



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

June 12, 2020

TRANSMITTED VIA EMAIL

The Honorable Scott Bedke
Speaker of the House
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street, Room E303
Boise, Idaho 83702
sbedke@house.idaho.gov

Re: Request for AG analysis

Dear Speaker Bedke:

This letter is in response to your recent inquiry regarding the Legislature's authority to call itself into special session. As explained in greater detail below, the authority to call the Legislature into special session is reserved to the Idaho Governor.

Idaho's Constitution Assigns The Governor Authority to Call For A Special Session Of The Idaho Legislature.

Article III, § 8 of the Idaho Constitution authorizes legislative sessions as follows:

The sessions of the legislature shall be held annually at the capital of the state, commencing on the second Monday of January of each year, unless a different day shall have been appointed by law, **and at other times when convened by the governor.**

(emphasis added). Idaho Code § 67-404 provides:

SESSIONS OF LEGISLATURE. At the hour of twelve o'clock M. on the Monday on or nearest the ninth day in January the regular session of the legislature shall be

convened. The presiding officer must call the same to order and preside. Neither house must transact any business, but must adjourn from day to day, until a majority of all the members authorized by law to be elected are present. Each legislature shall have a term of two (2) years, commencing on December 1 next following the general election, and shall consist of a "First Regular Session" which shall meet in the odd-numbered years and a "Second Regular Session" which shall meet in the even-numbered years and any extraordinary session or sessions which may be called as provided by law.

Idaho Code § 67-404 establishes that a different day has been appointed by law for the convening of a regular (annual) session (Monday closest the 9th vs. second Monday). This appears to be the only legislative discretionary element of this provision. The Legislature is authorized to convene a single annual session per year on a date determined by the Legislature (or if no date is determined, on the second Monday in January). All other sessions of the Legislature must be convened by the Governor.

Article IV, § 9 of the Idaho Constitution defines the authority of the Governor and limits the scope of any special session to the call of the Governor:

EXTRA SESSIONS OF LEGISLATURE. The governor may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it; but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation; but may provide for the expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the senate in extraordinary session for the transaction of executive business.

Finally, Article II, § 1 of the Idaho Constitution prohibits any of the co-ordinate branches of government from exercising "any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Thus, it appears that, in Idaho, the Legislature is without any authority to call itself into a special session. *See also Miles v. Idaho Power Co.*, 116 Idaho 635, 639 (1989) (*citing Diefendorf v. Gallet*, 51 Idaho 619, 638 (1932) for Governor's power to convene an extraordinary session and noting that Idaho Constitution expressly left the responsibility and discretion with the governor for determining the existence of "extraordinary occasions").

Even if Idaho Code § 67-422 Were Constitutional, the Criteria Set by Statute For Its Use Have Not Been Met.

Idaho Code § 67-422 requires that in the event of an "attack," the Governor is required to call the Legislature into special session within 90 days of the attack, or the Legislature is required to call

itself into special session if the Governor fails to issue the call for a special session. This provision is part of the Emergency Interim Legislative Succession Act. *See* Idaho Code §§ 67-413-426. Idaho Code § 67-414 states:

DECLARATION OF POLICY. The legislature declares: (1) That recent technological developments make possible an enemy attack of unprecedented destructiveness, which may result in the death or inability to act of a large proportion of the membership of the legislature; (2) That to conform in time of attack to existing legal requirements pertaining to the legislature would be impracticable, would admit of undue delay, and would jeopardize continuity of operation of a legally constituted legislature; and (3) That it is therefore necessary to adopt special provisions as hereinafter set out for the effective operation of the legislature.

Idaho Code § 67-415 defines an attack as:

"Attack" means any action or series of actions taken by an enemy of the United States resulting in substantial damage or injury to persons or property in this state whether through sabotage, bombs, missiles, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or methods.

This definition requires the following elements be met:

1. An action or series of actions;
2. Taken by an enemy of the United States;
3. Substantial injury to persons or property in the state; and
4. Through the listed means.

In reviewing the current pandemic, the first two statutory elements have not been met. First, there is no action or series of actions that have been taken in targeting the United States (or Idaho). This office's understanding of the events related to the cause of the pandemic is that it began in some fashion or another in China, but the actual details regarding the virus's spread are uncertain although numerous rumors and speculation exist. This office's understanding is that this release was not intentional nor targeted at the United States or Idaho. In fact no evidence has been advanced or even rumored that China was targeting Idaho. Similarly, China is not considered an enemy of the United States. Although China is a rival to the United States, neither the President nor Congress has designated China as an enemy. This does not mean that evidence could surface at some point to indicate that this was an attack; simply, based on the current posture, the events thus far do not appear to meet the definition of an attack under Idaho Code § 67-415, even setting aside any concerns about the constitutionality of the statute.

Reading Idaho Code § 67-422 in the Manner Required To Preserve Its Constitutionality Would Require That The Governor And All Constitutionally Designated Successors To Be Unavailable To Call For A Special Session.

As stated above, Idaho Code § 67-422 requires the Governor to call the Legislature into special session in certain circumstances or the Legislature is required to call itself into special session if the Governor fails to issue the call.

There are significant constitutional issues with this statute. Under Article II, §1 the Legislature cannot force the Governor to exercise a constitutional authority that is discretionary in nature.¹ Article IV, § 9 specifically vests the discretion to call and set the purpose for a special session with the Governor. Article II, § 1 limits the Legislature's authority to limit the Governor's discretion with regard to Article IV, § 9. As explained in detail above, under Idaho's Constitution only the Governor may call the Legislature into a special session. A statute cannot supersede the Constitution's delegation of authority.

That said, Idaho Code § 67-422 may be constitutional in certain circumstances under Article III, § 27, which provides the Legislature with specific authority to insure the continuity of state and local governmental operations.²

Section 27. CONTINUITY OF STATE AND LOCAL GOVERNMENTAL OPERATIONS. The legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack or in periods of emergency resulting from the imminent threat of such disasters, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for so insuring the continuity of governmental operations. **In the exercise of the**

¹ Article II, § 1 limits:

DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

² This constitutional provision was approved by the Idaho Legislature in 1959 and approved by the Idaho voters in 1960. It has not been amended since. Based on history, it is clear that this constitutional provision and its corresponding statutory provisions in Idaho Code §§ 67-414-426, *et seq.* were all enacted in preparation for a nuclear attack, most likely from the former Soviet Union. The timing of these provisions coincide with the Soviet development and successful testing of an Intercontinental Ballistic Missile with nuclear capabilities along with the Soviet Union's successful completion of the Sputnik mission. In sum, all of these provisions can be read as addressing how Idaho state and local government would be put back together and continue on following a large scale attack such as a nuclear missile or bomb being detonated in Idaho's population centers.

powers hereby conferred, the legislature shall in all respects conform to the requirements of this constitution except to the extent that in the judgment of the legislature so to do would be impracticable or would admit of undue delay.

(emphasis added). Importantly, this constitutional provision, as highlighted within the bolded sentence above, requires that the powers conferred upon the Legislature by this section be exercised in a manner consistent with the Idaho Constitution. The only exception is when compliance would be impracticable or cause an undue delay.

There are possible circumstances under Article III, § 27 of the Constitution that Idaho Code § 67-422 could become operable. If an attack occurred under which the Governor was unavailable, and the attack resulted in the unavailability of successors to the Governor's office³ and the Legislature was unable to provide for the prompt and temporary succession of the office, then there could be a scenario in which the Legislature would be able to convene itself under Article III, § 27 to ensure the continued operation of government.⁴ In essence, the Legislature would have to find that compliance with the Idaho Constitution was either impracticable or would cause undue delay⁵—neither of which are applicable to the current pandemic situation.⁶

No Circumstances Exist for the Legislature to Convene Itself.

It is highly doubtful that circumstances exist for Article III, § 27 to be operative at this time. Additionally, if Article III, § 27 were to be applied at this time, the Legislature would have no authority to convene itself under Article III, § 27, because no facts have been identified that require constitutional requirements be set aside.

³ Article IV, § 14 of the Idaho Constitution outlines the succession to the Office of Governor in the event the Governor is unavailable as follows: The Lieutenant Governor, The President Pro Tempore of the Senate, The Speaker of the House. See also Idaho Code §§ 67-805 and 805A.

⁴ It is important to note that if this scenario unfolded, the authority under Article III, § 27 likely is sufficient with or without a statutory structure. This is similar to the Governor's executive authority under Article IV, §§ 4 & 5: although the statutes may provide guidelines for how this authority is exercised, the statutes cannot limit the constitutional authority these provisions respectively grant.

⁵ It is worth noting that the 90 day time limit within Idaho Code § 67-422 and "undue delay" within the constitutional provision are difficult to reconcile. In the context of a response to an attack, 90 days is a long time period. Placing the 90 day limit's contrast with the Constitutional use of "undue delay" into context, within a year of adoption of these statutes, the Cuban Missile Crisis occurred. America stood on the precipice of nuclear war for 13 days.

⁶ This provision likely operates to prohibit a legislatively convened legislative session with a reduced quorum requirement as well. Idaho Code § 67-425. The analysis of Idaho Code § 67-422 applies to Idaho Code § 67-425, making its constitutionality suspect at best. Absent a catastrophic event that has resulted in the interruption of government continuity and the unavailability of legislators, the provisions of Article III, § 27 cannot be initiated. Additionally, Article III, § 27 requires compliance with the constitutional requirements for legislative actions unless the requirements are impractical or cause undue delay. No such event has occurred and no set of circumstances exists for Article III § 27 to apply, therefore the Constitutional requirement for a quorum cannot be set aside. See Article III, § 10.

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None of the conditions under Article III, § 27 have been met for the Legislature to take any steps to insure the continuity of state and local government. There has been no interruption of state or local government services. There has been no need for the Legislature to provide for succession of officers. No set of circumstances exists requiring the setting aside of any constitutional requirement at this time. Absent a call for a special session issued by the Governor under Article IV, § 9, the Idaho Legislature has no authority to convene at this time.

I hope that you find this analysis helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read 'BK', is written over a light blue rectangular background.

BRIAN KANE
Assistant Chief Deputy

BK:kw