



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

February 16, 2010

The Honorable Ben Ysursa  
Idaho Secretary of State  
**STATEHOUSE MAIL**

Re: Certificate of Review  
Proposed Initiative Relating to National Guard (Amend Idaho Code § 46-107  
and Title 46, Idaho Code)

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." 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.

### **INTRODUCTION**

The proposed initiative ("Initiative") seeks to amend Idaho Code § 46-107 to provide the following: "The governor, however, shall not be obliged to make any effort to conform to any terms of the national defense act or other laws of the United States which exceed the authority vested in the federal government by the United States Constitution." The Initiative

also proposes to amend Title 46 by adding a new chapter to limit federal authority to deploy any branch of the Idaho militia, including the National Guard, outside the territorial boundaries of the United States. For the reasons set forth below, it is likely the Court would find the proposed amendments unconstitutional.

## MATTERS OF SUBSTANTIVE IMPORT

### A. The Proposed Amendments to Title 46, Idaho Code, are Unconstitutional

The Initiative seeks to limit the governor's authority to deploy "any branch of the Idaho militia, including the national guard" outside the territorial boundaries of the United States unless one of the following conditions is met:

- (1) The governor wishes parts of the militia to participate in training exercises. No member of Idaho militia shall be compelled to be outside the United States for a training exercise for more than a month in any given year.
- (2) The territory of the United States has been invaded by a foreign army, and such deployment is necessary to specifically repel such an invasion.
- (3) Participants in a domestic insurrection have fled across a border of the United States and such deployment is necessary to give chase.

The proposed amendments directly conflict with Idaho Code § 46-101. Section § 46-101 states: "The state of Idaho does hereby accept the benefits and provisions of the national defense act, and it is the intent of this code to conform to all laws and regulations of the United States affecting the national guard." The National Defense Act gives Congress the discretionary authority to "determine [sic] that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force, shall be ordered to active Federal duty and retained as long as so needed. 32 U.S.C. § 102 (underlining added).

The proposed amendments suggest that the governor has the power to declare a federal law, code or treaty null and void, specifically when he or she determines that the United States government has exceeded its authority as defined in Article I, Section 8 of the United States Constitution. However, under the Idaho Constitution, the governor has no authority over the state's military forces when they have been called into national duty. The Idaho Constitution provides that "[t]he governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States." Idaho Const. art. IV, § 4 (underlining added). Contrary to the proposed legislation, the governor is not vested with the discretion to resist foreign deployment, or resist conforming to the National Defense Act. Under the United States Constitution, Congress has the power to "provide for calling forth the militia to execute the laws of the Union . . ." U.S. Const. art. I, § 8, cl. 15. Pursuant to federal law, Congress has the authority to determine the national

security needs of the United States, which includes the discretion to deploy the National Guard.

The Initiative proposes to limit the federal government's authority to deploy the Idaho National Guard outside the territorial boundaries of the United States. Under the Preemption clause it is "clear that federal law is as much the law of the several States as are the laws passed by their legislatures." Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114, 173 L.Ed.2d 920 (2009). "Preemption doctrine flows from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with any Act of Congress." Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 81 L.Ed.2d 527 (1984). Therefore, the governor would violate the United States Constitution, as well as the Idaho Constitution, by not conforming to federal law pursuant to the authority vested in the Congress.

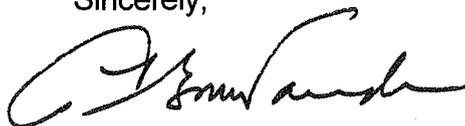
#### **B. Recommended Revisions or Alterations**

There are no alterations or revisions to this Initiative that would render it constitutional.

#### **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 the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alana Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,



LAWRENCE G. WASDEN  
Attorney General

#### **Analysis by:**

STEVE VINSONHALER  
Deputy Attorney General