

June 4, 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 May 7, 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. Each of these provisions were reviewed within the Certificate of Review issued on January 30, 2003. This office notes that the initiative submitted on May 7, 2003, and the initiative submitted on January 3, 2003, are substantially similar in form, verbiage, and potential effect. In the interest of brevity, the January 30, 2003, Certificate of Review is adopted and incorporated into this certificate of review in its entirety and attached hereto for your convenience.

Although substantively the same, the newest iteration of this initiative may be more constitutionally offensive than previous versions, as outlined below.

**2. Departments of Government**

Article II, § 1 of the Idaho Constitution defines the departments of government and states the policy of separation of powers. Specifically, art. 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 most recent version of the Idaho Judicial Accountability Act of 2004 changes the name of the judicial accountability entity from that of a “Special Grand Jury” to the “Idaho Judicial Accountability Commission.” This “commission” is created as an entity independent of the legislative, executive, or judicial branches of government; in essence, a fourth branch of government. This is patently unconstitutional. The branches of government are clearly delineated within art. II, § 1 of the Idaho Constitution. Any new branch of government must be outlined within art. II, § 1 of the Idaho Constitution. A change of this magnitude must be made through a constitutional amendment. A reviewing court would most likely find that the Idaho Judicial Accountability Act of 2004 is unconstitutional for this reason.

**3. A Note About Word Choice**

Consistent with this office’s statutory duty to review proposed initiatives for matters of style and substantive import, this office makes the following observation

related to style within the proposed Idaho Judicial Accountability Act of 2004. The use of the term/abbreviation "A.D." is superfluous.

Also, unnecessary words are used to describe the United States Constitution and the Bill of Rights. For example, the U.S. Constitution is described as "the 1789 Constitution for the United States of America including the 1791 Bill of Rights." These descriptive words are meaningless. The United States is governed by the Constitution as the supreme law of the land, which includes the Bill of Rights. M'Culloch v. State of Maryland, 17 U.S. 316, 360 (1819). Finally, the Declaration of Independence is referenced, but it must be noted that the Declaration of Independence has no force or effect of law.

## CONCLUSION

As noted within the January 30, 2003, Certificate of Review and the current certificate of review, the Idaho Judicial Accountability Act of 2004 contains constitutional infirmities, contradictions, and confusing terminology. It is beyond the scope of this review to definitively point out each and every transgression, but review of the January 30, 2003, Certificate of Review, which is adopted and incorporated herein, and this certificate of review reflect that upon review by a court of competent jurisdiction, the Idaho Judicial Accountability Act of 2004 will likely be found 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