

February 11, 2002

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Judicial Accountability Initiative Law (J.A.I.L.)

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on January 15, 2002. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. 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 petition, this office's 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 TITLE

Following the filing of the proposed initiative, our 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 our 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

A. Introduction

Entitled "The IDAHO Judicial Accountability Initiative Law (J.A.I.L.)," petitioners have presented a petition that seeks to substantially alter the judicial system of Idaho. Specifically, petitioners seek to alter and implement the following:

1. Judicial Immunity will be eliminated.
2. A Special Grand Jury related solely to the conduct of judges on the bench.
3. Procedures for the removal of judges.
4. Additional provisions related to the implementation of the Grand Jury.

Each of these measures would most likely be struck down by a reviewing court as unconstitutional and a violation of the separation of powers doctrine.

The separation of powers doctrine recognizes that each branch of the government is intended to operate in its own sphere of authority subject only to those checks and balances expressly granted within the Idaho Constitution. Absent a constitutional amendment, this measure will most likely be struck down. For additional consideration and review, an overview of the principal provisions of the Idaho Constitution related to this issue is provided below.

B. Separation of Powers Defined

Idaho Constitution article 2, § 1, defines the departments of government and states the policy of separation of powers. Specifically, article 2, § 1, states:

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

The initiative is considered a legislative power. *See* Idaho Constitution, art. 3, § 1. As a legislative power, the initiative cannot regulate the powers of the courts nor act as an oversight mechanism. All judicial power is vested within the courts.

It is quite clear that the Idaho Constitution expressly states that each branch of government is permitted to exercise those powers granted to it without encroachment from the other branches of government. As can be read from the last sentence of article 2, § 1—no department may exercise the power of another department unless it is expressly permitted within the Idaho Constitution. J.A.I.L., as enacted through the initiative process, would unconstitutionally encroach on the powers of the judicial branch because the statute would operate as an impermissible exercise of judicial power by the legislature without an express constitutional grant of power.

The separation of judicial power from executive power and the legislative power was not merely a matter of convenience. The three branches of government are coordinate and yet each, within the administration of its own affairs, is supreme. The granting of judicial power to the courts carries with it, as a necessary incident, the right to make that power effective in the *administration* of justice under the constitution. *See R. E. W. Const. Co. v. District Court of Third Judicial Dist.*, 88 Idaho 426, 435-36, 400 P.2d 390, 396 (1965). Rules of practice and procedure are, fundamentally, matters within the judicial power and subject to the control of the courts in the administration of justice. The

courts accept legislative *co-operation* in rendering the judiciary more effective. They deny the right of legislative *dominance* in matters of this kind. Dowling, *The Inherent Power of the Judiciary*, Vol. XXI, American Bar Association Journal, page 635.

The J.A.I.L. initiative seeks to create an additional body with power to remove judges, review the decisions made by judges, and in certain instances, indict a judge for a crime.¹ Essentially, this petition creates a legislative oversight mechanism for the courts. Creation of this body through statute is an impermissible exercise of judicial power by a legislative body.

Article 5 of the Idaho Constitution defines the powers of the judicial branch of government. Specifically, article 5, § 2, states:

Judicial Power—Where vested.—The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no changes shall be made in the jurisdiction or in the manner of the selection of judges of existing inferior courts.

Reading this section in its entirety, the legislature is empowered to establish certain courts, however, once established those courts are subject to the administration and supervision of the Idaho Supreme Court. The J.A.I.L. initiative usurps the administrative and supervisory power of the Idaho Supreme Court by replacing it as the highest authority on the conduct of judges within the judicial system. This is in direct conflict with the above quoted constitutional provision.

The above provision of the constitution is a restriction upon the power of the legislature to limit the jurisdiction conferred by the constitution on the judicial department of the state. While the legislature may provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of the powers of all the courts below the Supreme Court, in doing so it has no power to prescribe a jurisdiction for the district courts of the state which is less broad than contained in section 20, art. 5, of the constitution. See Fox v. Flynn, 27 Idaho 580, 150 P. 44, 46.

The power of the legislature is specifically limited in other areas as well. As can be seen in Idaho Constitution, article 5, § 13:

Power of legislature respecting courts.—The legislature shall have no power to deprive the judicial department of any power or jurisdiction, which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this constitution, provided, however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.

This section operates as another limitation on the power of the legislature or the initiative as an exercise of legislative power to control the courts. The J.A.I.L. initiative seeks to directly invade the province of the judicial system through the legislative process.

CONCLUSION

In the interests of timeliness and brevity this review deals only with the separation of powers issue. Other issues, that are highly problematic, include the fiscal impact of this measure if implemented, the creation of original appellate jurisdiction within the U.S. Supreme Court, the regulation of federal judges, and a myriad of other constitutional flaws. Nearly every provision of this initiative contains elements that are in direct conflict with the well settled principles of state and federal constitutional law.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Rose Johnson by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

BRIAN P. KANE
Deputy Attorney General

¹ According to the petition, a special jury would be convened to try the judge as well as sentence the judge through a procedure in which, upon a finding of guilt—each juror would recommend a sentence

that would then be averaged with other jurors' sentences. The average sentence would then be the judge's sentence.