MINUTES

SENATE STATE AFFAIRS COMMITTEE

DATE:	Monday, January 16, 2017
TIME:	8:00 A.M.
PLACE:	Room WW55
MEMBERS PRESENT:	Chairman Siddoway, Vice Chairman Hagedorn, Senators Davis, Hill, Winder, Lodge, Lakey, Stennett, and Buckner-Webb
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. NOTE RELATED TO CONTESTED ELECTION: The attachment is an index of the documents submitted to the Senate by the Secretary of State. The appropriate documents are attached to the Document Number shown in the index.
CONVENED:	**Chairman Siddoway** called the State Affairs Committee (Committee) to order at 8:00 a.m. He extended a welcome to those in attendance and asked the indulgence of the Committee because they would be hearing some of the same information that was outlined at the meeting held on Friday, January 13, 2017. **Chairman Siddoway** explained that the proceedings were being audio streamed and asked Mr. Brian Kane to come forward to address the Committee.
EXPLANATION OF PROCEEDINGS FOR THE CONTESTED ELECTION:	**Brian Kane**, representing the Idaho Attorney General's Office, presented an overview of the law regarding the Contest of Election. Article III, Section 9 of the Idaho Constitution gives authority to members of the Senate to judge the qualifications and terms of its own members. In that respect, there is discretion for both the Committee and the Senate as they evaluate this issue. Mr. Kane also stated: • The contest was filed with the Secretary of State, Secretary of the Senate, and the Senate President Pro Tempore on November 28, 2016. The bond was posted on December 29, 2016. • The Senate President Pro Tempore issued a procedural order on December 29, 2016. (A copy of the procedural order is attached to these minutes.) • Briefs were allowed; the initial briefs were to be completed by January 4, 2017. Any responses to the briefs must be submitted by January 9, 2017. All of the materials submitted by those deadlines are before the Committee. • Each side will have 20 minutes to present their side of the matter. No additional testimony can be taken by the parties in front of the Committee. However, the Committee does have the discretion to, at their request, hear from other parties. For example, the Attorney General's Office (AG's), the Secretary of State, or whatever officials the Committee might call upon. There will be no examination or cross examination of those officials called forward by the Committee by the incumbent or council or contestant or council. The Committee is free to ask whatever questions they think are relevant. • The Committee will then vote and make recommendations to the full Senate. Hopefully, there has not been any ex parté communication with the Committee

at this point regarding this matter. The Senate has the absolute discretion as it judges the election, consistent with Idaho law. .

Mr. Kane explained that, as the Committee considers this, it is important to note that these options are outlined in Idaho Code (I.C.) §§ 34-2121 and 34-2120. There can be one of two outcomes as the Committee hears the contested items and makes recommendations to the Senate:

1. The Committee could recommend that the Senate confirm the election result; or
2. The Committee could recommend that the Senate annul the election results.

If the decision is made to make a recommendation to annul the election result, there would be choices as to what would happen. If the ballots, as counted and allowed by this Committee, were to result in a tie, the Senate would decide how that tie would be resolved. If the Committee voids the election, there are two choices.

1. The Senate can declare the office vacant and order that it be filled as provided in Idaho Code Chapter 9, Title 59, – Vacancies and Resignations.
2. The Committee can recommend that the Senate call for a special re-election if an accurate vote count cannot be obtained or discovered. The Senate would set the time of the election and the identity of the candidates to be placed on the ballot.

I.C. § 34-2120 allows for the assessment of costs. Costs can be assessed against either the contestant or the incumbent. If the election is confirmed, costs may be assessed against the contestant. If the election is annulled, costs may be assessed against the incumbent. Witness fees and costs of discovery are provided for by the code, but it is within the Senate's discretion whether or not to include attorney fees as part of the cost. Traditionally, courts do not interpret costs to include attorney fees.

Mr. Kane highlighted some of the terminology that changes as different sections of the code are read. When the word "incumbent" appears, that is the holder of the seat or the declared winner of the election. The term "incumbent" is used throughout the code and is also considered the holder of the seat. In this instance, it would be Senator Nye. The term "contestant" is the person challenging the results of the election. In this matter, it would be Mr. Katsilometes.

The burden of proof in matters such as a contested election is on the contestant who would have to present evidence and arguments to the Committee sufficient to show that either Senator Nye is disqualified, or sufficient votes were cast or counted that clearly changed the result of the election. That conclusion is reinforced in Noble v. Ada County Elections Board, 135 Idaho 495, 501 (2000) (Noble).

Qualifications to be placed on a ballot are stated in two provisions: Article III, Section 6 of the Idaho Constitution and I.C. §§ 34-614 and 34-614A. Generally, candidates must be 21 years of age, a citizen of the United States, reside in the district one year preceding the general election in which candidacy is offered, and be an elector in the district for one year prior to the election. If they meet these qualifications, candidates may file a declaration with the Secretary of State.

The Senate's authority within this matter derives from Article III, Section 9 of the Idaho Constitution. To paraphrase, each house when assembled shall be the judge of the election qualifications in the terms of its own members.

Idaho Code, Title 34, Chapter 21, governs election contests. Within this contest there have been three grounds alleged:

1. The incumbent has committed a violation for criminal provisions related to elections as set out in Idaho Code, Title 18, Chapter 23, – Election Offenses.
2. The legal votes have been received or rejected at the polls sufficient to change the result.
3. Errors by the Board of Canvassers in counting votes or declaring the result of an election if the error would change the result.

Mr. Kane said, because I.C. § 18-2315 – Election and Offenses Not Otherwise Provided For, is referred to, the Committee should be familiar with that section of code. Every person who willfully violates any provisions of the laws of this State related to elections is, unless a different punishment for such violations is prescribed by law, punishable by fine not exceeding $1,000.00, or by imprisonment in the State prison not exceeding 5 years, or by both. In essence, this code section is a "catch all" provision of the election offense code. The issue then becomes, "is it not otherwise provided for." The allegation before this Committee is that a Sunshine Law violation equates to "not otherwise provided for" under the election code.

One of the questions before this Committee is whether the penalty provisions in I.C. § 67-6625 address that matter "not otherwise provided for." I.C. § 67-6625 provides for a civil fine and states "any person who violates the provisions of I.C. § 67-6603 through I.C. § 67-6614A," and a number of other provisions "shall be liable for a civil fine not to exceed two hundred fifty dollars ($250) if an individual, and not more than two thousand five hundred dollars ($2,500) if a person other than an individual." The second provision under subsection (b) says that "any person who violates I.C. §§ 67-6605 or 67-6621(b), and any person who knowingly and willfully violates I.C. § 67-6603 through I.C. § 67-6614A is guilty of a misdemeanor and, upon conviction, in addition to the fines set forth in subsection (a) of this section, may be imprisoned for not more than six (6) months or be both fined and imprisoned."

Mr. Kane acknowledged that there had also been alleged counting and canvassing errors within this matter. I.C. § 34-2103 states that if there is misconduct on the part of the election judges when officiating the election, "it shall not be held sufficient to set aside the election unless the vote of the precinct, township or ward would change the result as to that office." The burden of proof must be shown by the contestant to the Committee and Senate must be sufficient that the outcome of the election would change. **Mr. Kane** stated that this matter is properly before the Committee and the time set for the hearing has been reached.

Chairman Siddoway asked if the Committee had any questions for Mr. Kane. Being none, **Chairman Siddoway** outlined three points to consider in this matter:

- Were there violations of the Sunshine Law?
- Were the machines properly certified and functioning?
- Did the Board of Canvassers make their points?

In regards to the contestant and the incumbent, **Chairman Siddoway** cautioned the parties that this is not a court of law. Decorum should be maintained. Should undue remarks be made, there will be a warning and if it happens more than once, the opportunity to speak may be forfeited. Comments should be pertinent to the question.

Chairman Siddoway outlined the rules. There would be 20 minutes for the contestant to speak and it could be split up between the party and his counsel in any manner they saw fit. The Committee may question the speakers before continuing. The incumbent will follow the same procedure.

CONTESTANT: **Kahle Becker** represented the contestant, Tom Katsilometes, on count one of this election contest. He stated his client was in front of the Senate State Affairs Committee because of powers vested in the Senate pursuant to Article III, Section 9 of the Idaho Constitution entitled 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 . . ." **Mr. Becker** argued the quoted section was the relevant part. Additionally, in 1890, the Legislature enacted I.C. § 34-2105 which placed jurisdiction for Contests over Legislative Offices in the body in which the prevailing party would sit: "The senate and the house of representatives shall severally hear and determine contests of the election of their respective members."

Mr. Becker outlined his objectives in count one of the contest of election, to clear up any misperceptions:

- this case is the contestant's own doing without assistance or cooperation from any other elected members of the Republican party;
- it is his client's desire to represent of the citizens of Pocatello;
- Mr. Becker's client asks that the laws be applied as they are written regardless of the political affiliation of any of the members of the Senate, in what can be considered a judicial capacity; and
- the contestant is not asking for the ultimate relief of the declaration that he won the election of the District 29 Senate seat.

Mr. Kane outlined the remedies available under I.C. § 34-2121. **Mr. Kane** asserted as this is the first election contest conducted since the 1982 amendments of I.C. § 34-2101, this Committee must decide how to enforce these laws.

Mr. Kane argued that in 1982 following the last election contest, the Legislature amended I.C. § 34-2101(4) to bring the adjudication of the Sunshine Law violations by its members within the Legislature's jurisdiction. The Sunshine Laws were enacted in 1974 when 77.56 percent of Idaho citizens voted in favor of the law. The stated purposes of the Sunshine Law included the promotion of openness in government and transparency in regard to the financing of political activities in Idaho. **Mr. Becker** argued that as this Committee now sits in the appointed judicial capacity as the sole arbiter of those laws, the Committee should consider the facts in the present case and apply them to the law.

Mr. Becker explained that count one of the contest of election pertains to Sunshine violations and referred to the relevant statutory provisions in case law. **Mr. Becker** asked the Committee to focus on I.C. § 34-2101(4) entitled "Grounds of Contest", which states one of the grounds for a violation of Sunshine Laws occurs "when the incumbent . . . has committed any violation as set out in chapter 23, title 18, Idaho Code." **Mr. Becker** argued that I.C. § 34-2101(4) does not require that a person be criminally convicted of the laws of Idaho related to elections, rather I.C. § 34-2101(4) provides that the commission of any violation itself gives rise to grounds for an election contest. **Mr. Becker** referenced other statutory schemes with similar structures, as cited in the briefing. (See Document 52 in the attachment).

Mr. Becker states I.C. § 18-2315 provides "[e]very person who willfully violates any of the provisions of the laws of this state relating to elections is, unless a different punishment for such violations is prescribed by law, punishable by fine not exceeding $1,000 or by imprisonment in the state prison not exceeding 5 years, or both." **Mr. Becker** referenced earlier testimony from Mr. Kane which alluded to other deplorable acts in Idaho Code Title 18, Chapter 23. **Mr. Becker** argued the contestant is not asking or claiming that the incumbent be incarcerated, fined, or did anything malicious. **Mr. Becker** asserted I.C. § 34-2101 does not refer to just deplorable acts, it also refers to what Mr. Kane termed as the "catch all" provision in I.C. § 18-2315. **Mr. Becker** again referred to "any" violation in I.C. § 34-2101(4)(emphasis added). **Mr. Becker** argued his client is within the election contest grounds.

Mr. Becker argued that, under the law, every person who willfully violates any of the laws found in I.C. § 34-2101. He further argued: 1.) the term "willfully" is defined in I.C. § 18-101(1); 2.) the word "willfully" as applied to the word "intent" as used in I.C. § 18-2315, does not require actual intent to violate the law or injure another or acquire an advantage; and 3.) there is no requirement that the election law violation be committed knowingly or with malice. **Mr. Becker** further argued that the Idaho Supreme Court has further discussed the term "willfully." **Mr. Becker** argued the Idaho Supreme Court has defined "willfully" to imply a willingness to commit the illegal act or make an omission; it does not require evil or corrupt motive or intent in violating the law. **Mr. Becker** argued acting "willfully" does imply a conscious wrong but may be distinguished from acting maliciously or corruptly; acting "willfully" does not necessarily imply an evil mind but is synonymous with acting intentionally, decidedly, or without lawful excuse and therefore not acting accidentally. Furthermore, the Idaho Supreme Court has stated that a subjective, good faith belief in compliance with the law is irrelevant. **Mr. Becker** stipulated that Mr. Kane is correct in stating that the contestant has the burden of proof. However, clearly this is not a criminal case that requires the contestant to prove his case to the standard of "beyond a reasonable doubt." **Mr. Becker** proposed this matter is more similar to a civil matter therefore requiring a standard of proof of "more likely than not" that the incumbent committed the violations of the Sunshine Law at issue.

Mr. Becker addressed the Sunshine Laws at issue. I.C. § 67-6603(c) mandates "[n]o contribution shall be received or expenditure made by or on behalf of a candidate or political committee, until the candidate or political committee appoints a political treasurer . . . " The statue also requires that expenditures be made through the candidates political treasurer. Although not part of the Sunshine Law, I.C. § 34-903.5 prohibits candidates for partisan offices from placing their name on the ballot for more than one partisan office. Under the Sunshine Law, I.C. § 67-6610A entitled "Limits on Contributions", only $1,000 is able to be contributed from a person to a candidate: $1,000 for the primary election and $1,000 for the general election.

With regard to the applicable laws, **Mr. Becker** argued it is not necessary to prove that the unlawful campaign contributions to be discussed changed the result of the election. There are no statutory requirements to that effect. **Mr. Becker** further argued that to prove the money at issue would change the election outcome would be an impossible burden to meet, as the manner in which someone voted or the reason that they voted for a particular candidate are protected and not subject to discovery. **Mr. Becker** argued the correct standard is that the election was somehow unfair; that standard is also found in the Noble case that Mr. Kane cited.

Mr. Becker argued that Idaho citizens enacted the Sunshine Laws to keep elections fair, place all candidates in an even starting line for the race, and that violation of the Sunshine Law itself made an election unfair. **Mr. Becker** asserted the following factors as outlined in his citations in the record: 1.) on March 1, 2016, Mr. Nye declared his candidacy and appointed his political treasurer, Aaron Thompson; 2.) Mr. Nye was a sitting member of the House, however, his term was expiring when he decided to run for the Senate; and 3.) according to the seven day pre-primary campaign finance report filed on May 10, 2016, Mr. Nye received nine separate monetary contributions to his Senate campaign between January 8, 2016 and February 27, 2016, prior to Mr. Thompson's appointment as Mr. Nye's treasurer for his Senate campaign on March 1, 2016. **Mr. Becker** alleged Mr. Nye had formed the intent to run for the District 29 Senate seat at the time he solicited and received the nine donations.

Mr. Becker directed the Committee to look at schedule D1, which is page 141 of Document No. 34 (see attachment). He further asserted: 1.) the document entitled "Nye for Senate" shows nine premature donations; 2.) the Bank of Idaho records show a single bank account "Nye for Legislature" until May 2016; and 3.) on May 10, 2016 the "Nye for Senate" account was opened. **Mr. Becker** alleged Mr. Nye made expenditures for his Senate campaign prior to opening the "Nye for Senate" account, and that one of the expenditures in the "Nye for Senate Campaign" occurred April 1, 2016 and therefore prior to the receipt of subsequent, potentially lawful – meaning post treasurer appointment – campaign donations. Thus, **Mr. Becker** asserted the premature and unlawfully obtained funds were put to use in the "Nye for Senate" campaign; the first post-treasurer-appointment campaign donation was received April 7, 2016. He further argued at no time prior to the Senate election at issue did Mr. Nye, as a Representative, file a campaign finance report with the Secretary of State indicating that funds had been transferred to Mr. Nye's Senate campaign account.

Mr. Becker argued that on May 6th, Kathy Bair, Mr. Thompson's paralegal, (Mr. Thompson is Mr. Nye's treasurer) sent an email to Mr. Nye regarding the issue surrounding the nine premature donations, and the review and filing of a seven day pre-primary report. **Mr. Becker** referred the Committee to page six of the email chain, which states: "Attached you will find the seven day pre-primary report for the Senate campaign. Please review and see if it looks correct to you. The only grey area I am seeing, is the contributions you received on page one prior to your announcement. However, in reviewing the names of the donors, I felt they were well aware of your intention to run. Correct me if I am wrong."

Mr. Becker referred to page 4 of Exhibit V (Thompson deposition), where Mr. Thompson stated his recollection of Mr. Nye asking if he could loan from account A to B to document the intent and use of the funds, for example, "5-1-16 for $15,000." **Mr. Becker** argued these emails demonstrate that Mr. Nye was soliciting funds for his Senate campaign before he had appointed his treasurer on March 1, 2016.

Mr. Becker alleged that an additional Sunshine Law violation was uncovered in discovery. He told the Committee that Mr. Nye was informed by the Secretary of State's office that Mr. Nye could only transfer the $1,000 for the primary election and $1,000 for the general election as provided in the Sunshine Laws. **Mr. Becker** argued that despite receiving that admonition and receiving the email as confirmed by the Nye deposition Exhibit BB (see attachment), Mr. Nye signed check no. 1205 dated 5/19/2016 to the "Nye for Senate" account in the amount of $6,681.23 from the "Nye for Legislature" account. **Mr. Becker** described to the Committee the memo line of the check, which he argued indicated that check was for all the deposits from 1/1 through 4/30 to the Senate campaign. **Mr. Becker** alleged that once Mr. Nye's violations of this section of the Sunshine Law, I.C. § 67-6610A, were uncovered, Mr. Nye refused to answer any further questions at his deposition on that subject.

Mr. Becker turned the balance of the allotted time over to Tom Katsilometes.

Tom Katsilometes, the contestant, presented counts two and three of his contest of election. **Mr. Katsilometes** alleged the Board of Canvassers' report was incorrect as it was based on incorrect ballots as the tabulation of those ballots was conducted by machines that Mr. Katsilometes believes were faulty. Mr. Katsilometes referenced an excerpt from the official canvass report filed by the Bannock County Commissioners in their capacity as the Board of Canvassers for Legislative District 29, which concerns the general election results for November 8th, and it has each precinct result listed. The vote tabulations for Precinct 18 were: Mr. "Idaho Lorax" Carta, 30; Mr. Katsilometes, 277; and Mr. Nye, 195. The printouts for the recount were obtained from the Attorney General's office when they oversaw the recount.

Mr. Katsilometes stated that the listed time of the recount was 14:09, or approximately 2:00 p.m. The recount was started at approximately 1:35 p.m. on December 15th. He alleged that Precinct No.18 was the only precinct recounted. **Mr. Katsilometes** argued that he had selected five precincts to be recounted and, under State law, he was allowed to select which precinct would be counted first. He said the recount was to be hand counted and verified by machine count. The hand count tabulations for Precinct 19 were: Mr. "Idaho Lorax" Carta, 29; Mr. Katsilometes, 275; and Mr. Nye, 186. The machine count tabulations for the entire Legislative District 29 were: Mr. "Idaho Lorax" Carta, 29; Mr. Katsilometes, 274; and Mr. Nye, 187. The printout for Precinct 15 reported the tabulation as: Mr. "Idaho Lorax" Carta, 22; Mr. Katsilometes, 181; and Mr. Nye, 131. **Mr. Katsilometes** stated that an additional count was: Mr. "Idaho Lorax", 18; Mr. Katsilometes, 181; and Mr. Nye, 126.

Mr. Katsilometes argued that from the election day canvass reports, the differential in Precinct 15 shows: Mr. "Idaho Lorax" Carta, 22; Mr. Katsiolometes, 181; and Mr. Nye, 131. He further asserted the first recounted was a hand count and Precinct 18 showed: Mr. "Idaho Lorax" Carta, 30; Mr. Katsilometes, 277; and Mr. Nye, 195. This was a machine count. He further asserted that the individual differential for Mr. Katsilometes was over 1 percent; 3.3 percent for Mr. "Idaho Lorax" Carta; and 4 percent for Mr. Nye. Combined, the differential was over 2 percent. **Mr. Katsilometes** asserted that Idaho Code contains recount procedures for automated tabulated machines; in Bannock County, they use machines for recounts.

Mr. Katsilometes referred to I.C. § 34-2313(4) regarding recount procedures which provides "if the . . . tabulation differs by less than 1 percent or 2 votes, whichever is greater, the remaining ballots shall be recounted using an automated vote tabulating system. Otherwise, the remaining ballots shall be recounted by hand." **Mr. Katsilometes** argued some of the ballots that were later used to complete the recount included over votes; ovals were circled for Mr. Nye; additionally, the write-in candidate was circled for Mr. Nye and Mr. Nye's name written in. He alleged that those over counts make up the differential. **Mr. Katsilometes** pointed to ballot No. 176 in Exhibit No. 6 of Mr. Katsilometes' affidavit (see attachment), which was a test ballot obtained on a public records request.

QUESTIONS: **Chairman Siddoway** announced that time for the contestant had expired and 20 minutes was now allocated to questions from the Committee.

Senator Davis recalled that a couple of years ago, a former member of this body reminded a colleague from the House that sometimes we are not Republicans or Democrats, instead we are Senators; today is one of those days.

Senator Davis disclosed that under Senate Rule 39(H) the potential for a conflict exists. On October 25, 2016 the record at the Secretary of State's office shows that Senator Davis made a campaign contribution to the contestant, Mr. Katsilometes. Additionally, **Senator Davis** disclosed he met with Mr. Katsilometes together with other candidates after the primary election at a candidate training meeting regularly done for those new individuals on the ballot in the general election to provide assistance. Mr. Katsilometes did attend and that assistance was provided. Additionally, **Senator Davis** stated that he had a distant recollection that Senator Nye may have provided a campaign contribution in a modest amount years before he ran for the Idaho Legislature. **Senator Davis** disclosed he had searched through campaign disclosure reports from 2002 -2016, but was unable to find that item or to confirm that distant memory either for Mark Nye or for his law firm. **Senator Davis** stated his intention to participate and vote in the proceedings.

Senator Lakey disclosed under Senate Rule 39(H) that as Majority Caucus Chairman part of his responsibilities include utilization of the funds that are raised by the majority caucus. Those funds are typically used to support Republican candidates around the State; the Majority Caucus did make a contribution to Mr. Katsilometes. He also participated in the candidate training as described by Senator Davis. **Senator Lakey** stated that he intends to participate and vote in the proceedings.

Senator Hill, disclosed under Senate Rule 39(H) that as President Pro Tempore of the Senate he made recommendations to other members of the leadership regarding the donations from the caucus fund, which included a donation to Mr. Katsilometes. He also participated in the candidate training referred to by Senator Davis. **Senator Hill** intends to participate and vote in the proceedings.

Senator Winder stated that he had a similar disclosure under Senate Rule 39(H) as the Senator Hill. **Senator Winder** intends to participate and vote in the proceedings.

Senator Davis addressed Mr. Becker and stated that the Verified Complaint is not a part of these proceedings nor is the Answer to the Verified Complaint, instead the focus is on the Contest of Election. However, **Senator Davis** noted that in the prayer for relief in the Verified Complaint, the contestant requests attorney's fees under I.C. §§ 12-117 and 12-121. **Senator Davis** inquired what section under I.C. § 12-117 applies to the current proceedings. **Mr. Becker** stipulated that at this level of the proceedings, he is not sure that I.C. § 12-117 does apply. **Mr. Becker** stated this Idaho Code section was included in the Verified Compliant to preserve the contestant's options in the event of an appeal. He explained that in his experience with the Idaho Supreme Court, documented requests for attorney's fees were required at all stages of the proceedings. **Senator Davis** verified that Mr. Becker does not believe that I.C. § 12-117 has any application as a Senate judges this election. **Mr. Becker** argued his belief that this matter is a larger Constitutional conflict issue. **Mr. Becker** asserted that in this matter the Senate is sitting in a quasi-judicial capacity that is Constitutionally and statutorily appointed. There is a provision allowing for the awarding of costs and the placing of a bond. **Mr. Becker** argued his belief that the Senate might not be able to make an award of fees in these proceedings because to do so would necessarily involve judicial action.

Senator Davis said that as he read Mr. Becker's complaint, pleadings, and memorandum, and it is his understanding that the contestant is asking this body to make an award of attorney's fees. He questioned if the contestant is now indicating to the Committee that they are not asking for an award of attorney's fees in any capacity. **Mr. Becker** argued that these are truncated proceedings; the parties had two months to prepare a case for trial. He further argued this is the first case under the new statutory proceedings under subsection 4 which added the Sunshine Laws and brought in the Rules of Civil Procedure as part of the fact finding mission; as such the contestant is trying to do his best to comply with the uninterrupted law. **Mr. Becker** stipulated that the complaint may have been filed unnecessarily and legal research may not have been conducted at the onset of this case, but was then conducted later on. **Mr. Becker** argued that having read the cases dealing with the primary and having read the prior Senate State Affairs Minutes from the 1945 and 1981 costs of election, **Mr. Becker** is not certain the Senate has the power to award attorney's fees.

Senator Davis responded that Mr. Becker also referenced I.C. § 12-121, and asked if Mr. Becker would provide a similar answer to the relevance of that section. **Mr. Becker** answered that he would provide a similar explanation. **Senator Davis** questioned Mr. Becker that if, in the event Mr. Katsilometes prevails, he was telling the Committee that it does not have the power to award the incumbent attorneys fees. **Mr. Becker** argued that, under the statutes as written and in the Constitutional authority placed in this Committee and in the Senate, Mr. Becker did not think that power exists at this stage.**Mr. Becker** further asserted that there may be a right to appeal and in that event, this request for attorney's fees preserves their rights.

Senator Davis referred to I.C. § 34-2120 dealing with bond and costs, and asked if Mr. Becker believed that I.C. § 34-2120(a) limits the cost of either party to the $500 bond amount. **Mr. Becker** argued that the Idaho Code section relates to the constitutional division of powers; the filing of the bond was a prerequisite for this case. He asserted that the Senate could not make an award or a judgment which would necessarily require judicial action to enforce, whether that is costs exceeding the amount of the bond, attorneys fees, or anything else that would require the Senate to initiate some sort of judicial action. **Mr. Becker** argued that due to the parties not knowing how this proceeding was going to proceed, there was the possibility of a writ of mandamus. Being that this Committee was convened, **Mr. Becker** stipulated he is uncertain that the right of judicial action will exist going forward; it remains to be seen how the Senate decides this matter and if the law was complied with. **Mr. Becker** restated that the contestant wanted to preserve their right of the award of attorney's fees if this matter is appealed.

Senator Davis restated his question based on two predicates: 1.) it is Senator Davis' understanding that in order to perfect the filing the Contest of Election, the $500 bond had to be filed; 2.) it is his further understanding that the bond was timely filed, thus the Contest of Election was perfected. **Senator Davis** questioned Mr. Becker if, due to the fact the statutory requirement is $500, does the language of I.C. § 34-2120(a) preclude the Senate, if it has that power, from imposing a bond award greater than the $500. **Mr. Becker** asserted that the $500 bond would be the maximum statutorily allowed amount based on: 1.) the plain language of the statute; and 2.) the limited enforcement of this Legislature without judicial action. **Senator Davis** asked if Mr. Becker believes that the Senate has the power to enforce a bond up to $500 but any amount greater than that, the Senate lacks that constitutional jurisdiction. **Mr. Becker** argued the answer to the question comes down to enforcement: the Senate may be able to make an award greater than $500, but enforcing that award will require judicial authority and action and ultimately, executive action. **Senator Davis** referenced I. C. § 34-2120(b) and asked Mr. Becker if it puts a $500 limit in its express right to award costs.

Mr. Becker argued the only funds available to this Legislature for the award of costs is the amount of the bond. He further argued that it is a constitutional issue as to whether the Senate can require someone to pay more than that. **Senator Davis** asked if Idaho Rules of Civil Procedure, Rule 11 applies to this type of proceeding. **Mr. Becker** argued that the Legislative history of the amendment said that the Legislature enacting the change wanted to bring the fact finding procedures within the Senate's control. He further asserted that certain provisions of the Rules of Civil Procedure have been referred to; the scope of what Rules of Civil Procedure have been brought within this Legislative body are up for debate at this time. He argued that the subpoena power and deposition power have been brought within the reach of the Senate within these rules. **Senator Davis** restated his question: does Rule 11 apply to this type of proceeding? **Mr. Becker** requested a moment to look it up.

Senator Davis asked if Mr. Becker believes the Legislature has a common law right to impose a request for attorney's fees to the prevailing party. **Mr. Becker** argued that this Legislature has been very clear that it expects to apply the laws as written. As written, **Mr. Becker** asserted that there would be a common law right to impose a request for attorneys fees. He questioned if the authority exists for this Committee to engage in judicial lawmaking; then again, this Legislature has made clear that they don't expect the Idaho Supreme Court to engage in judicial lawmaking.

Senator Davis changed the focus to I.C. § 34-2101.2. **Senator Davis** asserted that although Mr. Becker has not spoken to this subsection, it is referenced in the Memorandum in paragraphs 4 and 61 and in the Verified Complaint in paragraphs 25, 33, and 35; however, I.C. § 34-2101 is not included in the Notice of Contest of Election. **Senator Davis** asked what the contestant meant by these references in the Verified Complaint and the memorandum to the inclusion of Subpart 4 that Senator Nye is not eligible. **Mr. Becker** referred to the Sunshine Law and argued that it appears that the violations took place prior to the November 8, 2016 election. He asserted that the contestant's reading of the statute was that if someone committed the Sunshine Law violations, that per se makes the election unfair. He further argued how can someone be qualified to run for an office when they have broken a law enacted by a Legislative body in which they seek to sit.

Senator Davis addressed paragraph 62 of Mr. Becker's Memorandum; Senator Davis inferred from that paragraph that Mr. Nye was declared ineligible as a candidate. **Mr. Becker** asserted the intent was for this body to make a finding that, based on Sunshine Law violations, either the election was unfair due to the violations of the Sunshine Law or that Mr. Nye who, by violating the Sunshine Law, was not a qualified candidate. **Senator Davis** listed the qualifications to hold the office; age, citizenship, residency, being an elector for at least one year before, and they must file a declaration of candidacy. **Senator Davis** referred to the Jordan v. Pearce, 429 P.2d 419 (Idaho 1967) case in Bannock County. In Jordan, there were three candidates in the election contest that was filed, and the Court wrestled with the question of eligibility. **Senator Davis** argued that the Idaho Supreme Court held that eligibility "has reference to the qualification to hold the office rather than the qualification to be elected to the office." Jordan, 429 P.2d at 423 (emphasis added). **Senator Davis** asked if Mr. Becker was familiar with that case and the holding of the court on qualifications and eligibility. **Mr. Becker** stipulated he recalled reading a case about a probate judge but was not sure if it was the Kelly case. **Mr. Becker** argued that the case before the Committee deals with a statute amended since the decision in Jordan; the reference to the Sunshine Law brings the issue within the scope of this Committee's discretion.

Senator Davis continued on to Subpart 4 of the Verified Complaint, which is the heart of the argument dealing with disqualification. **Senator Davis** asserted that his understanding of the contestant's argument is that the incumbent probably did meet all the requirements for eligibility as the contestant has made no allegations to the contrary. **Senator Davis** sought to clarify that the incumbent's argument is that because the incumbent violated Idaho Code Title 18, Chapter 23 he can later be determined to be disqualified. **Senator Davis** asked for confirmation of his understanding that as a result, Subpart 2 would not have application but the contestant would rely on Subpart 4. **Mr. Becker** argued the contestant's reading was that Subpart 4 would be grounds for disqualification that would then be applied to Subpart 2. **Senator Davis** asked if any reference in the pleadings or in the memoranda to Subpart 2 could be disregarded. **Mr. Becker** asserted that if this Committee finds any violation, then it is in this Committee's discretion if that violation renders someone unqualified to run. He further argued that Idaho Constitution, Article III, Section 9, places the authority to judge the qualifications of its members within the Senate's purview and there is a statutory and a constitutional provision for such purview.

Senator Davis agreed with much of the contestants argument regarding the interpretation of I.C. § 18-2315; paragraph 7 of the Memorandum cites I.C. § 18-2315 as the criminal violation. **Mr. Becker** argued that I.C. § 18-2315 was the section termed the "catch all" section. **Senator Davis** stated his problem with the predicate of Mr. Becker's statement of I.C. § 18-2315: "unless a different punishment for such violation is prescribed by law." **Senator Davis** asked Mr. Becker if there is anywhere else in Idaho Code where a different punishment is provided for violating Idaho's election law. **Mr. Becker** stated his understanding of Senator Davis' question as asking if the Sunshine Laws or the criminal laws are mutually exclusive of one another. **Mr. Becker** argued that he did not believe the Sunshine Laws and criminal laws are exclusive of the other. **Mr. Becker** argued that the two being mutually exclusive would render the entire election contest Sunshine Law provision null and void. **Mr. Becker** asserted that there was no other way for this complaint to be brought before this Committee if the contestant first had to wait for someone to be criminally convicted. **Senator Davis** countered he is not suggesting a person had to be charged, tried, and convicted; the way he reads that phrase is that unless a different punishment is prescribed by law, there is a similar section in I.C. § 18-2315 that applies to the failure to appoint a treasurer. **Mr. Becker** asserted that I.C. § 18-2315 says "unless a different punishment for such violation as prescribed by law." He further argued that this Committee is sitting in the role of deciding what is the different punishment prescribed by law by virtue of vesting its role in a judicial capacity.

Senator Davis asked if I.C. § 67-6603(c) was the reference for the violation of failing to appoint a treasurer. **Mr. Becker** argued that the code section was referring to the failure to appoint a treasurer, as well as the donation in excess of the $1,000 limit. **Senator Davis** stated that I.C. § 67-6625 is the code section that the Attorney General has instructed the Committee to review; that section references I.C. § 67-6603 along with other sections. **Senator Davis** explained that as he reads the statute, I.C. § 67-6603 seems to provide a different punishment for the violation of election laws; that is where Senator Davis draws the predicate for the punishment. **Mr. Becker** asserted that these statutes were discussed in more detail in the complaint explaining how these statutes were interrelated. He argued I.C. § 18-2315 states that unless the punishment is something else in Idaho Code, the punishment is a $1,000 fine. He argued that conclusion leads to the question of if this Committee and the Senate can impose a $1,000 fine in addition to the relief that the contestant is asking for. **Senator Davis** asked Mr. Becker if the word "different" is the controlling term. **Mr. Becker** reiterated his argument that this Committee, under Idaho Constitution Article III, Section 9, has vast discretion in

how to judge the qualifications of its members and how to reprimand its members. He further argued that I.C. § 18-2315 provides some guidance as to what possible punishments may exist. He argued that other punishments may exist in terms of ethics violations; any punishment is within the discretion of this Committee and the entire body of the Senate. **Mr. Becker** argued the contest of election case is an interesting mix of constitutional discretion, and that there is not much case law because this body sits in quasi-judicial capacity.

Senator Davis asked if Subpart 4 was what the contestant relied on in addition to I.C. § 18-2315. **Senator Davis** argued that the predicate initially says committed any violations as set out in Idaho Code Title 18, Chapter 23; that is a basis for disqualification if there is a violation under Idaho Code Title 18, Chapter 23. Senator Davis then stated that conclusion leads to I.C. § 18-2315, which says that one is guilty of disqualification unless there is another code section that controls. **Senator Davis** then asserted that if there is another code section, then Idaho Code Title 18, Chapter 23 would not apply because of Title 67 and then there is not a basis under Subpart 4 for contesting the election. **Senator Davis** asserted the outcome was not about discretion but rather about statutory construction; he questioned how can this be done without less language and that is the biggest hurdle on the application of Subpart 4. **Mr. Becker** argued that he believes the focus is on the punishment instead of the violation. He asserted that in looking at I.C. § 34-2101, the original election contest, Idaho Code references the violation; it is the violation itself that brings the issue before the Committee not necessarily the punishment.

Senator Davis turned to the Sunshine Law violation of the contest of election. **Senator Davis** asked Mr. Becker to explain, based on the depositions taken, where the nine donations were actually deposited: in the House account or the Senate account. **Mr. Becker** asserted that initially the money was deposited in the House account. **Senator Davis** asked if the check for the entire amount of funds was moved to the Senate account. **Mr. Becker** argued that not all of the funds were moved to the Senate account and that some were expended prior to the check moving the funds over to the Senate account. **Senator Davis** asked if it is lawful to have a political campaign account with an appointed treasurer but not be a candidate for elected office. **Senator Davis** provided an example of such an event: assuming that Senator Davis decides not to run for re-election but already has a campaign account for running for the Senate with a treasurer appointed. **Senator Davis** asked Mr. Becker based on his understanding and the previous example, if Senator Davis chooses not to run for re-election, if he could still have a political campaign account with an appointed treasurer but not be a candidate for elected office. **Mr. Becker** argued he thought in the example that Senator Davis could have such an account with an appointed treasurer, but there is a spend down provision. **Senator Davis** asked Mr. Becker if it was lawful to have more than one political campaign account with an appointed treasurer and be a candidate for one office and not the other. Using the same example as above, Senator Davis asked if he has more than one campaign account, campaign treasurers, but he runs for one office and not the other, what would be the outcome in Mr. Becker's opinion. **Mr. Becker** argued that in that example, Mr. Nye could have had his House campaign account be subject to the spend down provisions.

Senator Davis asked for the result of the Benjamin Paul Gregerson report of alleged violation of the Sunshine Act report filed with the Idaho Secretary of State. **Mr. Becker** asserted it was his understanding that Mr. Nye was instructed to file some campaign finance disclosure reports; he asserted that he did not believe those had been filed yet. **Senator Davis** asked if Mr. Becker was familiar with Exhibit M, Bettsie Kimbrough's reply. **Mr. Becker** responded that would have been Exhibit D to the Thompson deposition; he asserted his familiarity with the email chain. **Senator Davis** inquired if Mr. Becker knew what Ms. Kimbrough's findings were. **Mr. Becker** asserted that the letter said a new campaign disclosure needs to be filed. **Senator Davis** asked if she also indicated that no further action would be taken on this issue. **Mr. Becker** stipulated that Ms. Kimbrough said that, but argued that the response of Ms. Kimbrough seems to be contradictory to requiring additional information. **Senator Davis** asked if there was anything in the record before the Committee today that was not before the Secretary of State when that office made the determination that no further action would be taken on the issue. He further inquired if the contestant thinks it would be relevant for the Committee to reconsider the Secretary of State's analysis. **Mr. Becker** argued that it doesn't appear that the Secretary of State looked at anything beyond the publicly available disclosures. He asserted the bank records are now available pursuant to subpoenas and the deposition testimony is available as well as the emails between Mr. Nye and Kathy Bair who was Aaron Thompson's paralegal. He argued that those emails uncovered during discovery demonstrate that Mr. Nye was aware of the Sunshine Law violations and undertook the action despite that awareness. **Mr. Becker** argued that conclusion brings up the word "willfully" which is a low mens rea (mental state) and that **Mr. Becker** argued has been demonstrated with the emails and bank records showing the bank transfers.

Vice Chairman Hagedorn inquired if Idaho Code specifies separate bank account for running for a different legislative office. **Mr. Becker** stipulated that Idaho Code doesn't require a separate bank account, but the Idaho Code references campaign accounts. He further argued that appointing a political treasurer for a campaign triggers the timing and manner in which donations can be received. **Vice Chairman Hagedorn** stated that I.C. § 67-6604 identifies the accounts that a political treasurer is required to keep for a candidate. He asked if the treasurer's report for Mr. Nye's House and Senate accounts had been filed and if Mr. Becker had seen the reports. **Mr. Becker** asserted the House bank accounts for the incumbents prior race would have been filed, but that he believes the Secretary of State's request for filings is for sometime in the future. He stipulated that the incumbent did see campaign disclosures and that was subject to testimony in Mr. Thompson's, Kathy Bair's, and Mr. Nye's depositions. **Vice Chairman Hagedorn** asked why the contestant subpoenaed the incumbent's Senate bank account if there wasn't a requirement in code for different bank accounts. **Mr. Becker** argued that the subpoena was issued in order to see the check records. He further argued that publicly available information couldn't be relied on because more detail might exist in bank records than is disclosed to the public. He asserted that it was necessary to see the actual checks and who signed them. **Mr. Becker** argued someone else could be the guilty party and absolve the incumbent of any knowledge or wrongdoing; perhaps that could have impacted the willfully mens rea standard. **Vice Chairman Hagedorn** inquired if there was an issue with the incumbent's Sunshine report for his Senate race or candidacy. **Mr. Becker** argued there absolutely is an issue with the incumbent's Sunshine report; it discloses the nine premature donations. He argued those nine emails demonstrate that the incumbent intended to run for the Senate at the time he solicited these donations. He asserted that, relating to the two separate accounts, there are mechanisms in place for transferring the $1,000 for a primary election and the $1,000 for a general election.

Vice Chairman Hagedorn asked if the bank accounts are separate from the Sunshine disclosures, and if the issue is with the Sunshine disclosures, but not the bank accounts. He clarified his question, asking if the donations came in and were properly filed on the Sunshine disclosures, that would be allowable; were the Sunshine disclosures in this case properly filed. **Mr. Becker** argued that what was not proper in the incumbent's Senate campaign finance disclosures was that nine donations were received before March 1st before the appointment of a political treasurer. He further argued that combining those donations with the incumbent's receipt of the emails and with his testimony, it can be argued that he intended to run for the Senate at the time that those nine donations were received. **Vice Chairman Hagedorn** inquired if the same treasurer was used for both of the Sunshine Reports and if they were signed by the same person. **Mr. Becker** stipulated that the same individual did sign both reports. He asserted that the Secretary of State's office indicates that there is a treasurer for the House campaign and a treasurer for the Senate campaign. He argued the filing for running for the election and the appointment of the treasurer for that particular campaign is what triggers the Sunshine law.

Senator Lakey referred to the Notice of Contest and asked if anything was included besides the violation of the Sunshine Law under I.C. § 67-6603? **Mr. Becker** asserted that the election contest was filed pro se. He argued sometimes things are put in a complaint and then you engage in discovery. **Mr. Becker** repeated his understanding of Senator Lakey's question: did the contestant specifically reference the Sunshine Law violation of the excessive transfer of the $6,000 when there was a $1,000 primary election and $1,000 general election donation. **Mr. Becker** asserted paragraph one of the Notice of Contest states, "the Sunshine Law," and then it goes on to state "codified at I.C. § 67.6603." He argued that section of the Notice of Contest contains a general reference to the Sunshine Law. **Mr. Becker** argued that by looking at the legislative history where the Idaho Rules of Civil Procedure are introduced as the fact finding guidelines, someone can engage in discovery and find out some other money came in that would not have been discovered if depositions had not been taken and bank records received.

Senator Lakey referred to I.C. § 34-2101; most of those grounds for election contest are serious such as malconduct, corruption, and fraud. I.C. § 18-2315, the "catch all", references what amounts to a felony provision as far as a $1,000 fine or imprisonment not exceeding 5 years. Idaho Code Title 18, Chapter 23 has serious violations: fraud, corruption, forgery of ballots, etc. **Senator Lakey** asserted the contestant referenced that the Senate has broad discretion in this matter. He asked if the contestant is arguing that if the Senate found a violation of the Sunshine Law in any case, that the Committee is required to grant relief. **Mr. Becker** asserted that finding is in this Committee's discretion. He argued that Mr. Kane from the Attorney General's Office outlined the forms of relief and one of those forms is to find a violation and not do anything about it. **Mr. Becker** argued that if Idaho citizens are required to adhere to laws, shouldn't they expect the same of elected officials.

Senator Davis noted that he had read everything Mr. Katsilometes had submitted. He asserted it was his understanding in reviewing I.C. § 34-2308 that the contestant had a right to appeal the recount within 24 hours. **Senator Davis** inquired if the contestant filed such an appeal. **Mr. Katsilometes** argued that the recount was not properly concluded. He asserted that a letter was received from the Attorney General's (AG) office six days after the recount purporting to declare a winner. He argued that there is no statutory authority for the AG's letter; the proper canvassing and reporting of the ballots is done by the county clerk to the Board of Canvassers as expressed in Idaho Code Chapter 12, Title 34. **Senator Davis** restated his question: did any appeal of the recount occur? **Mr. Katsilometes** argued the contestant has not been given the results by the county clerk or the Board of

Canvassers as an official result of the recount. **Senator Davis** confirmed that the answer to his question is no. **Mr Katsilometes** concurred.

Senator Davis asked if Mr. Katsilometes has heard of the term "resolution ballot." **Mr. Katsilometes** responded that he had. **Senator Davis** asked if Mr. Katsilometes was aware of the involvement of resolution ballots in the recount. **Mr. Katsilometes** replied in the affirmative. **Senator Davis** asked if Mr. Katsilometes' charts show an accounting for resolution ballots. **Mr. Katsilometes** asserted that he did not have time in the contestant's allotted time in this proceeding to cover the subject of resolution ballots. **Senator Davis** asked if resolution ballots would be included in his analysis. **Mr. Katsilometes** asserted that the resolution ballots were partially included in his analysis. **Senator Davis** asked what I.C. § 34-2103 means for purposes of this Committee's review. **Mr. Katsilometes** argued that there is an allegation of misconduct on the part of judges of an election, I.C. § 34-2103 requires a showing of that misconduct, and It is a definition of what misconduct is for election judges.

Chairman Siddoway thanked Mr. Becker and Mr. Katsilometes for their presentations, announced the time had expired for questions from the Committee to the contestant, and asked that the incumbent and his counsel introduce themselves with a reminder of the 20 minute time limit.

INCUMBENT: **James Ruchti**, representing Senator Mark Nye, gave a brief introduction. He asserted that when he tells his friends and colleagues about this case, those who are Democrats worry. His friends ask if Mr. Nye will get a fair hearing when the Legislature is 75-80 percent Republican, while others wonder if Mr. Ruchti would have an advantage because he served in the Legislature with some of the Committee members. **Mr. Ruchti** asserted he has learned that although politics play a role in many of the things that are done, when it comes to the integrity of the Legislative body, politics stops. He asserted that above all, the members of the House and Senate know that beyond the immediate needs, the most important thing to be done is to protect the institution that was established by the Constitution of the State of Idaho in 1890. **Mr. Ruchti** asserted that there are no concerns about whether or not this proceeding will be fair, it will be fair.

Mr. Ruchti asserted that this type of proceeding has only occurred three times: 1945, 1981, and now in 2017. He argued that in the previous two contests of election, the Senate did not do away with the election. He further argued that one of the most fundamental aspects of our democracy is the idea that the people in a given area can choose who represents them in the Legislature, on the bench in some instances, and in the executive office. He argued this choice in representation is fundamental to democracy and necessary so that people will have confidence in what their government does. **Mr. Ruchti** argued what is being asked of the Committee today is extraordinary. He argued the contestant is asking the Committee to contemplate, using the power of government, throwing out the democratically expressed will of the people of District 29. He asserted thousands of people voted in that election, and probably very few people know that this morning a committee of the State Senate is contemplating whether the Legislature should do away with those election results. He argued that setting aside the election results is significant; if that occurs and if it is determined that there is a basis for doing away with that election, such a decision would not only be news to Bannock County and all those who were elected at the same time, but all districts in the State would be extremely alarmed that the government would come in and undo the people's choice and the basis for a contest of election. He asserted he found the basis in I.C. § 34-2101.

Mr. Ruchti stated that Subpart 4 is the section the contestant is concentrating on which references Idaho Code Title 18, Chapter 23. **Mr. Ruchti** argued the types of behavior the Legislature is concerned with in that section are deplorable. He argued that section sets out actions by election officials to manipulate an election by adding or subtracting votes; it is behavior by the person running for election to manipulate the system in a way that is "deplorable." He argued that based on the questions that he has heard asked of the contestant, the Committee understands the types of actions statutorily needed to undo an election.

Mr. Ruchti argued that the basic allegations being made against the incumbent are wrong. He argued the incumbent did not do what he is accused of doing. **Mr. Ruchti** argued the incumbent had a treasurer appointed when he received the nine donations; seven of the nine donations were repayments for seats at his table at the Frank Church banquet; two were donations that were handed to the incumbent. **Mr. Ruchti** argued the incumbent received all of these donations between January 1, 2016 and March 1, 2016 before he declared to run for the Senate. He asserted the money from all nine donations was put into the incumbents House bank account with Idaho Bank & Trust. He further asserted that account was first set up when the incumbent first ran for the House in 2014. He asserted that account was the existing account going into 2016; all nine donations went into that account. **Mr. Ruchti** argued that during this time period former Senator Lacey was trying to decide whether or not to run again. He argued that the decision to file is never clear until the actual filing is made. He further argued that between January 1st and March 1st, 2016, the incumbent was trying to decide if he would be running for the Senate; as he gets the nine donations and they are deposited in the incumbents House account. **Mr. Ruchti** asserted those nine donations came to a total of $1,412.50. He further asserted that the paperwork for the incumbent to run for the Senate seat was filed on March 1, 2016 and the incumbent sets up a Senate account at the Bank of Idaho. **Mr. Ruchti** argued the incumbent left $1,412.50 in his House account and filed his Secretary of State Campaign Finance Report before the Primary Election, as required.

Mr. Ruchti argued that when the incumbent filed the finance report, he filled out the contribution lists and expenditures. He asserted the incumbent's practice was to prepare those reports and bring them to his treasurer, Aaron Thompson. **Mr. Ruchti** asserted Mr. Thompson had been and still is, treasurer for the incumbent's House account, and that Mr. Thompson is also the appointed treasurer to the Senate account. **Mr. Ruchti** further asserted Kathy Bair is a paralegal in Mr. Thompson's office, and that in that position Ms. Bair has completed these types of reports and served as treasurer for many years for Senator Malapeai. **Mr. Ruchti** argued when Ms. Bair saw the nine donations listed between January 1 and March 1, 2016 she was not sure how they should be reported. He argued that the incumbent is of the opinion that the House account funds can be used in the Senate race, based on research of the statutes, speaking with others, rules of the Secretary of State's office and other statutes. He argued that Ms. Bair spoke with the Secretary of State's office and those are the emails that Mr. Becker referred to earlier. **Mr. Ruchti** argued Ms. Kimbrough tells Ms. Bair that the Secretary of State's position is, according to Ms. Kimbrough, that the House funds cannot be rolled over to the Senate account except for a total of $2,000, which includes $1,000 during the primary election and $1,000 during the general election. He asserted Kathy Bair reports this in the emails that are on record. He argued the incumbent's response is also on file; he said let's do it right and file on both accounts by this week's deadline and follow the Secretary of State's advice. **Mr. Ruchti** argued that in the incumbent's deposition, he made it clear he didn't agree with the Secretary of State's advice, but he was going to follow it until he could come to some conclusion in his own mind.

Mr. Ruchti asserted that a $1,000 donation was made during the general election from the House account to the Senate account; the $2,000 limit is greater than the $1,412.50. He argued that money was moved from the House account to the Senate account as prescribed by the Secretary of State's office. He further argued that the incumbent moved an additional $6,000 from the House account to the Senate bank account and let it sit there. **Mr. Ruchti** argued the incumbent didn't report it on his Campaign Finance Reports because he didn't use it in his campaign. **Mr. Ruchti** further argued a separate bank account is not needed for a race; House and Senate campaign funds could be kept in the same account, although it would not be a good idea. He argued that in theory, that is what the incumbent has been told; thus the money is moved over but is not spent in relation to the campaign. **Mr. Ruchti** argued the incumbent has nothing to hide. He further argued the problem with a Contest of Election and the fact that a contestant has the ability to conduct discovery; it means a contestant can start out with one of the requirements, list it in the Notice of Contest of Election, and then do discovery such as pulling bank records, deposing the treasurer and assistant treasurer, deposing the candidate, and generally look for more information. **Mr. Ruchti** argued that after that extensive discovery, then the focus and direction of the contest can be changed. He argued that in this case the focus and direction was changed; the original reference is the $6,000.

Mr. Ruchti asserted that the Secretary of State's office looked at this issue that the contestant is complaining of in a similar earlier complaint filed with the Secretary of State by Mr. Gregersen. **Mr. Ruchti** argued the Secretary of State's office looked at the issue and issued a letter to Mr. Gregersen explaining that the money went into the House account, there was a treasurer, and everything was fine. He further asserted that in the case of Mr. Gregersen, the Secretary of State stated another report will be required to be filed for the House account when it is due, about the end of January. **Mr. Ruchti** argued this issue before the Committee has been looked at and reviewed by the Secretary of State's office, and they found that there was not a violation.

Mr. Ruchti argued that there was no willful behavior on the part of the incumbent as demonstrated by plenty of evidence as shown in the depositions in the attachment from Mr. Thompson, Ms. Bair, and Senator Nye as well as the emails. **Mr. Ruchti** further argued that the issues raised by the contestant would not have changed the outcome of the election. He argued the standard that the contestant wants to use is if the election was unfair; **Mr. Ruchti** argued that standard cannot be used. He further argued all elections are unfair; one candidate may have more name recognition, more money, or rumors are started that may impact the election. He argued such events are part of the process, but the process has worked for this country and this State for years and years. He asserted the margin of victory in this election was approximately 500 votes, which he argued was no small amount. He further argued that the $1,412.50 in question was a small amount when races now cost $20,000-$30,000 or more to run.

Mr. Ruchti addressed points 2 and 3 of the complaint, the problem with the machines and the software that goes with them. **Mr. Ruchti** argued that when the incumbent was getting ready for July 25th when everything was to be filled for the election, his understanding was that the election contest and "Idaho Lorax" Carta's deposition were the two pieces of evidence that he would have to refute. **Mr. Ruchti** asserted he attended the election recount and the result of the election recount from the Deputy AG's office.

Chairman Siddoway stated that time allotted for the incumbent was up and that the Committee would now ask questions.

QUESTIONS: **Senator Davis** stated that Mr. Ruchti's answer to the Verified Complaint was not relevant but illustrative. In the Incumbent Memorandum, included in the Preferable Relief request, attorney's fees were included under I.C. §§ 12-117 and 12-121 and then the incumbent added "and other applicable Idaho law." I.C. § 12-117 as Senator Davis reads it, only applies if the party involves a state agency. Senator Davis asked how I.C. § 12-117 applies to the present matter. **Mr. Ruchti** stipulated he can't explain how that section applies; he listed I.C. § 12-117 because Mr. Becker did and he disagrees with its inclusion now. **Senator Davis** described I.C. § 12-121 as it applies to a civil action and asked if Mr. Ruchti saw the matter as a civil action under I.C. § 12-121. **Mr. Ruchti** asserted that it was not a civil matter. **Senator Davis** referred to "and other applicable Idaho law" and asked for a citation for other applicable Idaho law. **Mr. Ruchti** answered that the other applicable law was the Idaho Constitution. **Mr. Ruchti** argued that the Idaho Senate has the inherent authority under the Constitution of the State of Idaho to award attorney fees. **Senator Davis** asked if Rule 11 of the Idaho Rules of Civil Procedure would apply in this type of proceeding. **Mr. Ruchti** said he didn't have an answer. He argued practitioners of the law think of Rule 11 as the obligations as officers of the court and their obligation to be honest in their allegations; they can't just make blanket allegations without having a good faith basis for them.

Senator Davis proceeded to I.C. § 34-2120 – Bonds and Costs. He asserted page 27 of the Memorandum suggests authority exists. **Senator Davis** asked Mr. Ruchti if he believed that the $500 statutory limit under Subpart A limits the authority of the Legislature to award costs only up to $500. **Mr. Ruchti** argued that he does not believe a limit on the award exists. He argued that the Senate, in its authority under the Constitution of the State of Idaho has the ability to award costs beyond that bond amount and additional attorney fees. **Mr. Ruchti** argued the bond amount was provided as a floor and to ensure there was some money readily available. He further argued if the Senate awards attorney fees and costs as he is requesting, it will be unique because such an award rarely happens. **Mr. Ruchti** asserted his willingness to take that challenge on and find out how to execute on the Senate's findings and ruling.

Senator Davis asked if Mr. Ruchti knew what a "resolution ballot" is. **Mr. Ruchti** asserted he does know what a resolution ballot is, and while he can't give a detailed explanation, he attended the recount where the resolution ballots, as he understood it; it became a key issue as the recount was done. **Senator Davis** asked if Mr. Ruchti attended the recount. **Mr. Ruchti** confirmed he had.

Senator Davis stated that the argument in Mr. Ruchti's memorandum referring to Exhibit S, suggests only egregious behavior as a basis for an election contest. **Senator Davis** noted the incumbent's cite to the date stamped numbers 116 and 118, and asked Mr. Ruchti to explain the language in Exhibit S. **Mr. Ruchti** asserted that the Legislature convened the Legislative Council after the 1980-1981 contest of election to look at whether the statutes for contested election were serving the purpose they wanted. He further asserted Exhibit S is a record of those proceedings and includes the agenda and some of the minute notes. He argued there are two things that must be understood about Exhibit S and what was being discussed. He asserted Record Nye 116 is an outline of what is going to be discussed. He argued that initially on Record Nye 116, they are talking about minor offices, which are every other office but state executive or legislative offices. He further argued that starting with Page 2, the outline says Initiation of the Contest: any qualified elector. He next asserted that Contest Grounds lists all of the actions such as, malconduct, fraud, corruption of election officials, illegal votes, and errors in the canvass of the ballot which is sufficient to change the results of the election. He asserted page 3 of Exhibit S outlines the contest grounds for state executives and legislative offices and page 4 - B is Grounds for Contest; same as for all other offices, see above.

Senator Davis stated that his understanding about one of the requested remedies is that the Senate set a new election day and that Mark Nye be precluded from appearing on the ballot. He asked Mr. Ruchti if there is a constitutional prohibition on restricting Mark Nye's access to the ballot under these circumstances. **Mr. Ruchti** stipulated he has not researched this topic but argued that access to the ballot is one of the items most prized in a democracy – that and voting itself. He further argued such action would be exposed to heavy scrutiny under the First Amendment.

Senator Lakey referred to the argument around I.C. § 34-2101(4) where the contestant referred to the appointment of political treasurer. The contestant's argument was that the appointment in this case didn't meet a standard to show that the result would have been different, and that showing requirement appears in subsections 1, 5, and 6 of I.C. § 34-2101. **Senator Lakey** asked if that issue is addressed anywhere else. **Mr. Ruchti** argued the statute provides for the right of the Senate to control this process of determining who may sit in the Senate as a constitutional right, which rises above all statutes that are passed. He argued that before the Senate makes the determination to undo the will of 42,000 plus constituents in Bannock County, the event that is being complained of has to rise to the level of "it would have made a difference in the election outcome." **Mr. Ruchti** argued the standard is not in the statutory language, but he believes it is something that the Senate must consider before making a decision of that magnitude.

Senator Lakey recalled Mr. Ruchti's oral argument that a decision to run for office is not really clear until someone actually files. He referenced I.C. § 67-6602.2 which states that a candidate either file or announce publicly. **Senator Lakey** asked Mr. Ruchti if the incumbent announced publicly that he was running for Senate prior to March 1. **Mr. Ruchti** argued that the answer to Senator Lakey's question hinges on what is meant by "publicly." If the meaning relates to whether Mr. Nye ruminated about running for the Senate seat publicly, **Mr. Ruchti** asserted he didn't have the facts, but given human nature in this business, that is something the incumbent could have talked about. **Senator Lakey** asked about Subsection 1 which says if a candidate "receives contributions or makes expenditures or reserves space or facilities with intent to promote candidacy for office" and asked how the incumbent did not fit into that definition. **Mr. Ruchti** argued that there was an approximate $90 expenditure to an advertising company which occurred right around the time of announcement, but before the Senate account was opened. He further argued that from a technical reading of the statute, perhaps there is something there, but the process of running for office is not as nice and neat as one would think.

Chairman Siddoway asked for further questions from the Committee. Being none, the question was before the Committee regarding the Contest of Election. After deliberation about this issue throughout the weekend, **Chairman Siddoway** came to the conclusion that the question should be split between acting on the contest and, acting on the costs and fees and the attorney's fees. During this discussion today, please hold the discussion regarding costs and fees and attorney's fees until the regular Committee meeting on Monday, January 23 at 8:00 a.m. Are there questions for others relating to the contested election?

Senator Davis asked if Brian Kane, Idaho Attorney General's Office would yield to some questions. **Mr. Kane** agreed and introduced himself.

Senator Davis said that Mr. Katsilometes indicated that he did not file an appeal for the recount because he was still waiting for some certification from the Board of Canvassers. He asked what the role of the AG's office was in recount proceedings. **Mr. Kane** answered that when the recount provisions in Idaho Code were reviewed, it is very clear that the AG acts in an oversight capacity. Within the recount, there is a series of statutes that clearly outlines the role of the AG. The process is:

- to file the request for the recount with the AG's office;
- the AG then orders the ballots impounded through the county sheriff;
- the AG sets the date for the recount;
- the AG oversees the recount and acts as the final authority on any questions raised during the recount; and
- at the conclusion of the recount, the AG states whether the results are confirmed or whether another recount has to be ordered.

In this case, the AG's office would be looking at whether or not there were votes sufficient within those five selected precincts that would have resulted in applying them across all precincts, and whether another outcome would be likely. If another outcome would be likely, the AG would order a general recount of all precincts. **Mr. Kane** stated that another likely outcome did not occur in this case. At the conclusion of the recount, there is 24 hours to appeal the results of the recount.

Senator Davis asked if, in light of the concerns raised by Mr. Katsilometes, both here and in his Contest of Election and the memorandum, has any argument dissuaded the AG's office away from its representation as to what the results of the recount were. **Mr. Kane** answered that if an appeal of the recount had been filed, the AG's office would have defended the results of the recount.

Senator Davis asked if Tim Hurst, Chief Deputy, Secretary of State's Office would yield to some questions. **Mr. Hurst** responded in the affirmative and introduced himself.

Senator Davis stated his understanding that Mr. Hurst attended the recount. Mr. "Idaho Lorax" uses the term "baffled." **Senator Davis** asked Mr. Hurst to explain why some of the initial concerns were satisfied on the recount in the mind of the Idaho Secretary of State's office. **Mr. Hurst** agreed that there was some confusion when the recount was done because the numbers were different from the contest. It was then pointed out that there were resolution ballots that had not been run yet. Resolution ballots are those the tabulator cannot read. Those ballots go through a process to make them readable and then are processed at the end of the day and the results are added into the precinct results. When the precinct results on the recount were done, the resolution ballots were not run the first time. Those ballots were run and added; that accounted for the difference.

Chairman Siddoway asked if there was a discrepancy at that time or a discrepancy in the number after the resolution ballots were accounted for and added in. **Mr. Hurst** stated it was not off by more than one or two votes.

Chairman Siddoway asked for an explanation of the process when the first precinct is tested. **Mr. Hurst** said that there is a statute that requires an audit whenever there is a recount. A certain number of precincts or certain number of ballots as defined in the statute are pulled out and counted by hand. When a total of those ballots is derived, those same ballots are then run through the tabulator to see if the numbers are the same. That was done in this case and it was within the threshhold of being correct so the ballots were continued to be run through the machines. **Chairman Siddoway** asked, after the first precinct, what is the process if there was a discrepancy, like in this case seven that were not tabulated correctly. Are all five precincts counted through the machine or are they hand counted? **Mr. Hurst** said after the first recount is completed, it will be determined whether the count should be by hand or by machine. If it checked out, the machine would be used. **Chairman Siddoway** gave an example: if you had a district that had 20 precincts and in the recount, it was found that there was a difference of five votes in each precinct that was tabulated. How do you discern what the number would be for the whole district? **Mr. Hurst** answered that if that difference was projected over the

entire 20 precincts, if there was one in the five precincts that went one way and that was projected over all 20 the precincts, they would be counted again by hand. Here there are 400 ballots and that wasn't the case. **Chairman Siddoway** confirmed his understanding that if there were five votes difference, the record would extrapolate that same difference to come out in the 20 precincts, which would have made a 100 vote difference. In this contest, there was over a 400 vote difference. That would not have changed the result of the election.

Senator Hill asked if Tom Katsilometes, contestant, would yield to another question. **Mr. Katsilometes** said he would and introduced himself.

Senator Hill stated that Mr. Katsilometes indicated there was a "critical clarification" that should be made at the end of his earlier testimony. What was that critical clarification? **Mr. Katsilometes** said that the clarification is on what the standard is regarding the violation of I.C. § 18-2315 that states "every person who willfully violates any of the provisions or the laws of this State relating to elections is, unless a different punishment for such violation is prescribed by law, punishable by fine not exceeding. . ." The distinction is it is a violation of this section. It doesn't necessarily mean that if the punishment in another section is different, this section is applied. The punishment is different in the Sunshine Laws but the violation still stands.

Senator Hill commented that this is a very serious matter. The Committee has tried to approach it from an unbiased, non-partisan point of view. Some may think this looks like a very expedited process, and in reality it is when compared with one of the other branches of government. **Senator Hill** stated he, as well as the Committee, has spent countless hours reading and studying and talking to the AG and others for clarification. This is not a quick decision nor is what they received today the only information that they have. **Senator Hill** said he is struggling with the contest. One of the main points is going from I.C. § 34-2101 which gives the grounds for a contest which states "when the incumbent... has committed any violation as set out in Chapter 23, Title 18 Idaho Code" which contains some very serious violations. Then there is the catch all. **Senator Hill** said he is not so hung up on the punishment part as he is on the title which is Election Offenses Not Otherwise Provided For. If it isn't provided for anywhere else, then he can come here. But the alleged violation is provided for in Title 67, Chapter 66, Idaho Code. If any responsible legislature, when writing I.C. § 34-2101, wanted to include Title 67, Chapter 66, Idaho Code, they would have included it. They would have said, when the incumbent has committed any violation as set out in Chapter 23, Title 18 or Chapter 66, Title 67, Idaho Code, there are grounds for a contest. To try to get there through this other way, **Senator Hill** explained he can't get there as it has to do with the punishment and it has to do with the title of the Idaho Code section. If a possible violation of Idaho Code Title 67, Chapter 66 would create grounds for a Contest of Election, how many legislators would be in trouble? Look on the Secretary of State's website and look at how many amended Campaign Disclosure Reports are filed by how many members of this body over time. Mistakes are made, there is a provision for correcting those mistakes, and those mistakes, according to a letter from the Secretary of State's office, were addressed and subsequently corrected.

Senator Hill understood the concern with the recount. He checked every precinct recount against what the original count showed. He looked at the people that were there for the recount. If there were a few discrepancies, they have to be sufficient to change the result. Regarding the machine certification, they were certified in full view of the Democrat and Republican parties, observers from the League of Women Voters, and the two candidates. They ran test ballots before and after. There is no indication of an issue for concern. None of these issues are sufficient enough, even if they exist, to lead to a new election.

MOTION: **Senator Hill** moved that the Contest of Election filed by Tom Katsilometes that this Committee has had under consideration be denied and that Mark Nye's election as State Senator from District 29 be confirmed. **Senator Davis** seconded the motion.

Senator Siddoway acknowledged that it had been moved and seconded to confirm Mark Nye's election and asked if there was any further discussion.

Senator Davis reaffirmed a request made to both parties during a previous telephone conference call that both the parties and their counsel were invited to, as they go through this experience, keep a list of statutory shortfalls or areas where it would have made their jobs easier if those statutes had been more plain. He asked if that list could be provided as soon as reasonably possible. It is fortunate that the 1981-1982 Legislature left much deeper footprints for this Legislature than were left for them from 1945. We would like to leave even deeper footprints for any successors that will have this happen. **Senator Davis** requested a copy so that improvements can be made. **Senator Davis** stated his intention to support the motion.

Senator Davis reiterated his concern over the predicate and that I.C. § 18-2315 may be read by some the way Mr. Katsilometes has suggested, but the problem with Mr. Katsilometes' approach is that whether it is without the "unless" language or with it, in both instances, it talks about violation and punishment both in the portion that is attributed to I.C. § 18-2315, and in the "unless" language. **Senator Davis** states his belief that I.C. § 18-2315 is not applicable.

Senator Davis referred to the recount procedure and respectfully disagreed with Mr. Katsilometes that the AG plays a lessor role than they have suggested. After reading each of the statutes concerning the recount procedure, he reads them differently. It is plain that the AG has these affirmative legal duties and they have performed them. Mr. Katsilometes bears the burden of proof to illustrate and demonstrate to the Committee that a different result would have occurred; merely suggesting a basis or grounds for reasonable doubt is not enough to carry the burden of proof. **Senator Davis** said he cannot support the election contest and will support the motion.

Senator Lakey stated that he will be supporting the motion. He is of the same mind as Senator Hill and Senator Davis in regards to I.C. § 18-2315. But even in Title 67, Chapter 66, Idaho Code, he doesn't think the standard is whether or not the potential violation would have made a difference. But he does appreciate the comments that were made in support of that issue. That isn't the standard, but he did evaluate the seriousness of the request. The request is to overturn an election where the results were clear. That requires heavy consideration and a heavy burden. He weighed the seriousness of the enumerated offenses in the code, both in I.C. § 34-2101 and those specific sections enumerated in Title 18, Chapter 23, Idaho Code. When those are compared with the alleged violation, or all the potential violations under Title 67, Chapter 66, Idaho Code, we are talking about technical violations: filing a late report, missing a contribution, or not including on the parade banner "Jones for Senate" at the bottom. Those kind of technical, relatively small violations are not what was intended to overturn an election result. Even with Title 67, Chapter 66, Idaho Code, **Senator Lakey** did not think it was the Legislature's intent to make those technical violations the basis for overturning an election. In this case, there may have been a technical violation either on that expenditure or the other checks that weren't for reimbursement. But it doesn't rise to the level of this Committee's overturning the election.

Vice Chairman Hagedorn noted that being one of two on this Committee that has moved from one body to the other, it is a very, very confusing time financially in how to determine the process of establishing the bank account and the accounting the

treasurer has to deal with; the statute is not clear. That should be fixed because it will continue to happen in the future. It happens when someone moves from one body to the other or from the legislative branch to the executive branch. The Secretary of State went through these same struggles. The statutes need to be clarified. **Vice Chairman Hagedorn** said he read through all the depositions, the emails, and all the documents and appreciated the comment by then Representative Nye, that he wanted to do what the Secretary of State felt was right. **Vice Chairman Hagedorn** stated his agreement with Senator Nye, it was not the right call on the Secretary of State's part but, that is what he did. He appreciated Senator Nye's candor and trying to do what he believed everyone else thought was right. **Vice Chairman Hagedorn** indicated his support of the motion.

Senator Winder thanked each of the participants in the process for the respectful way in which he was approached over the last month and have honored their restriction when talking about the case. That was an important part of showing respect for the process. Senator Winder did not ask a lot of questions but he did ask a lot of questions as he read and absorbed the contents of the documents which was a lot of information. **Senator Winder** stated that he came to the same conclusion as the maker of the motion, that the evidence presented was not sufficient to support the Contest of Election. **Senator Winder** stated his support of the motion and requested a roll call vote.

Chairman Siddoway thanked Eric Milstead and the Legislative Services staff. Terri Kondeff deserves special recognition for her work on cataloging all of the documents. It was daunting when the box of documents was delivered. He extended his thanks to Senator Davis and the Senate President Pro Tempore for their work. Without Senator Davis' legal expertise on this issue, the process would have been much more difficult. The overriding issue to Chairman Siddoway was, what was fair? There were mistakes made, but those mistakes were minor in form and they wouldn't have changed the election. If the incumbent had tried to hide something or manipulate the system, there may have been a different outcome. It has been shown that the incumbent, through his communications with the Secretary of State's office and election officials, was trying the determine how to go through the process correctly. **Chairman Siddoway** stated his inclination to support the motion.

Chairman Siddoway also thanked the Committee members. They put in a lot of hours studying the documentation. This is not a partisan issue, the Committee was intent on doing the right thing.

ROLL CALL VOTE: **Vice Chairman Hagedorn**, **Senators Davis**, **Hill**, **Winder**, **Lodge**, **Lakey**, **Stennett**, **Buckner-Webb**, and **Chairman Siddoway** voted aye. The motion carried unanimously.

Chairman Siddoway explained that the process for the question on costs and fees. Both the incumbent and the contestant should submit the cost and fees in a memorandum of no more than five pages, by Wednesday, January 18, 2017, at 12:00 p.m. to Chairman Siddoway's office. Upon receipt of those memorandum, a copy of the contestant's memorandum will be sent to the incumbent and a copy incumbent's memorandum will be sent to the contestant.

Then, by Friday, January 20, 2017 at 12:00 p.m., the responses to the opponents memorandum should be delivered to Chairman Siddoway's office.

Senator Davis asked if the word "costs" also means that if either the incumbent or the contestant, or both, believe that they have a legal claim for attorney's fees, that within those five pages, they would make their written argument as to why they believe, as a matter of law, they would be entitled to fees in addition to traditional costs.

Chairman Siddoway stated that they could claim whatever they thought appropriate. However, they should put the rationale supporting the reasons for claiming whatever amount they were seeking. That should included any statute references and/or legal argument they may have. Friday at noon, those responses will be sent out to the Committee. On Monday, January 23, 2017, at 8:00 a.m., the first order of business will be to take up the question in regard to awarding costs and fees.

Senator Hagedorn asked if those costs would include Legislative Services or Secretary of State incurred costs. **Chairman Siddoway** responded in the negative.

Senator Davis asked if the Committee would act on the written arguments without any further oral arguments. **Chairman Siddoway** answered that was correct. It isn't the intent of the Chairman to have those costs discussed by the incumbent nor the contestant.

ADJOURNED: There being no further business at this time, **Chairman Siddoway** adjourned the meeting at 10:57 a.m.

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Senator Siddoway

Chair

_____

Twyla Melton, Secretary

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Assisted by Jill Randolph