

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Wednesday, March 15, 2023

TIME: 1:00 P.M.

PLACE: Room WW54

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

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.

MINUTES APPROVAL: **Senator Hart** moved to approve the minutes of February 13, 2023. **Senator Lee** seconded the motion. The motion carried by **voice vote**.

GUBERNATORIAL REAPPOINTMENT: **Committee Consideration of the Gubernatorial Reappointment of Brian Marx** to the Sexual Offender Management Board. **Mr. Marx** asked the Committee to approve his request for reappointment. **Senator Wintrow** asked what personal skills or experience would make him a good match for this position. **Mr. Marx** responded he had been a criminal defense lawyer for 15 years, a felony trial lawyer since December of 2010, and handled many cases including sex offenses. He added he had a good knowledge of how the Board worked from his prior experience. **Senator Hart** inquired how the board was comprised and some typical issues they dealt with. **Mr. Marx** listed the board composition and explained one of their upcoming projects was working on coming up with a tiered registry system. **Chairman Lakey** thanked Mr. Marx for his service and indicated the vote would be taken at the next meeting.

S 1157 **JUDGES - Amends existing law to revise provisions regarding judges' retirements and to provide that certain judges shall not be eligible to serve as a senior judge and may not elect to receive retirement compensation.** **Chairman Lakey** asked those who would be testifying to limit their comments to 2 minutes to allow others to testify. He reminded the group that when they testify, they go through the chair when they ask and answer questions.

Senator Lee stated Plan B was an alternative retirement system for judges not including magistrates. It applied to Supreme Court Justices, appellate judges and all district judges. Plan B created an incentive for justices and judges to retire early. She added there was a challenge to recruit and retain new district judges. The courts had said that salary was part of the issue. Judges were being incentivized financially to leave their jobs early which caused them to be lost at the best, brightest and most experienced time in their careers. If they did not take Plan B and continued to work, they retired at 75 percent. If they became a senior judge, but under Plan B, they got 75 percent of their salary from work, at least 60 days, 75 percent of their salary, and then their retirement continued to accrue. It would make no sense to stay on the bench. The Plan B proposal encouraged judges to complete their elected term. In return they were considered eligible for Plan B. The statute did not guarantee that any judge would get to be a senior judge. Much of the statutes were looked at prospectively and some of the guarantees were promises that could not be kept. **Senator Lee**

added that she felt removing the Plan B provision if judges did not complete their term would incentivize judges to stay on the bench, and it would encourage the positions to be opened when there were vacancies.

Senator Hart asked if there was a choice in a retirement path. **Senator Lee** responded that the senior judge route to retirement was to retire, but they could work at least 60 days a year and get 75 percent of their annual salary. The Plan B Retirement option enabled those who may not be eligible for full retirement to quit, become a senior judge and take the Plan B status and work at least 60 days a year. This Plan B program increased the burden for the legislature to continue funding the judges retirement system.

Senator Foreman added he had a concern that Plan B may be moving the goalposts on people who had been employed for many years, had a retirement plan, and may be planning on modifying it slightly. He questioned if there was any plan to grandfather people into the Plan B option. **Senator Lee** stated that there were two issues related to grandfathering. The first being there would need to be agreement that this was a perpetual right that the Legislature could not take away. Second, it would be almost a 20 year time frame to get this removed or changed. The courts needed district judges immediately. With Plan B the judges get the 87 ½ percent and get to stay on the bench doing the work they love. **Senator Foreman** asked Senator Lee if she would be opposed to sending this legislation to the **14th Order**. She responded that she would respect whatever the Committee wanted to do.

TESTIMONY:

Chief Justice Bevin, Executive Head of Idaho's Judicial Branch. **Justice Bevin** stated that **S 1157** changes were unprecedented. State retirement systems had historically been changed prospectively. When changes were made prospectively, the changes took effect for judges taking the bench after the changes took place. **S 1157** did the opposite. The concern was that the judges took the bench with an expectation that the financial plan they made while making the decision to become a judge cannot be reduced during their time of service. Their expectations were that their assurances would be honored by the commitment of the State of Idaho back to them. **Senator Lakey** reiterated that the justices main concern was related to the prospective nature of the change.

Judge David Gratton, Idaho Court of Appeals. **Mr. Gratton** said he was at the end of his 15 years of service, and he felt the changes in Plan B should be made prospectively. He had relied on the track record of the Judiciary in making the changes prospectively. **Senator Wintrow** asked if Judge Gratton saw Plan B having a negative impact on hiring more judges. **Judge Gratton** responded he felt it would have a negative impact. The people who would be hired as a judge were typically those with successful practices and would take a financial hit. He also indicated that if there was a pattern of not following through on promises made, it would be problematic.

Judge Cynthia Wallace, District Judge, Fourth Judicial District, stated she was opposed to **S 1157**. She felt this legislation would negatively affect her as well as every other district and appellate judge who took the bench under the current Judges Retirement Fund. If the Legislature chose to amend the retirement program of district and appellate judges, the bill should be applied prospectively so it did not impact the current agreement. **Judge Wallace** added that the mindset when she went into public service was always, you are not going to make the money you would make in private practice, but the government will take care of you through your retirement. She relied on that and always believed in it.

Judge Michael Reardon, District Judge, Fourth Judicial District, stated he was appointed as a magistrate the end of 2004 and took office as a district judge in 2015. He had applied for and been approved for Plan B. His retirement target date was October 1st. **Judge Reardon** said his priorities had changed and he would like to retire with Plan B because it would give him a chance to continue serving and still spend more time with his family. He felt this legislation should be made prospectively.

Judge Cindy Meyer, Administrative District Judge, First Judicial District, said she was opposed to **S 1157** added that she left a fairly lucrative practice because she wanted to be a judge. She looked at the salary and the benefits and recognized that the health and retirement benefits were good. She had relied on it and looked forward to it. If the legislation were approved, she asked to have it go through prospectively.

Senator Lee assured the Committee that she would be happy to do their will. She reminded the Committee that almost every judge was selected for Plan B, but there were no guarantees. It was discretionary.

Chairman Lakey asked Senator Lee to describe what was broken with the current program. **Senator Lee** said there were two problems. The system had been created as a financial incentive to leave their term early. There was an expectation the voters had that one would complete their term. If one does not want to complete the term, then retire. An additional incentive was added for an incomplete term by adding the additional 12 ½ percent pay incentive.

MOTION: **Senator Anthon** moved to send **S 1157** to the **14th Order** of business for Possible Amendment. **Senator Foreman** seconded the motion.

A discussion was held among the Committee members relating to support of the motion to send the legislation to the **14th Order**. Those reasons included; a separation of powers issue; losing Plan B may cause a need for more judgeships to cover the same amount of work; it was very difficult for judges to return to private legal practice; and, salaries high enough to retain the judges.

MOTION VOTE: All in favor of sending **S 1157** to the **14th Order of Business** for Possible Amendment, indicate by saying aye. Motion carried by **voice vote**.

H 236 **STATE PUBLIC DEFENDER ACT - Amends, repeals, and adds to existing law to establish the State Public Defender Act. Representative Jon Weber** introduced **H 236** and explained it removed the responsibility and the liability of public defense from the counties and moved it to the State. It eliminated the Public Defense Commission and established a State Public Defense Office. It outlined the process of appointing a state public defender and the accompanying duties and it established seven public defense offices one in each judicial district. It outlined the process to appoint a district public defender and the required duties. The last major responsibility was the appropriation of a one time money of \$4,467 million dedicated to the transition from a public defense commission to establish the State Public Defender Office.

Senator Foreman asked Representative Weber if he could clarify a bit about a lack of political independence with this legislation and a lack of proper funding. **Representative Weber** explained that \$36 million was from the counties that they currently spend across the state on public defense. The other \$12 million was what the State added to the Public Defense Commission. The \$48 million was the amount nine months into the fiscal year so adding another three month amount would make the budget approximately \$62-\$63 million. The State was growing so they would need to go through the JFAC process to receive added funds as they were needed. Regarding the political independence concern, the Governor did appoint the State Public Defender. To help weaken the political independence they had created a seven member board, one member from each district, who would come up with a list of 3-5 names to recommend to the Governor to make that recommendation. Once the appointment was made the meetings would not be held often. **Senator Foreman** questioned if there were other states using a similar system that had worked well. **Representative Weber** responded there were none similar to what was being proposed by **H 236**. **Senator Hart** asked if our system was broken. **Representative Weber** explained there were a lot of good things happening in public defense, but there were areas that needed help. He added they were going to take all the good things and build upon them. **Senator Hart** questioned the funding source. **Representative Weber** stated the \$48 million is firm for public defense for on-going funding every year. Additional funding will have to be added through the legislative JFAC process.

TESTIMONY:

Leo Morales, Executive Director, ACLU of Idaho, spoke in opposition to **H 236**. **Mr. Morales** commented that he would be very short because he had submitted a multi-page document written testimony that outlined their concerns and recommendations regarding **H 236** (see Attachment 1).

Chairman Lakey asked if the existing rules relating to capital qualifications stayed in place for another 18 months. **Mr. Morales** responded that it was unclear in the legislation and they wanted to make sure that it was clearly expressed in the bill and not accidentally removed.

Seth Grigg, Executive Director, Association of Counties, spoke in support of **H 236**. **Mr. Grigg** explained that this legislation was a result of a collaborative effort of the Governor's Office, Representatives Weber and Cannon, county commissioners and public defenders. This legislation looked very different than the original draft. **Mr. Grigg** gave a few comments relating to the funding for the new Public Defender Act. The \$36 million figure was guaranteed in statute. That amount came from historical data up through the year 2021. The \$12 million funds were appropriated by the Legislature for the Public Defense Commission to operate that were passed through to counties. **Mr. Grigg** noted that the expenses for Public Defense were basically unknown and the legislature would need to appropriate additional funds as needed in the long term.

Eliza Massof, attorney, whose clientele consisted primarily of lower salaried individuals who were charged with first degree murder when the state was seeking the death penalty. She spoke in opposition to **H 236**. Ms. Massof felt very strongly that the Governor had too much power because his position enabled him to make so many political appointments. She was convinced that passage of **H 236** would give far too much power to the Executive branch to the point where people would be afraid to testify without fear of job termination. **Ms. Massof** stated this legislation was missing several key components. She asked to slow the process down and get the legislation right the first time.

Aaron Bazolli, Chief Public Defender, Canyon County, spoke in support of **H 236**. **Mr. Bazolli** stated he was going to comment on some questions people were asking relating to the legislation. **Mr. Bazolli** said relating to capital defense, there was not anything in the statute, but there was a suggestion that they would be appointed to the team, which was an American Bar Association standard in capital defense crimes. The structure including more than 300 full time county employees wondering where they were going to be, what they were going to be doing, and were they going to be state employees. It appeared they were going to be state employees. This was going to be a massive undertaking that someone was going to have to address. After studying every state and the structure of their public defense commission, **Mr. Bazolli** had seen the same problems. If it was not properly funded, given enough attorneys, enough funds to handle proper case load and resources, it did not matter who you had, where you had them, who ran it, it was going to fail. This legislation needed to be passed now so that for the next 18 months work could be done in all of these areas before the State took over.

Representative David Cannon, Public Defender. **Representative Cannon** spoke in favor of **H 236**. He stated that when **H 735** was passed there was not a clear path on how it was going to take public defense from the counties and give it to the state. No one seemed to know what to do with contract public defenders versus full time public defenders. A one size fits all approach seldom works for most communities. **H 236** was written so it protected the status quo as everyone began this new type of organization. **Representative Cannon** was concerned about the amount of undue political influence but he felt this bill had provided a fair amount of insulation and protection against undue influence of the Executive branch.

MOTION: **Senator Foreman** moved to hold **H 236** in Committee subject to the Call of the Chair.

SUBSTITUTE MOTION: **Senator Lee** proposed a Substitute Motion and moved to send **H 236** to the floor with a **do pass** recommendation. **Senator Hartgen** seconded the motion.

DISCUSSION: **Senator Wintrow** commented the Constitution stated that there was an obligation to protect the Sixth Amendment rights and people would hold the Legislature accountable for that. **Senator Ricks** added that the time that would be available to work on fine tuning the process would be very helpful. Both **Senator Wintrow** and **Senator Ricks** supported the Substitute Motion.

Senator Hart stated he would not support the **do pass** motion because he did not feel there had been enough testimony heard and the legislation had been too rushed. **Senator Foreman** said he would not support the substitute motion because he felt the State would have too much control over the system. He thought that the system would be better managed and operated by the people who developed it.

MOTION VOTE: **Chairman Lakey** concluded it was the State's constitutional obligation for public defense. He said **H 236** was a good compromise because there would be a State office and there would be local people doing work on the ground level. He would support the Substitute Motion. We have a Substitute Motion from **Senator Lee** to send **H 236** to the floor with a **do pass** recommendation. The motion carried by **voice vote**. **Senators Hart** and **Foreman** both asked to be recorded as voted nay.

ADJOURNED: There being no further business, **Chairman Lakey** adjourned the meeting at 2:15 p.m.

Senator Lakey
Chair

Sharon Pennington
Secretary