driving, describing the person deliberately being a jerk in their car, and the other was distracted, where the driver was intentionally doing something that takes their attention from the road. In both instances, when the driver caused a collision, it was not an accident. It was important to give law enforcement officers the tools to use when the incidents happened. The officer can cite, the prosecutor can play down, and the judge had the final discretion when he made his decision.

**TESTIMONY:** **Mike Pohanka** stated, aggravated driving while reckless, was any person causing great bodily harm, permanent disability or permanent disfigurement to any person other than himself was committing a violation of the provision and was guilty of a felony upon conviction. The same was true for aggravated driving while distracted. **Mr. Pohanka** said deputies, troopers and officers should be able to cite for a felony conviction any time an individual was using their handheld device to video. He shared his experience with Sergeant Wendler after he had been hit by a young lady recording him at the scene of a traffic accident. Sergeant Wendler only lived because there were EMS people there who could give CPR and knew how to take care of him until he was life flighted to Idaho Falls. The National Safety Council found a percentage of drivers manipulating handheld devices while driving had increased 127 percent from 2012 to 2001. **Mr. Pohanka** emphasized that he wanted to do everything he could to try and prevent deaths and needless injuries. He stated motorists needed to be accountable for their actions. Driving was a privilege, not a right.

**Senator Wintrow** asked the definition of aggravated driving while reckless versus distracted. **Chairman Lakey** explained distracted driving was operating a motor vehicle while using an electronic device. Reckless driving was being in physical control of a vehicle on public or private property, open to public use, carelessly, heedlessly or without due caution, driving any speed to endanger any person or property.

**Michael Wendler**, former Idaho State Trooper, stated he was the officer Mr. Pohanka spoke about. He shared how difficult his experience was for both him and his family. **Mr. Wendler** stated that most ISP troopers had an experience where the outcomes were less than desirable. He told of an incident he investigated. There were serious injuries to the young lady and she remained paralyzed for life. When Mr. Wendler talked to the perpetrator of the crash, his biggest concern was when he would get his cell phone back. He never questioned what happened to the young woman. **Mr. Wendler** explained all he could do was write a citation for careless driving. He was strongly in favor of **S 1058** in the hope that it would give officers more tools for these kinds of circumstances that would ultimately help the involved victims.

**Ron Nate**, Idaho Freedom Foundation, said **S 1058** would substantially increase the penalties for the crimes of reckless driving. Currently, a misdemeanor and distracted driving, were an infraction. The increased penalties would only occur when they contributed to an accident causing great bodily harm, permanent disability or permanent disfigurement to any other person. **Mr. Nate** stated that this legislation could be creating even more victims if the law was applied to the maximum in each case. It took a minor infraction and turned it into a felony and there was no clear requirement to prove the electronic device caused the accident or that the driver intended to cause harm. If someone died in an accident and they were reckless driving or using a device, this legislation would classify it as manslaughter. Inattentive driving was not addressed in the legislation. **Mr. Nate** believed there was too much sentencing disparity in **S 1058**.

**Lori Solders**, Idaho Coalition for Motorcycle Safety, testified they were in support of this bill. The distracted driving bill previously passed was not strong enough to get people off their phones. Their organization wanted to help do whatever it took to get people off their phones and pay attention when they drive. **Ms. Solders** commented, driving was a privilege not a right.

**Senator Hartgen** concluded by mentioning the letter from the Idaho Fraternal Order of Police supporting this legislation (see Attachment 2). Meetings were held with the prosecutors and area sheriffs and they were all in favor of **S 1058**. She clarified that manslaughter charges were not new and have nothing to do with this bill. She stated the judge had total discretion on what could and could not be done for both of these two different crimes.

**Senator Ruchti** declared Rule 39(H). He questioned the provision in the legislation stating one could use evidence of a guilty plea in a civil cause of action. He felt certain that would come up in some cases. **Senator Foreman** added the penalties in the legislation were far too severe. Severe penalties did not seem to be a deterrent to cause people to quit doing what they were not supposed to do. He suggested that prevention was what we want, not retribution or penalties or ruining someone else's life by putting them in prison. The only way to prevention was to educate society so they recognized and internalized the need to stop doing what they were doing. **Senator Wintrow** said she wanted to find the right balance so she could make the right decision. She had real concerns about adding a felony charge to this legislation. **Senator Hart** commented that possibly this bill would be better if more time was spent working on it. **Chairman Lakey** agreed there were hard decisions to be made and felt a little more time was a good choice.

**MOTION:** **Chairman Lakey** called for a motion. Senator Hart moved to hold **S 1058** in Committee. **Senator Foreman** seconded the motion. **Chairman Lakey** called for a **roll call vote**. **Chairman Lakey, Vice Chairman Foreman, Senators Hart, Wintrow** and **Ruchti** voted aye. **Senator Lee, Anthon** and **Hartgen** voted nay. The motion carried 5 to 3 and **S 1058** was held in Committee.

**Chairman Lakey** announced that **S 1086** would be heard in the next meeting on March 6, 2023.

**ADJOURNED:** There being no further business, **Chairman Lakey** adjourned the meeting at 3:05 p.m.

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Senator Lakey  
Chair

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Sharon Pennington  
Secretary