



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

May 13, 2021

TRANSMITTED VIA HAND DELIVERY

The Honorable Chuck Winder
President Pro Tempore
Idaho State Senate
Idaho State Capitol
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Boise, Idaho 83702
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The Honorable Scott Bedke
Speaker of the House
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
sbedke@house.idaho.gov

Re: Request for AG analysis regarding the recess of the Idaho Legislature

Dear Pro Tem Winder and Speaker Bedke:

This letter is in response to your recent inquiry regarding a scenario where the Senate adjourns *sine die* and the House is unable to adjourn *sine die* due to the lack of a majority. It is important to note that this scenario is unique and without precedent in Idaho. At the federal level, the United States Congress has had one chamber not concur in adjournment in order to block recess appointments (2007 & 2012). It appears that if one chamber recesses while the other adjourns *sine die*, then the adjournment could be considered invalid because it has not been concurred in by the other chamber. In sum, one interpretation could be that both chambers are considered to be in an extended recess pending concurrence for adjournment purposes. It is also difficult to ascertain how either chamber could be legally forced back into session and required to take legislative action. Recognizing the uncertainty of these circumstances, the below analysis offers an assessment regarding the outcome of the actions of the House and Senate.

A. Absent Concurrence in Adjournment the Default May Be an Extended Recess

In place of the House adjourning *sine die*, you have asked whether the House may recess open ended, or to a date certain. The House likely has the authority to recess but that authority is contingent on the Senate's concurrence. Similarly, if the Senate adjourns *sine die*, but the House

does not concur in that adjournment, then the Senate's adjournment is likely limited by the House's nonconcurrence. With both chambers agreeing in some fashion to not being in session, the likely default result is that both chambers would be considered in recess. It appears that these activities are governed by article III, section 9 of the Idaho Constitution, which requires:

Section 9. POWERS OF EACH HOUSE. Each house when assembled shall choose its own officers; judge of the election, qualifications and returns of its own members, determine its own rules of proceeding, and sit upon its own adjournments; but neither house shall, without the concurrence of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting.

This provision is similar to a provision in the United States Constitution. See Idaho Const. art. I, § 5, C14. The requirement for concurrence in lengthy adjournments is an element of bicameralism; the Founders were worried that the will of one House might be thwarted by the other's mischievous absence. In this case, although the two chambers may not be agreeing on the vehicle to absent themselves, they are agreeing to not be in session, thus the concern regarding mischief does not appear to be applicable. But there is no concurrence as to adjournment, because the House is recessing.

Based upon the House's lack of concurrence, the Senate's adjournment *sine die* may be of limited legal effect. When the House returns, if it does not adjourn *sine die*, then the Senate will likely have three days in which to return. This office is unaware of the mechanism for how either chamber compels the attendance of the other. For example, the Senate may be able to comply with the requirement to return under article III, section 10 with a smaller number adjourning from day to day.

B. The Chambers May Need to Address Issues Raised by the Lack of Adjournment *Sine Die*

Administratively, given the finality of the Senate adjourning *sine die*, Senators are likely no longer paid per diem or other legislative entitlements unless otherwise provided for by the Citizen's Committee and through the Senate's approval process for interim work. Senate interim and senators assigned to joint interim committees likely have no impediments to their requirements for interim work. If the House recesses, it may need to address its member's eligibility for unvouchered and vouchered expenses. The Citizen's Committee on Legislative Compensation added the following language to its 2020 report:

If the Legislature, by passage of a concurrent resolution, adjourns to a day certain for more than three days, no unvouchered expense allowance shall be payable to any member of the Legislature for the time period during such temporary adjournment without the approval of the Senate Pro Tem or the Speaker of the House.

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This means that the House may need to specifically address through the appropriate legislative vehicle within the House that these expenses will not be paid unless approved by the Speaker. The citizen's committee contemplated that this would be addressed through a concurrent resolution, but given the unique nature of the circumstances, adoption of a limitation on payment of these expenses by the Chamber in recess appears consistent with the Citizen's Committee on Legislative Compensation.

It is essential to note that the scenario currently presented is unique and unprecedented in Idaho. The Legislature's decision to pursue this course of action causes risk which could result in a reviewing court concluding differently.

I hope you find this analysis helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read 'BK', with a long horizontal flourish extending to the right.

BRIAN KANE
Chief Deputy

BK:kw