



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

February 13, 2007

**VIA HAND DELIVERY**

The Honorable Ben Ysursa  
Idaho Secretary of State  
HAND DELIVERED

Re: Certificate of Review  
Initiative Regarding The Public Employee Accountability Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 12, 2007, and received by this office on January 16, 2007. Pursuant to Idaho Code § 34-1809, this office has reviewed the initiative 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 initiative 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 are required by law to 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 "Public Employee Accountability Act," the initiative petition ("Initiative") seeks to significantly modify current Idaho law in several ways. Petitioners have presented an Initiative that seeks to eliminate absolute judicial immunity (and would appear to also abolish absolute legislative and prosecutorial immunity), provides for a grand jury to inquire into a prosecutor's decision not to charge a crime upon a party's request, and directs the

legislature on the issue of impeachment. Specifically, the petitioners seek the following:

1. Add a definition of "malfeasance" to the Idaho Tort Claims Act;
2. Define "Public Employee" to include "all members of the judicial branch of government";
3. Delete absolute immunity for all public employees, including the judicial branch;
4. Require a grand jury to be called and convened if any party believes a public employee engaged in a judicial or quasi-judicial proceeding has committed a crime against him/her if a prosecutor has declined to charge the public employee;
5. Toll the statute of limitation until fourteen (14) days after the grand jury renders a finding;
6. Provide the grand jury with broad powers including investigating new criminal allegations and directing police inquiry;
7. Require that a bill of particulars be submitted to the state legislature which must initiate impeachment proceeding with fifteen days if a public official who is subject to impeachment is found in violation of the law;
8. Prohibit the legislature from referring a grand jury's bill of particulars regarding an impeachable officer to Judicial Council;
9. If extraordinary funding for the grand jury is needed, the state treasurer must take funds from either the general fund or an emergency fund and allocate them to the county treasurer where the grand jury is seated;
10. Direct the Idaho Legislature to amend the Initiative to preserve the intent and principles of the Initiative if any portion of the Initiative is ruled unconstitutional; and
11. Grant to the state legislature the authority to amend the Idaho constitution to achieve the intent and principles of this act.

Most of the provisions of this measure would likely be struck down by a reviewing court as unconstitutional. In addition, the definition of "malfeasance" included in the Initiative is problematic. "Malfeasance" as defined includes "an act for which there is no authority or warrant of law or which a person ought not to do at all, or the unjust performance of some act, which party performing it has no right, or has a legal and fiduciary duty not to do." The definition is so broadly worded that it would likely create confusion as to what constitutes malfeasance.

### **Proposed Initiative Likely Violates Article III, § 16, Prohibiting Consideration of More than a Single Subject**

The Initiative can be broken down into several subject matters. The first is the "clarification" of the Idaho Tort Claims Act to include the judiciary as a "public employee" and the denial of absolute immunity for any public employee. Judges, prosecutors, witnesses and legislators are historically entitled to absolute immunity from civil suit under the common law. Mitchell v. Forsyth, 472 U.S. 511, 521, 105 S.Ct. 2806, 2812-13 (1985). The language abolishing absolute immunity would apply to all of them.

A second subject is the impaneling of a grand jury when a prosecutor declines to criminally charge "a public employee engaged in a judicial or quasi judicial proceeding [who] has committed a crime . . .". A "public employee" can be not only the judge, but the public

defender or prosecutor as the Initiative defines the term.

While the Initiative on the whole appears to be focusing on the judiciary, the expanded definition covers far more than simply judges. An additional subject concerns impeachment proceedings of a "public official subject to impeachment process." Again, while the Initiative overall appears to be directed to the judicial system and judges in particular, this section covers a broader group of judicial and executive officers.

The final subject matter covers extraordinary funding for a county grand jury and directing the funding to come from state coffers.

Article III, § 16 states:

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.

*In re Crane*, 27 Idaho 671, 689, 151 P. 1006 (1915), states "the purpose of the clause . . . is to prevent combining of incongruous and objects totally distinct . . ." The Initiative addresses removing absolute immunity of public employees, summoning a grand jury, directing impeachment proceedings in the legislature, and funding grand jury proceedings. It appears likely that the breadth of the subjects, which should be set forth in distinct enactments (or Initiatives), would provide a basis for this Initiative being found unconstitutional.

In addition to this broad constitutional question, the proposed Initiative sections also appear likely to violate several specific constitutional provisions. A brief overview of specific concerns are presented.

### **Proposed Initiative Likely Violates Article I, § 8 Giving the District Court Sole Discretion to Impanel a Grand Jury**

Idaho Constitution, Art. I, § 8 provides in part that "a grand jury may be summoned upon the order of the district court in the manner provided by law . . .", while Idaho Code § 2-501 provides that "grand juries shall not be summoned unless the district judge so directs."

The Initiative directs a grand jury to be impaneled at the request of a party who believes a "public employee" has committed a crime against him. The Idaho Supreme Court in Parsons v. Idaho Tax Commission, 110 Idaho 572, 716 P.2d 1344 (1986), determined that access to a grand jury is not a constitutionally protected common law right and that a district court has discretionary authority not to call a grand jury.

The Initiative provides an aggrieved party may request a grand jury; it appears that upon receiving a request, a district court could take no action but to summon the grand jury. Displacing the district court's constitutional authority to summon a grand jury would likely

violate this constitutional provision.

**Proposed Initiative Likely Violates Article III, § 9 Which Gives a Legislative House the Sole Power to Make Its Own Rules of Proceedings**

In the Initiative, once the legislature receives a bill of particulars from the jury foreman, it is required to initiate impeachment proceedings within fifteen (15) days. Article V, § 4, provides that "[t]he house of representatives solely shall have the power of impeachment." The Initiative further prohibits the legislature "from referring the matter to the Judicial Council."

Section 9 of Article III of the Idaho Constitution, gives each house the power to determine its own rules of proceeding. As stated by Keenan v. Price, 68 Idaho 423, 437, 195 P.2d 662 (1948) "[t]he power of the legislative houses to make their own rules is for orderly procedure and the expedition and disposition of their business." To mandate the legislature begin impeachment proceedings in a time certain and to prohibit referral to another body would prevent the legislature from making rules for its orderly procedure.

**Proposed Initiative Likely Violates Article IV, § 9, Providing the Governor Sole Discretion to Convene Extraordinary Sessions of the Legislative as well as Separation of Powers When an Extraordinary Session is Called for Impeachment**

The Initiative requires the legislature to initiate impeachment proceedings within fifteen (15) days after receipt of a bill of particulars from the jury foreman. The Idaho Legislature is only in session beginning the second Monday of January (Article III, § 8) and ending usually in March or April. If a bill of particulars is presented outside this time frame, the legislature would have to be called back into session to consider the bill within fifteen (15) days.

The authority to call an extra session of the legislature rests solely in the governor's discretion under Idaho Constitution Article IV, § 9 ("governor may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it"). Although the Initiative doesn't clearly direct the governor to act, if the impeachment proceedings were required when the legislature was not in session, the governor would be required to act because there is no other mechanism for calling a special session. Requiring the governor to convene the legislature to begin impeachment proceedings likely violates the discretionary power of a governor.

**Proposed Initiative Section Concerning Funding Likely Violates Several Constitutional Provisions**

The Initiative requires the state to fund a grand jury if extraordinary funds are needed. The foreman of a grand jury would submit a request for state funds to the Attorney General who in turn would notify the State Treasurer. The State Treasurer is required, upon threat of being charged with a misdemeanor, to take funds either from general fund or an emergency fund and allocate them to the county treasurer without delay. The method of providing for funding violates numerous constitutional provisions.

Article VII of the Idaho Constitution governs finance and revenue for the State of Idaho. Section 13 of this article prohibits money being drawn from the treasury "but in pursuance of appropriations made by law." There is no appropriation for payments from the treasury to a county for grand jury expenses, unless the courts were to construe the language of Section IV of the Initiative, which does not use the ordinary language of appropriation, to be an appropriation.

Section 15 of the same article provides a system of county finance and requires that if a county issues any warrants that are outstanding and unpaid and there is no money in the county treasury for payment, the commissioners "shall levy a special tax . . ." This is the method provided by the Idaho Constitution for paying unfunded grand jury expenses.

Finally, Idaho Constitution, Article XII, § 3 prohibits the state from assuming any debts of any county "unless such debts shall have been created to repel invasion, suppress insurrection or defend the state in war." Paying grand jury expenses does not fit into any of these categories.

**Proposed Initiative Section Concerning the Legislature's Amending the Initiative and/or the Constitution Likely Violates Article III, § 1 and Article XX, § 1**

The final section of the Initiative directs the state legislature to "amend this act to conform to any adverse decision rendered by a court of law in order to preserve the intent and principles of this act" if any portion of the this Initiative is declared unconstitutional. But one legislative act (this Initiative) can never bind a future legislature.

In his Commentaries, Blackstone stated the centuries-old concept that one legislature may not bind the legislative authority of its successors:

Acts of parliament derogatory from the power of subsequent parliaments bind not . . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament.

1 W. Blackstone, Commentaries on the Laws of England 90 (1765). See also H.L.A. Hart, The Concept of Law 145 (1961) (recognizing that Parliament is "sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed ab extra, but also from its own prior legislation"). United States v. Winstar Corp., 518 U.S. 839, 872, 116 S.Ct. 2432, 2453, 135 L.Ed.2d 964 (1996) (footnote included in text).

Simply put, the Initiative cannot bind a future legislature to exercise the legislative power in the manner that the Initiative prescribes. To do so would violate the future legislature's right to legislate as it determines. To attempt to prevent a future legislature from legislating contrary to the intent and principles of the Initiative would likely violate that portion of Article III, § 1 of the Idaho Constitution which states, "The legislative power of the state shall be vested in a senate and house of representatives."

Lastly, the Initiative directs the state legislature to utilize the passage of this Initiative to amend the Idaho Constitution if necessary. This likewise runs afoul of the principle that one legislative act cannot bind or direct a future legislative act.

Further, Article XX, §1 of the Idaho Constitution provides that the Constitution can only be amended upon a two-thirds vote of each house of the legislature and a majority of the electors. As indicated in Idaho Mutual Benefit Assoc. v. Robinson, 65 Idaho 793, 799, 154 P.2d 156 (1944), "[t]he people, not the legislature, amend the constitution." The Initiative directs the legislature to do something it cannot do and consequently a court would likely hold it unconstitutional.

### CONCLUSION

The Public Employee Accountability Act contains many constitutional infirmities, contradictions, and confusing terminology. It is beyond the scope of this review to definitively point out each and every transgression, but this certificate of review reflects that, upon review by a court of competent jurisdiction, the Public Employee Accountability Act will likely be found unconstitutional in many regards.

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 David M. Estes, 1317 9th Ave., Lewiston, ID 83501 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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LGW/bbk/jm

Enclosure