



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

February 10, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Idaho Right to Protection Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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." The petitioners are free to "accept or reject them in whole or in part." Due to the number of initiatives that were submitted for review and the available resources for performing the reviews, we did not communicate directly with the petitioner as part of the review process. The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must 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 titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

This initiative apparently addresses three substantive matters. First, it provides that a "lawful citizen of Idaho" has the right to self defense, defined as "the right to defend himself

or herself, unless he or she is in the act of committing a crime, without interference from federal or state agencies.” Second, it provides that, “Law abiding citizens of Idaho shall not have their gun or ammunition rights waived by any governmental agency nor shall their guns or ammunition be tracked, with but not limited to, markings or radio frequency identification (RFID) dust, paint, or by any other direct identifiers.” Third, the initiative states that citizens have a constitutional “right to privacy in such citizen’s home . . . and to be anonymous as long as such citizen is not in the act of committing a crime.” The initiative continues that the state and federal government had “surmised [sic]” powers in excess of constitutional grants despite lack of “authority to supersede these constitutional guarantees.”

B. Review and Recommended Revisions or Alterations

Generally, it is difficult to discern what the legal goal of this initiative is. Although it would be included in the “Crimes and Punishments” section of the Idaho Code (Title 18), it does not define a crime or set any punishment.

As to the first substantive matter, Idaho already recognizes a right of self-defense. See, e.g., Idaho Code §§ 18-4009 and 18-4010. Because it must be presumed that this legislation would change the right of self-defense, it must either restrict or expand that right. It might restrict that right by limiting it to “lawful citizen[s] of Idaho.” If it is not the intent to deny self-defense to non-citizens or those who obtained their citizenship rights unlawfully, perhaps this language should be stricken.

Likewise, the right of self-defense might be expanded by the proposal through omission of the reasonability requirement. Currently, under Idaho law, a person may not use unreasonable or excessive force in self-defense. If it is the intent of this initiative to remove that, making it possible to kill a criminal who is not actually a threat to the life or health of the victim, the initiative should be worded accordingly.

If it is not the intent to change Idaho law regarding self-defense, then this portion of the initiative should be deleted. If, on the other hand, it is the desire to change the law, then the best course would be to instead amend the statutes governing self-defense.

As to the second substantive matter, this law would apply to prevent the tracking of guns or ammunition of “law abiding citizens of Idaho” by Idaho citizens and government. It would also prevent Idaho governmental agencies from “waiv[ing]” the gun rights of any “law abiding citizens of Idaho.” This law would be preempted by federal law such that this would not apply to federal officials.

Although this initiative would make tracking guns illegal, it does not provide a penalty for such conduct. What conduct constitutes the crime of tracking a gun or ammunition is also vague. For example, a store that keeps internal records of gun or ammunition sales might be guilty of criminal activity under this section, as could a gun club that keeps track of what weapons its members own or shoot on a regular basis.

The initiative also does not define “law abiding citizens.” Presumably the intent here

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is to allow the tracking of weapons possessed by criminals, but does not specify whether this means someone with a past conviction, someone currently suspected of criminal activity, or both.

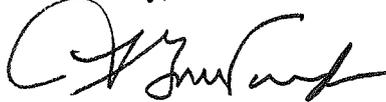
As to the third substantive matter, it again does not define a crime or a punishment. It states that Idaho citizens enjoy a constitutional right to privacy. It should be noted that it is unclear if this initiative is merely referring to the privacy granted by the Fourth Amendment (and its Idaho counterpart) or rather refers to the penumbral privacy from which the right to abortion derives. Again, if this initiative is merely to declare that citizens have the rights already granted by the Idaho and United States constitutions, such would be merely redundant. If it is to declare that those rights must be defined differently than as held by precedent of the Supreme Court of the United States and the Idaho Supreme Court, such a declaration is preempted and of no legal effect.

If this initiative is intended to grant specific rights in excess of the constitutions as interpreted by the respective highest courts, such specific rights should be specifically articulated. As it is currently written, one interpretation of this part of the initiative is that police may search a "home, farm, vehicle, trailer, or any other place of domicile" only when the citizen who lives in such a place is "in the act of committing a crime." This appears to prevent the search of a home or other domicile for evidence of past crimes. Whether it is the intent of the initiate to prevent police from searching for evidence of past crimes in a domicile should be clearly stated. Otherwise, this section should be rewritten to give guidance as to its intent and effect.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

KENNETH K. JORGENSEN
Deputy Attorney General