



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WARDEN

February 4, 2005

The Honorable Ben Ysursa  
Idaho Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review - Idaho Judicial Accountability Act of 2006

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 10, 2005. 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

### Introduction

Entitled "The Idaho Judicial Accountability Act of 2006" ("IJAA"), petitioners have presented a petition that seeks to substantially alter the judicial branch and system of Idaho. Specifically, petitioners seek the following:

1. Abolishment of the Judicial Council;
2. Creation of the Idaho Judicial Accountability Commission, established to review any decision made in any court, review complaints of judicial misconduct, and empowered to appoint "special prosecutors;"
3. Repeal of Chapter 1, Title 1, Idaho Code;
4. Repeal of Idaho Code § 1-2003;
5. Impose limitations on judicial immunity;
6. Amendment of Idaho Code §§ 19-4201A, 19-4202, 19-3945, and 2-215; and
7. Procedures for the removal of judges.

Most of the provisions of this measure were reviewed within the Certificate of Review issued on June 4, 2003, and would likely be struck down by a reviewing court as unconstitutional and a violation of the separation of powers doctrine. This office notes that the initiative submitted on January 10, 2005, and the initiative submitted on May 7, 2003, are substantially similar in form, verbiage, and potential effect. In the interest of brevity, the June 4, 2003, Certificate of Review is adopted and incorporated into this certificate of review in its entirety and enclosed herewith for your convenience.

Although amended, the newest version of this initiative suffers from similar constitutional defects as prior versions.

### **The Proposed Initiative Likely Violates the Separation of Powers.**

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 2006 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 2006 is unconstitutional for this reason.

The initiative also empowers the Commission to exercise powers generally reserved to the legislature, the judiciary, and the executive. An initiative is an exercise of legislative power; therefore, the Commission can only exercise those powers that are provided for within Article III of the Idaho Constitution. This initiative seeks to create a commission empowered with the authority to exercise both Article IV and Article V powers. Exercise of these powers is constitutionally offensive. The interference with and assumption of powers of coordinate branches of government by another is anathema to the basic concepts of Idaho's constitutional representative democracy.

### **Article III, § 16 Prohibits Consideration of More than a Single Subject.**

Reviewing the initiative, it is quite lengthy. This initiative comprises eight (8) pages of single spaced text on 8 ½" by 14" paper. It considers myriad subjects ranging from creation of the Commission, to appropriations to the Commission, to procedures for the removal of judges, to criminal causes of action, to altering jurisdiction regarding habeas corpus actions, and changing payments to jurors to name a few. Additionally, the act amends or repeals no fewer than five (5) distinct titles and chapters of the Idaho Code within a single initiative.

Article III, § 16 states:

SECTION 16. UNITY OF SUBJECT AND TITLE. Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

This initiative appears to embrace many subjects within a single enactment. For example, this initiative contains sections appropriating moneys (§§ 2526, 2530, & 2531), which are considered distinct acts that should be separate from others. Hailey v. Huston, 25 Idaho 165, 136 P.2d 212 (1913). It appears likely that the breadth of the subjects, which should be set forth in distinct enactments (or initiatives) would provide an alternative basis for this Initiative being found unconstitutional.

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 in the June 4, 2003, Certificate of Review and the current certificate of review, the Idaho Judicial Accountability Act of 2006 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 June 4, 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 2006 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 petitioners Norma Batt and 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:

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Deputy Attorney General

LGW/bpk/mdw

Enclosures