

January 30, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding The Idaho Judicial Accountability Act of 2004 (IJAA)

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 2, 2003. 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, 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 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

1. Introduction

Entitled "The Idaho Judicial Accountability Act of 2004" ("IJAA"), petitioners have presented a petition that seeks to substantially alter the judicial branch and system of Idaho. Specifically, petitioners seek to alter and implement the following:

1. The Elimination of Judicial Immunity.
2. A Special Grand Jury ("SGJ") established to review any decision made in any court.
3. Procedures for the removal of judges.
4. Abolishment of the Judicial Council.
5. Additional provisions related to the implementation of the Grand Jury.

Most of the provisions of this measure would 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.

2. Separation of Powers

Article II, § 1 of the Idaho Constitution defines the departments of government and states the policy of separation of powers. Specifically, article II, § 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 a legislative power. Idaho Const. art. III, § 1. As a legislative power, the initiative cannot regulate the powers of the courts, or act as an oversight mechanism. Moreover, an initiative proposes a law that is statutory in nature—laws passed by initiative are on an equal footing with laws passed by the legislature. Gibbons v. Cenarrusa, No. 28408, 2002 WL 834149 (Idaho May 3, 2002); Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943). Laws of this kind cannot alter constitutional provisions including those which define and empower the courts. Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068 (1936). 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 art. II, § 1—no department may exercise the power of another department unless it is expressly permitted within the Idaho Constitution. The IJAA, as enacted through the initiative process, would unconstitutionally encroach on the powers of the judicial branch because the statute would operate as an impermissible intrusion into judicial power through the use of a legislative power (the initiative), without an express constitutional grant of such power.

The separation of powers among judicial, executive and legislative 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, at 635.

The IJAA 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. Essentially, this petition creates an impermissible legislative oversight mechanism for the courts. Creation of this body through statute is an impermissible exercise of judicial power by a legislative body.

Article V of the Idaho Constitution defines the powers of the judicial branch of government. Specifically, art. V, § 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 IJAA initiative usurps this constitutional, 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 Idaho 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 Idaho Const. art. V, § 20. See Fox v. Flynn, 27 Idaho 580, 150 P. 44, 46 (1915).

The power of the legislature is specifically limited in other areas as well. As can be seen in Idaho Const. art. V, § 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 IJAA initiative seeks to directly invade the province of the judicial system through the legislative process.

3. The Initiative Violates Art. I, § 9 of United States Constitution

The United States Constitution states: “No bill of attainder or *ex post facto* law shall be passed.” U.S. Const. art. I, § 9. To fall within the *ex post facto* prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime. Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 896, 137 L. Ed. 2d 63 (1997).

The IJAA clearly violates this provision because it states: “In a six-month period, which shall begin to run immediately upon the initial seating of the SGJ, a complainant may file a complaint for judicial misconduct which occurred prior to enactment of this Act.” IJAA p. 7, § 2540 (emphasis added). Clearly, the above provision would apply to events occurring before the enactment of IJAA, and disadvantages the “offender” by making an otherwise legal act at the time of the conduct, illegal after the fact. A reviewing court would most likely find this provision unconstitutional as an *ex post facto* law.

4. The Initiative Violates Both the Due Process Clause and the Rights of the Accused

Pursuant to the Fifth and Sixth Amendments of the United States Constitution, citizens accused of crimes, criminal conduct, or conduct that creates punitive sanctions, are afforded basic rights related to the accusations. Paramount within these rights is the right to Due Process as contained within the Fifth Amendment. According to Idaho Code § 18-109, a “crime” is defined as:

[A]n act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed upon conviction, either of the following punishments:

1. Death
2. Imprisonment
3. Fine
4. Removal from Office; or
5. Disqualification to hold and enjoy any office of honor, trust or profit in this state.

Idaho Code § 18-109.

According to the IJAA, possible penalties for improper judicial conduct within the ambiguously broad definition of judicial misconduct include forfeiture of pay, forfeiture of retirement benefits, and removal from office. IJAA, *supra*. Since the IJAA is, in essence, proposing crimes and criminal procedures to be utilized within judicial misconduct cases, those charged with misconduct must be afforded the rights guaranteed them by the United States Constitution.

A citizen charged under the IJAA is presumed guilty. “All complaint allegations *shall be liberally construed in the favor of the complainant . . .*” IJAA, § 2535. This runs directly counter to the United States’ system of justice, whereby the accused are presumed innocent. This merely highlights one instance of many wherein the rights of those charged are not protected by the IJAA. For example, the IJAA unconstitutionally limits the rights of the accused to trials by jury, unconstitutionally limits peremptory challenges to jurors, unconstitutionally creates juror qualifications that violate the Fourteenth Amendment, and violates the prohibition against double jeopardy.

5. Remedial Suggestions for Initiative Language and Organization

Incongruities within the language of the IJAA should be addressed. For example, the primary theme of the IJAA initiative is the elimination of judicial immunity for “judicial officers” as defined within the initiative, but the provisions of the initiative create a broad immunity protection for members of the “Special Grand Jury.” This inconsistency cannot be reconciled on its face by any of the provisions of the initiative.

The IJAA purports to create a vehicle by which judicial conduct will be overseen by a legislatively created “Special Grand Jury,” but, in reality, the initiative seems to create a vehicle by which the “Special Grand Jury” will substitute its judgment for the conduct of the courts of Idaho. The actual jurisdiction of the “Special Grand Jury” is nebulous as well. According to the initiative, a judge may issue a ruling which is the subject matter of a complaint. An appeal of the district court’s judgment may be taken, and the complaint lodged with the “Special Grand Jury.” What happens if the “Special Grand Jury” makes a

determination of wrongdoing, and the appellate court affirms the decision of the district court? This occurrence cannot be reconciled.

Finally, the initiative grants the “Special Grand Jury” virtually limitless powers related to *habeas corpus*, indictments, grants of temporary immunity, and criminal proceedings against judges. On their face, many of these provisions are offensive to the rights of due process guaranteed by both the United States Constitution and the Idaho Constitution.

CONCLUSION

In the interest of timeliness and brevity, this review highlights only the most constitutionally offensive issues. Other issues that are highly problematic include the fiscal impact of this measure if implemented, the creation of varying degrees of original jurisdiction with the “Special Grand Jury,” the confusing regulation of both attorneys and judges, and a myriad of other constitutional flaws. Nearly every provision of this initiative contains elements in direct conflict with well-settled principles of state and federal constitutional law. A reviewing court would most likely find the IJAA, in its entirety, to be unconstitutional.

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,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRIAN P. KANE
Deputy Attorney General