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February 14, 1986

The Honorable Laird Noh
Idaho State Senator
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Constitutionality of Fish and Game Commission
Appointment Requirements

Dear Senator Noh:

In your letter of January 21, 1986, you requested our opinion as to whether Idaho Code § 36-102(d), taken with Idaho Code § 36-102(a)(b), required a commissioner to name a specific political party to which he or she belongs or whether a commissioner could declare himself or herself to be "independent" or belonging to no specific political party. My letter of January 28, 1986, advised you that these code sections do require the declaration of a specific political party to which a commissioner belongs. You have now requested advice as to the constitutionality of Idaho Code §§ 36-102(d) and 36-102(a)(b) in the following respects:

- (1) Does the requirement of § 36-102(d) of "a declaration as to the name of the political party to which such commissioner belongs" deprive citizens who do not in fact belong to any political party of a right or privilege protected by the Idaho or United States Constitution?
- (2) Is the requirement of a declaration of a political party in this instance unconstitutionally vague because there is no way to test it, considering that Idaho does not require a declaration of party affiliation when voting or registering to vote?

ANALYSIS:

Idaho Code § 36-102 creates and defines membership, and its requirements, of the Idaho Fish and Game Commission. Numerous qualifications are stated in § 36-102(b):

The selection and appointment of said members shall be made solely upon consideration of the welfare and best interests of fish and game in the State of Idaho, and no person shall be appointed a member of said commission unless he shall be well informed upon, and interested in, the subject of wildlife conservation and restoration. No member shall hold any other elective or appointive office, state, county or municipal, or any office in any political party organization. Not more than three (3) of the members of said commission shall at any time belong to the same political party. Each of the members of said commission shall be a citizen of the United States, and of the State of Idaho, and a bona fide resident of the district from which he is appointed as hereinafter set forth. . . .

In addition, § 36-102(d) states that at the time the oath of office is taken "there shall be added a declaration as to the name of the political party to which such commissioner belongs, . . ."

The major constitutional issue raised by your first question is whether a citizen who in fact belongs to no political party is deprived of equal protection of the law by the fact that he or she could not be appointed a fish and game commissioner without declaring affiliation with an organized, recognized political party in the state.

Equal protection looks at any classification within a statute which impacts differently upon the categories of persons affected. The Idaho and United States Supreme Courts have articulated equal protection standards which differ according to the interests and nature of the rights affected. The most rigorous test is that of "strict scrutiny" which requires a classification to be justified by a compelling state interest. However, this test applies only to "suspect classifications," such as those based upon race, and to classifications burdening fundamental interests," such as public access to the courts. See, e. g. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). This standard is not applicable because no suspect classes or fundamental interests, as it has been defined, are involved here.

The more restrained standard, commonly termed the "rational basis" test appears to be the applicable test. Under this standard, a classification will be upheld if it is rationally related to a legitimate government objective. Langmeyer v. State, 104 Idaho 53, 656 P.2d 114 (1982). In Langmeyer, the question before the court was the constitutionality of a five year residency requirement to qualify for appointment to a county planning and zoning commission. Against an argument that a higher standard of review should apply, the court said:

While we acknowledge the important functions served by commissions appointed by governing bodies within this state, eligibility for appointment to one of these commissions cannot be equated with the franchise to vote or attain the same level as a "basic necessity of life." Therefore, the statute is measured under the traditional equal protection test--whether the classification rationally furthers a legitimate state interest. (cites omitted). Langmeyer at 56-57.

On the basis of this finding in the Langmeyer case, it is our conclusion that the equal protection standard would apply to the fish and game commission, also an appointive commission.

The court next discussed the application of the rational basis standard, "The classification under the traditional basis test is not unconstitutional because it results in some inequality--mathematical precision is not required." Later, in Bint v. Creative Forest Products, 108 Idaho 116, 120, 697 P.2d 818 (1985), a workman's compensation case, the court held "Under the 'rational basis test,' a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it."

It has been found generally to be a legitimate governmental objective to politically balance an appointed commission as is required by Idaho Code § 36-102(b):

The constitutionality of statutes providing that not more than a certain number or proportion of a certain class of public officers should be elected or appointed from a particular party, has, with some exceptions (cite omitted), been generally sustained. (cites omitted) 140 A.L.R. 471, 472 (1942).

The Idaho Constitution does not forbid a political test for holding public office. If it is legitimate to statutorily

require a balanced commission, is it also allowable by the requirement of a declaration of party affiliation to, in effect, exclude an "independent?"

In researching the decisions of other states, we have found few relevant cases dealing with political qualifications for an appointive office. None of the cases found have been recently decided. In State v. Sargent, 145 Iowa 298, 124 N.W. 339 (1910), the Supreme Court of Iowa upheld a city ordinance that required a mayor, in cities having a population of more than 20,000, to appoint a board of fire and police commissioners from the two leading political parties. The court upheld the limitation of this requirement by saying:

The only point. . . is that it forces an elector, if he would stand any show of appointment to the board, to ally himself with one or the other of the two dominant parties, thus destroying his free agency in matters political. There is no merit, as we think, in this argument.

The court went on to say the requirement in question was a common legislative requirement. It also said:

True, an elector who did not ally himself with one or the other of the dominant parties could not be appointed to membership upon the board; but there is no such thing as a right to hold office. This is a mere privilege at all times within the control of the legislature, save where limited by some constitutional provision.

See also, State v. Marion Circuit Court, _____ Ind. _____, 72 N.E. 2d 225 (1947).

Cases based on particular state constitutional requirements, not found in Idaho's Constitution, have gone the other way in deciding issues in this subject area. See, e.g. Attorney General v. Detroit, 58 Mich. 213, 24 N.W. 887 (1885); State v. Washburn, 167 Mo. 680, 67 S.W. 592 (1902).

In analyzing the rationale behind the structure of the fish and game commission, it appears the purposes are to have knowledgeable, concerned commissioners and also to provide political balance and geographical representation on the commission. The statutory exclusion of an "independent" recognizes that, practically speaking, an "independent" exists only between elections. If one wishes to vote or otherwise participate in the formal political processes of the state, one usually must choose to do so through a recognized political party. The fish and game commission is an appointed commission

subject to the political process. The excluding of an "independent" is rationally related to the legitimate purpose of having the officially recognized and organized political forces in the state as members of the commission. While the legislature could choose to amend the law to allow "independents" to become commissioners, it does not offend the equal protection clauses of the Idaho or United States Constitutions to exclude them under the rational basis test.

Regarding the issue of due process, in Bint, supra, at 823, the court said:

The applicable standard of analysis under a due process challenge is the same as under an equal protection challenge: whether the challenged law bears a rational relationship to a legitimate legislative purpose.

Hence, a due process challenge would find no liberty interest violated.

Recent cases decided by the Idaho Court of Appeals have discussed a new intermediate standard of review. In Idaho, this standard has been denominated as the "means focus test," See, State v. Reed, 107 Idaho 162 (App), 686 P.2d 842 (1984); which discusses this test. While we believe some questions may remain as to the applicability of the basic rational relation test in this matter, we are unwilling to hypothesize as to the future reasoning of the Idaho Supreme Court.

Further, it is unlikely that there is a constitutional violation of art. I, § 2, of the Idaho Constitution regarding privileges and immunities which reads, ". . .and no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the legislature (emphasis added)." This part of § 2 has been little used or cited in Idaho cases. Because the emphasized language qualifies a grant of a privilege or immunity, it is difficult to apply. In Fisher v. Masters, 59 Idaho 366, 378, 83 P.2d 212 (1938), it was said that the declaration of rights contained in this article guarantees "equal rights, privileges and immunities" to all persons within the bounds of the state, though the constitution containing it was adopted by a limited number of male citizens. The case, however, did not explain what "privilege and immunities" meant, nor add the limiting language of the constitution emphasized above. The ability to become a fish and game commissioner is not a privilege that "may not be altered, amended or repealed by the legislature." It may be. Consequently, this constitutional issue appears not to be applicable here.

Finally, the statute, Idaho Code § § 36-102, also is not unconstitutionally vague. The test for finding a statute void-for-vagueness on its face, and thereby in violation of due process, is whether the law is impermissibly vague in all of its applications. State v. Newman, 108 Idaho 5, 696 P.2d 855 (1985). In Newman, the court noted the three underpinnings of the vagueness doctrine. They are: (1) to give people a reasonable opportunity to know what is and is not prohibited conduct, (2) to avoid giving those charged with enforcing the law arbitrary and discriminatory enforcement standards, and (3) to avoid delegating basic policy matters to decision makers by giving them clear standards for judging innocence or guilt. Newman at 12.

The vagueness doctrine is not applicable here because the thrust of the vagueness doctrine is to prevent prosecution of innocent people under vague laws. Here, the statute is clear on its face and no prosecution would be involved. It requires a declaration as to which political party a commissioner belongs. It may be difficult to determine what this affiliation really is since a person is not required to declare it for voting or voter registration. However, the appointment is subject to confirmation by the senate. The senate committee may ask relevant, probing questions of a nominee before confirmation. The senate has the freedom to exercise its judgment in affirming a nomination and the confirmation process is not subject to censure by anyone. The vagueness issue is not applicable to the question presented because the statute is not vague on its face and not vague in its application since a nominated commissioner is required to make a declaration of his or her party.

We note, too, that a presumption of constitutionality attaches to a statute. Leliefield v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983); Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975). When a court judges a statute, another principle of statutory construction was stated in State v. Hanson, 81 Idaho 403, 409, 342 P.2d 706 (1959):

The cardinal principle of statutory construction is to save and not destroy . . . and it is incumbent upon a court to give a statute an interpretation which will not nullify it if such construction is reasonable or possible.

Based on the grounds discussed above, it is our judgment that the statute is not unconstitutional as it presently stands.

The Honorable Laird Noh
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Please contact me if you have further questions or concerns.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Patrick J. Kole".

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK/tg