



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

February 17, 2010

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

Re: Certificate of Review  
Proposed Initiative Relating to the Informed Jury 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." 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. Summary of the Proposal**

The proposed initiative sets forth a new chapter to be designated as Idaho Code § 2-701, *et seq.*, entitled the "Informed Jury Act." We understand the proposed initiative to intend the following general results: (1) juries in Idaho's courts will have the right to ignore

judicial precedent that they believe to be in error and to reach their own determination of both the facts and the law in all cases; (2) judges must inform the jury that it is not bound by the judge's interpretation of the law; must read a specific statement to the jury regarding jury nullification; and must distribute copies of the Idaho and United States Constitutions to the jury; and (3) failure to adhere to these provisions will result in mistrial and/or removal of the judge.

## **B. The Proposed Initiative May Pose Constitutional Concerns**

The Idaho Constitution provides that the "legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it." Idaho Const. art. V, § 13. A statute dictating that juries "have the right to ignore any judicial precedents they believe to be in error" may violate this constitutional provision, as it would serve to deprive the judiciary of its traditional function of interpreting the law and issuing precedential decisions regarding those interpretations. See Mead v. Arnell, 117 Idaho 660, 669, 791 P.2d 410, 419 (1990) (holding that art. V, sec. 13 of the Idaho Constitution is "clear that it is the duty of the Court to interpret the law.")

Whether a violation of the separation of powers doctrine would be implicated is not as clear under these circumstances as it would be if this proposed legislation were initiated by the Legislature itself, as an initiative instead stems from the constitutional provision that "[t]he people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature." Idaho Const. art. III, § 1. To the extent, however, that the initiative process involves the exercise of legislative authority by the people, there is the potential that this proposed statute unconstitutionally infringes upon the judiciary's "power or jurisdiction which rightly pertains to it." Idaho Const. art. V, § 13; see State v. Kellogg, 98 Idaho 541, 546, 568 P.2d 514, 519 (1977) (J. Bakes, dissenting) (discussing "the exclusive grant of legislative authority to the senate and house of representatives of Idaho and to the people of Idaho acting by referendum or initiative.")

Another constitutional concern presented by the proposed initiative is the fact that the initiative would permit juries to ignore not only legal precedent from the state courts, but also legal precedent from the United States Supreme Court, as well as any federal laws that a jury subjectively believes to be contrary to the Constitution. As the Supremacy Clause of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. A jury's disregard of federal laws and United States Supreme Court precedent potentially violates the Supremacy Clause.

The proposed initiative also includes, in its proposed section 2-705, a mandatory statement to the jury that includes the following language:

Remember also that if you ever serve on a jury in a federal case, Supreme Court rulings have affirmed the rights of the jury to determine both the facts and the law, even if the judge instructs you that such rights do not exist and that you are barred in his or her court room from exercising them.

This language raises the same constitutional concerns, as it attempts to influence the jurors' conduct in the federal courts, even where the proposed initiative is intended to apply only to the state courts. Significantly, the United States Supreme Court has held that "it is emphatically the province and duty of those [federal] judges to say what the law is. At the core of this power is the federal courts' independent responsibility – independent from . . . the separate authority of the several States – to interpret federal law." Williams v. Taylor, 529 U.S. 362, 378-79, 120 S. Ct. 1495, 1505, 146 L.Ed.2d 389 (2000) (internal quotation marks and citation omitted). The Williams court clarified that "requir[ing] the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution." *Id.* In short, the provisions permitting jurors to disregard federal laws and precedent in the state courts, when applicable, as well as the provision requiring a mandatory statement to the jury that encourages disregard of federal laws and precedent in the federal courts, may violate the Supremacy Clause. See also Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114-16, 173 L.Ed.2d 920 (2009) (holding that a state cannot pass a law that nullifies a federal claim or cause of action); Howlett By and Through Howlett v. Rose, 496 U.S. 356, 371, 110 S. Ct. 2430, 2440, 110 L.Ed.2d 332 (1990) ("The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.")

### C. The Proposed Initiative is Inconsistent with Other Statutory Provisions

The proposed initiative is inconsistent with several other provisions of the Idaho Code. Idaho Code § 9-102 provides:

**All questions of law** arising upon the trial, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, **are to be decided by the court** when submitted and before the trial proceeds, and **all discussions of law are to be addressed to the court**. Whenever the knowledge of the court is by this chapter made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

(Emphasis added.) Courts are statutorily required to "take judicial notice" of "[w]hatever is established by law," Idaho Code § 9-101, which leads to the courts' statutory obligation "to declare such knowledge to the jury, **who are bound to accept it.**" Idaho Code § 9-102 (emphasis added).

With respect to criminal trials, Idaho Code § 19-2129 provides: "**The court must**

**decide all questions of law** which arise in the course of a trial.” (Emphasis added.) Idaho Code § 19-2131 similarly provides: “On the trial of an indictment for any other offense than libel, **questions of law are to be decided by the court**, questions of fact by the jury; and **although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.**” (Emphasis added.)

The proposed initiative is also inconsistent with Idaho Code § 2-101, which defines a jury as a body “invested with power to present or indict a person for a public offense or try a question of **fact.**” (Emphasis added.) Similarly, the proposed initiative is inconsistent with Idaho Code § 2-104, which defines a trial jury as a body “sworn to try and determine by a verdict a question of **fact.**” (Emphasis added.)

In order for the proposed initiative to clearly take full effect, these inconsistent statutes would also need to be amended or repealed, as “implied repeal of special statutes by general statutes is not favored.” Rydalch v. Glauner, 83 Idaho 108, 119, 357 P.2d 1094, 1101 (1961); Callies v. O’Neal, 147 Idaho 841, 216 P.3d 130, 136 (2009).

As a practical matter, the proposed initiative would involve further inconsistencies with a great many statutory provisions, as it has the potential to render ineffectual the civil and criminal laws underlying litigation. For example, while Idaho Code § 18-902 prohibits the crime of assault, the proposed initiative permits a jury to ignore this statute if it subjectively believes the statute to be “in error,” “wrong, against the Constitution or the principles governing normal human conscience.” The initiative would also permit the jury to ignore laws defining the boundaries of liability, such as statutes of limitations, as well as federal laws, so long as the claims are raised in the state courts.

#### **D. Additional Comments**

Section 2-707 of the proposed initiative states that “[t]he repeated failure of a judge to abide by the provisions of section 2-704 shall be grounds for dismissal pursuant to procedures established relative to Article V, section 28 of the Idaho State Constitution.” Art. V, sec. 28 of the Idaho Constitution provides that “[p]rovisions for the retirement, discipline and removal from office of justices and judges shall be as provided by law.” Thus, the proposed initiative merely refers to the general fact that procedures for removal will be as provided by an unidentified law. Currently, the “procedures established relative to Article V, section 28 of the Idaho State Constitution” for removal of judicial officers are set forth in Idaho Code §§ 1-2103 and 1-2103A. For the sake of clarity, the proposed initiative should either refer directly to these statutory procedures or should set forth separate procedures within the body of the new statute.

As a more minor point, it may be advisable to remove quoted language from the proposed initiative or to instead paraphrase the substance of the language at issue, particularly in the proposed Statement to Jury contained in section 2-705. For example, the

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quotation from Chief Justice John Jay appears to be slightly misquoted in the proposed initiative, as most sources list the actual quote as: "You [juries] have a right to take it upon yourselves to judge both, and to determine the law as well as the fact in controversy." Quoted language is unusual in a statute; including potentially misquoted language in the body of a statute would be inadvisable.

The proposed Statement to Jury also includes the following language:

If any law in this case violates either of those documents [the Constitutions] as you plainly understand them, you are obligated to **return a not guilty verdict with regards to the charge** involving that statute. Remember, that your decision is **affecting the life of another person** and if you blindly accept a law you know to be wrong, against the Constitution or the principles governing normal human conscience, you are **just as guilty of harming this person** as those who passed such an unjust law.

(Emphasis added). The above language appears to be narrowly drafted to apply to criminal cases, as it specifies that the jury is "obligated to return a not guilty verdict with regards to the charge," and as it refers to the jury's effect upon "the life of another person." However, the proposed initiative is intended to apply to all cases in Idaho's state courts, which would include civil cases. Civil cases do not involve verdicts of "guilty" or "not guilty," nor do they involve criminal charges. Furthermore, some civil cases involve entities as the parties, rather than individual "persons." It is recommended that the above language be revised and broadened in order to be relevant to the broader range of cases to which the proposed initiative is intended to apply.

#### 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:**

KARIN D. JONES  
Deputy Attorney General