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January 26, 1990

Honorable Pamela I. Bengson  
House of Representatives  
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Citizen Advisory Vote; Abortion

Dear Representative Bengson:

You have asked the following questions:

1. May the legislature authorize a referendum consistent with the provisions of the Idaho Constitution and the Idaho Code;
2. If so, may the referendum be nonbinding; and
3. May it provide for alternate choices by the voters?

For the sake of clarity, a definition of terms is in order. "Referendum" in Idaho means the power of the electorate to approve or reject any act of the legislature. As distinguished specifically from "initiative," it is the power of the people to approve or set aside a measure which has actually been passed into law by the legislature. An "initiative" permits direct enactment of laws by the people. "Initiative" and "referendum" are specifically defined and authorized by article 3, section 1, of the Idaho Constitution, which provides in pertinent part:

The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum,

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and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection. (Emphasis added.)

Chapter 18 of title 34 is the enabling legislation for the constitutional provision. There, too, "initiative" and "referendum" are specifically defined in reference to the passage of law.

Notably, only two issues have been subject to referendum in the history of our state: sales tax in 1935 and again in 1965 and the right to work in 1982.

Close reading of your questions suggests that your proposal contemplates an advisory vote of the people, as opposed to a "referendum" per se. The only specific provision in Idaho law for an advisory vote is found at Idaho Code § 34-2217, which authorizes submitting the question of ratification of amendments to the United States Constitution to the Idaho electorate on an advisory basis. This section, entitled "Referendum on United States constitutional amendment - Advisory nature" adds to the confusion regarding the nature of a referendum. "Referendum" as used in this title is not the "referendum" authorized in article 3, section 1, of the Idaho Constitution. This provision simply authorizes an advisory vote of the people.

While the measure you propose is not a "referendum" or "initiative" subject to the provisions of article 3, section 1, of the Idaho Constitution or of Idaho Code §§ 34-1801 et seq., advisory votes are neither authorized nor prohibited by the Idaho Constitution. In the absence of a specific prohibition, the legislature may place such an advisory question on the ballot. Because such a vote is outside the scope of article 3, section 1, of the Idaho Constitution, however, it will have no binding effect.

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If you have any questions, please let me know.

Sincerely,



DANIEL G. CHADWICK  
Chief, Intergovernmental  
Affairs Division

DGC/dp