

August 23, 2001

The Honorable Pete T. Cenarrusa
Secretary of State

HAND DELIVERED

Re: Certificate of Review
Initiative Concerning State Term Limits

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on August 3, 2001, called the "Idaho State Term Limits Act of 2002" (proposed initiative).

Idaho Code § 34-1809 provides in relevant part:

REVIEW OF INITIATIVE AND REFERENDUM BY ATTORNEY GENERAL . . . the attorney general . . . shall, within twenty (20) working days from receipt thereof, review the proposal for matters of substantive import and shall recommend to the petitioner such revision or alteration of the measure as may be deemed necessary and appropriate. The recommendations of the attorney general shall be advisory only and the petitioner may accept or reject them in whole or in part. The attorney general shall issue a certificate of review to the secretary of state certifying that he has reviewed the measure for form and style

Pursuant to this duty, this office has reviewed the proposed initiative and prepared the following advisory comments.

This office offers no opinion with regard to the policy issues addressed by the proposed initiative. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this proposed initiative, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLES

Following the filing of the proposed initiative and pursuant to Idaho Code § 34-1809, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While this office prepares the

titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative would make a number of changes to Idaho Code § 34-907. Idaho Code § 34-907 contains the ballot access restrictions for statewide elected officials and state legislators that were adopted by voter initiative in 1994. None of these changes set forth in the proposed initiative raises any significant statutory or constitutional concern beyond those raised by existing law.

1. Addition of the Term “Special”

Currently, Idaho Code § 34-907(1) states that the ballot access restrictions apply for all multi-term incumbents planning to appear on the “primary or general election ballot.” The proposed initiative would include ballots prepared for “special” elections in the list of ballots covered by the ballot access restrictions in Idaho Code § 34-907(1).

2. Repeal of Ballot Access Restrictions for Congressional Candidates

Currently, Idaho Code §§ 34-907(1)(a) and (b) set out ballot access restrictions for multi-term congressional incumbents. Ballot access restrictions for congressional candidates were held to be unconstitutional in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). The initiative would remove the unconstitutional language from Idaho Code § 34-907.

3. Restriction on Switching from House to Senate and Vice Versa in Consecutive Elections

Idaho Code § 34-907(1)(d) prohibits an individual from appearing on the ballot as a candidate for either the Idaho State Senate (Senate) or House of Representatives (House) when that individual has served as “a state legislator, representing any district within the state, including all House seats within the same district, during eight (8) or more of the previous fifteen (15) years.” However, the initial language in Idaho Code § 34-907(1) limits this restriction to service in the “same office.” Therefore, under the current version of Idaho Code § 34-907, a person who is prohibited from appearing on the ballot as a candidate for the State Senate, for example, could appear on the ballot as a candidate for the House of Representatives. The same would be true for a multi-term member of the House appearing on the ballot as a candidate for State Senate.

The initiative would narrow the ability of a multi-term incumbent in one house to appear on the ballot as a candidate for a position in the other house. A state legislator could not appear on the ballot as a candidate for the State Senate or the State House of

Representatives once he or she has served as a “member of the state legislature during twelve (12) or more of the previous fifteen (15) years.”

4. Repeal of Ballot Access Restrictions for County Officials

Currently, Idaho Code §§ 34-907(1)(e) and (f) contain ballot access restrictions for multi-term incumbent candidates for county commission and other county elected positions. The initiative would repeal these restrictions.

5. Change of Effect Date for Terms Counted Toward Ballot Access Restrictions

Section 5 of the 1994 initiative enacting the current version of Idaho Code § 34-907 stated that the effective date of the initiative was January 1, 1995. It also stated that, “[s]ervice prior to January 1, 1995 shall not be counted for purpose of” calculating when the ballot access restrictions go into effect. Legislative terms begin on December 1 following the general election. Idaho Code § 34-907. Therefore, the term that resulted from the 1994 general election does not count toward the ballot access restriction calculations for state legislators only.

Section 3 of the proposed initiative would change the date from which terms are calculated to determine when ballot access restrictions begin. The initiative includes all “terms of office [that] began or begin at any time after December 1, 1994” in the calculation of terms leading toward ballot access restrictions. It is not clear what the drafters intend by this change. It does not cover the state legislative terms that were the subject of the 1994 general election because those terms began on December 1, 1994, not after December 1, 1994. The drafters should clarify what they hope to accomplish with the language in section 3 that differs from the existing effective date of Idaho Code § 34-907.

6. Other Matters for Consideration

In a memorandum decision dated August 23, 2000, the District Court for the Sixth Judicial District invalidated Idaho Code §§ 34-907(1)(e) and (f), which imposed term limits on county elected positions. Rudeen v. Cenarrusa, Memorandum Decision and Order, Case No. CV00-00012 (6th Dist., Power County, August 23, 2000). The rationale adopted by the district court in Rudeen included the following rulings: (1) the right of suffrage is a fundamental right set forth in the Idaho Constitution; and (2) the right of suffrage includes the right to vote, access to the ballot to run for public office, and to hold public office. The court also relied upon the “equal footing” line of authority, traced back to the Idaho Supreme Court’s decision in Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943). The equal footing doctrine holds that legislation passed through the initiative process is “on an equal footing with legislation enacted by the state and must comply with the same constitutional requirements as legislation enacted by the Idaho legislature.”

Westerberg v. Andrus, 114 Idaho 401, 405, 757 P.2d 664, 668 (1988). In other words, if the legislature would be constitutionally prohibited from passing a law, then the voters would also be prohibited from passing the same law through the initiative process.

In the Westerberg case, the Idaho Supreme Court struck down a lottery law passed by the voters through the initiative process, explaining that the legislature was constitutionally prohibited from establishing lotteries. Therefore, the court reasoned, a lottery could only be established by amending the Idaho Constitution. *See id.* (“[W]e conclude that [the Idaho Constitution] prohibits the establishment of a lottery through any legislative process, including the initiative.”) Indeed, the voters of Idaho subsequently passed a constitutional amendment establishing a state lottery.

Similar to the Idaho Supreme Court in Westerberg, the district court in Rudeen ruled that because the right of suffrage is a fundamental right under the Idaho Constitution, the term limits initiative is unconstitutional. The district court further advised that, “[t]he term limits issue in Idaho ought to be determined permanently and definitely (if at all) by political debate and election on a constitutional amendment.” Memorandum Decision at 37 (emphasis added).

The rationale applied by the district court in Rudeen resulted in a decision which invalidated term limits on county elected officials. Yet, the term limits law applies to county and state elected officials, including legislators and executive branch officials. The incomplete nature of the ruling is entirely due to the coincidental status of the named plaintiffs in the lawsuit—of the twenty-two (22) named plaintiffs, none of them were state elected officials. However, if the legal validity of the district court’s rationale is accepted, it would seem that the decision would apply equally to any statutorily imposed term limit restrictions on any elected official in Idaho.

The Rudeen decision is currently on appeal to the Idaho Supreme Court. For the reasons set forth above, the court’s decision may have direct application to this proposed initiative.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

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