April 1, 1996

Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Initiative Regarding Term Limits

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on March 4, 1996. 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, 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," and the petitioner is free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our 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 petitioner would like to propose language with these standards in mind, we recommend that she do so and her proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative seeks to add a new section of Idaho Code which instructs the Idaho congressional delegation as well as state legislators and candidates for such offices to affirmatively support an amendment to the U.S. Constitution to impose term limits on members of Congress. If these elected officials or candidates for such offices engage in certain acts or omissions relating to said term limits amendment, certain language may be placed by their names on a ballot for their election or re-election.[1]

The proposed initiative instructs members of the Idaho congressional delegation to "use all of his or her delegated powers to pass a congressional term limits amendment, which would restrict U.S. Representatives from serving more than three (3) terms, and U.S. Senators from serving more than two (2) terms in Congress." If members of the

Idaho congressional delegation do or fail to do certain acts specified in the initiative (for example, fail to vote in favor of a proposed congressional term limits amendment) the Secretary of State is required to print on the election ballot adjacent to such elected official's name the following: "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS."

Next, the proposed initiative would allow non-incumbent candidates for the office of U.S. Representative, U.S. Senator, state representative or state senator the opportunity to sign a "Term Limits Pledge" each time he or she files as a candidate for such an office. The pledge states that the candidate supports the congressional term limits amendment and pledges to use all of his or her legislative powers to enact such an amendment. If the candidate fails to sign the pledge, the phrase, "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" will appear adjacent to his or her name on the election ballot.

Further, the proposed initiative, through the enactment of a new section of the Idaho Code, instructs the state legislature to make application to Congress for a constitutional convention to propose amendments to the U.S. Constitution. If a legislator fails to take the actions listed in the proposed initiative, the phrase, "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" would appear adjacent to the name of such individual on all primary, special or general election ballots.

Finally, the proposed initiative mandates that the Secretary of State's Office is responsible for making an accurate determination regarding whether any of the above language should be printed on the ballot next to an individual's name. The proposed initiative incorporates a judicial review process initiated either by the individual by whose name the language would appear on the ballot, or by an elector if the secretary of state makes the determination that the language should not appear on the ballot.

The new section of the Idaho Code which would be enacted by the passage of the proposed initiative would automatically be repealed if the congressional term limits amendment sought in the initiative becomes law. Further, no language would appear on the ballot regardless of the actions taken by the elected officials or candidates if such an amendment becomes law before the election.

Requiring the State of Idaho to print any of the above language on a ballot raises problems under several constitutional provisions including the freedom of speech, the Equal Protection Clause of the U.S. and Idaho Constitutions, and the right of suffrage provision contained in the Idaho Constitution.[2]

The form and content of a ballot for the election of state legislators or members of Congress is generally left up to the states. For example, in Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992), the court held:

> An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice. The ballot is necessarily short; it does not allow for narrative statements by candidates and requires responses by the electors simple enough to be counted. Within these limitations, a State has discretion in prescribing the particular makeup of the ballot for its various elections; however, this discretion must be exercised in subordination to relevant constitutional guaranties.

Id. at 175 (citations omitted). *See also* Bachrach v. Secretary of the Commonwealth, 415 N.E.2d 832, 835 (Mass. 1981) ("[A]s soon as the State admits a particular subject to the ballot, and commences to manipulate the content, to legislate what shall and shall not appear, it must take account of the provisions of the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws.").

Requiring the state to place pejorative comments adjacent to a candidate's name on the ballot essentially places the state in a position of endorsing certain candidates and issues in the political arena. While there are no cases directly on point, numerous cases involving the election process in general, some of which are specific to ballot access and placement on ballots, have invalidated actions which have a similar effect based upon the First Amendment and/or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Some decisions focus upon the Equal Protection Clause and its established "right to equal treatment in the voting process." San Antonio Ind. School Dist. v. Rodriquez, 411 U.S. 1, 34, n.74, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). Other cases more directly address the First Amendment's protection of equal liberty of expression.[3]

Regardless of the exact interplay between the various provisions of the United States and Idaho Constitutions, it is not proper to place the state in the role of endorsing or certifying candidates and issues on the very instrument which has the most dramatic impact on such candidates and issues. "The core of the principle of equal liberty of expression is that government action may not favor or disfavor expression because of its content. Voting is political expression, not simply in the sense of choosing among candidates and policies, but also in the sense of making a statement about the public issues raised during a political campaign." Karst, Equality as a Central Principle in the First Amendment, 43 U. Chic. L. Rev. 20, 53 (1975).

By favoring candidates who support term limits, the government is supporting certain political expression because of its content. Regulating content of speech is normally reviewed under a strict scrutiny analysis under the First Amendment.[4] By

placing unfavorable comments adjacent to certain individuals' names on the ballot, those candidates are denied an "equal chance" in violation of the Equal Protection Clause, which also necessitates heightened scrutiny. "In short, when the state is alleged to work against and make more difficult the election of certain candidates, the value of the vote of those supporting those candidates, in terms of their ability to affect the outcome of the election, is lessened." Chemerinsky, Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency, 49 Ohio St. L. J. 773, 788 (1988).

In Brown v. Hartlage, 456 U.S. 45, 60, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982), the U.S. Supreme Court addressed Kentucky's ban on public statements with respect to the willingness of candidates to serve in public office without remuneration. The candidate in question promised during the campaign to reduce his salary if elected, but subsequently retracted his pledge. The U.S. Supreme Court, quoting Mills v. Alabama, 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966), held:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

456 U.S. at 52-53. The Court further held, "[i]t is simply not the function of government to 'select which issues are worth discussing or debating' in the course of a political campaign." *Id.* at 60 (citation omitted). Similarly, the State of Idaho cannot select which issues should be promoted and supported by candidates for political office and accepted by the electorate.[5]

In Bachrach, *supra*, the court analyzed a Massachusetts law which proscribed the use of the term "independent" on the ballot. The Massachusetts law required the term "unenrolled" to be placed adjacent to a candidate's name who was not formally affiliated with any political party. The court held that "[e]xpression in the electoral context is 'at the heart of the First Amendment's protection.' The ballot itself partakes of this protection as representing the culmination of the electoral process." 415 N.E.2d at 835, n.9 (citation omitted). The court declared the law unconstitutional because of its less favorable treatment of candidates who were not affiliated with a political party. The court held that "the prohibition would be unlawful on much the same basis as a statute which might undertake to forbid political candidates in their campaigning to discuss a given subject, *e.g.*, religion or nuclear power . . . ." *Id.* at 836. The court further held:

> If the freedom of expression was impaired, so also would damage be done to associational rights, and thus to the right to vote. For example:

> Voters who during the campaign might have been favorably impressed with the candidate as an Independent, would be confronted on the ballot with a candidate who was called Unenrolled. Unenrolled is hardly a rallying cry: the Commonwealth in its brief appears to grant the possibility that the word would have a negative connotation for voters.

Id. (emphasis added; footnote omitted). Similarly, the proposed initiative treats candidates for office who do not subscribe to the exact constitutional term limits amendment sought in the initiative, differently and less favorably than other candidates. The proposed initiative places words beside the candidate's name which would have a negative connotation for many voters.

In Gould v. Grubb, 536 P.2d 1337 (Cal. 1975), the court addressed a city charter provision affording priority ballot listing for incumbents. The court held this provision as well as a provision for alphabetical order listing on the ballot was unconstitutional. The court stated that "all procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." *Id.* at 1342, *quoting* Moore v. Ogilvie, 394 U.S. 814, 818, 89 S. Ct. 1492, 23 L. Ed. 2d 1 (1969). The court reasoned that the "incumbent first" provision established two classifications of candidates for public office. Because the classification scheme directly impacted the electoral process and the fundamental nature of the right to vote, strict scrutiny analysis was required. The court held that the state failed to set forth a compelling reason to justify its use of such a process. At the heart of the court's decision was the holding, "[i]n our governmental system, the voters' selection must remain untainted by extraneous artificial advantages imposed by weighted procedures of the election process." 536 P.2d at 1348.

This is not to say that "government speech" has no role in our political culture. "Government has legitimate interests in informing, in educating, and in persuading, and it may add its voice to the marketplace of ideas on controversial topics. Nevertheless, it may not, in the guise of governmental speech, trammel the free speech rights of its citizens." Keller v. State Bar of California, 226 Cal. Rptr. 448, 462 (Cal. Ct. App. 1986) (citation omitted). Nor should governmental speech penalize the free speech rights of candidates for political office on issues which are of importance to the electorate, by penalizing those candidates by the placement of pejorative words adjacent to their names on a ballot.

Expanding on the ability of government to lend its voice to the political process as analyzed under federal and state constitutional provisions, one commentator has noted:

> Citizens are entitled to a government that is neutral in the process of selecting candidates. Whether or not the concept of self-government is

> "central" to the first amendment, it is undeniably an important first amendment value, and the integrity of the democratic process could rightly be questioned if government officially intervened in the political process to favor particular candidates. Whether or not the intervention was powerful, it would ipso facto disturb the first amendment equality principle. If *Barnettes'* fixed star guides navigation at all, it must lead us to the view that government speech in support of specific candidates cannot be reconciled with the first amendment.
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> The issue is whether the government should be able to monopolize for itself the right to address the merits of an issue on the ballot or to call the voters' attention to issues which it and perhaps it alone wishes considered. It should not. Such a procedure violates the first amendment equality rights of proponents or opponents (depending on the particular position taken) and abuses the process of free and fair elections itself. Under an eclectic approach, government speech that threatens to dominate the elections marketplace and that undermines respect for the political process is highly suspect. Courts have already held that the allocation of preferred places on the ballot to incumbents and even the allocation of preferred places on the ballot on an alphabetical basis violates such rights. Governmental pronouncements appearing on the ballot going to the very merits of the issues are similarly infirm.

Shiffrin, Government Speech, 27 U.C.L.A. L. Rev. 565, 602, 639 (1980) (emphasis added).

The effect of the proposed initiative is two-fold. First, by placing unfavorable comments next to a candidate's name on the ballot, the state is effectively signaling to the electorate that this candidate is unworthy of their vote in contrast to other candidates.[6] Thus, the state is decreasing the chance that such individuals would be elected based upon their stand on a political issue and, thus, decreasing the value of the votes of his or her supporter. As held in Anderson v. Celebrezze, 460 U.S. 780, 786, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." (Citation omitted.)

Second, the government is speaking in support of a constitutional term limits amendment, a political issue, best left to the political campaign rhetoric between the candidates and their supporters. Not only is the government speaking in support of one side on a controversial issue, it is lending its voice at the most crucial point in time in the

relationship between the voters and candidates. Based upon the cases cited above, as well as numerous others not cited in this certificate of review, it is our opinion that the proposed initiative would be held unconstitutional.

An additional legal problem with the proposed initiative is its capacity for misleading the voters if it becomes law. As stated in Hampel v. Mitten, 278 N.W. 431, 435 (Wis. 1938), "[n]othing is more important in a democracy than the accurate recording of the untrammeled will of the electorate. Gravest danger to the state is present where this will does not find proper expression due to the fact that electors are corrupted or are misled." The proposed initiative uses the phrase "DISREGARDED VOTERS' INTENT ON TERM LIMITS." However, what is the voters' intent? While the proposed initiative may pass at one biennial election, who is to say that such a law would pass at the next biennial election at which the ballot language would have to appear. Would it still be the voters' intent to want a constitutional term limits amendment five or ten years in the future?

Moreover, unless the voter knows what the "voters' intent" is, the label may very well be misleading. An individual would enter the voting booth and see this language next to a candidate's name. Yet, how is that individual supposed to know that the "voters' intent on term limits" is that the voters are in favor of rather than opposed to a term limits amendment?

The following examples illustrate how misleading this initiative could be. Under the initiative, if a member of the congressional delegation "failed to vote in favor of all votes bringing the proposed Congressional Term Limits Amendment set forth above before any committee or subcommittee upon which he or she served in the respective house," the words "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" would appear beside his or her name on the ballot. However, what if that member of Congress originally supported a different, and more stringent, constitutional term limits amendment and, thus, voted against the amendment sought in that committee? Subsequently, the member of Congress changed his or her mind and actually voted in favor of the constitutional term limits amendment sought by the sponsors of the proposed initiative when it arrived on the floor. What if the legislator was sick or absent when the vote was taken? Would he or she actually have "disregarded voters' instructions on term limits?"

In conclusion, in our opinion, the proposed initiative, if challenged, would be declared unconstitutional. The effect of placing unfavorable comments next to a candidate's name places the state in the role of endorsing candidates and issues in the course of a political campaign. While government is free to add its voice to the marketplace of ideas, it is highly doubtful the state can use its power to seek to manipulate election results by slanting what appears on the ballot. This initiative has the

effect of praising one candidate and penalizing another based solely upon the political beliefs expressed by such individuals. Based upon the law cited above, such conduct on the part of the state is improper. Further, the potential is high for the voters to be misled by the placement of certain pejorative words adjacent to a candidate's name.

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 Donna Weaver by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
THOMAS F. GRATTON
Deputy Attorney General

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[1] There is historic precedence in Idaho for placing language on a ballot next to a candidate's name. Prior to 1913, U.S. Senators were chosen by state legislatures rather than by direct election. In 1909, the legislature passed a bill which provided for party voters to indicate their preference for U.S. Senator. Any candidates for the state legislature were given the opportunity to sign a pledge that they would always vote for the candidate for U.S. Senate who received a majority of the votes upon that candidate's party ticket at the special primary. If the candidate signed the pledge, below the primary ballot adjacent to the candidate's name would appear the phrase, "Pledged to vote for party choice for U.S. Senator." However, most of the cases which have developed and interpreted the First and Fourteenth amendments to the U.S. Constitution were decided after 1909.

[2] *See* U.S. Const. amends. I and XIV; Idaho Const. art. 1, §§ 2, 9 and 19.

[3] Although this right "has been explained largely as a derivation from the Equal Protection Clause, it rests just as soundly on the first amendment's principle of equal liberty of expression. Indeed, the first amendment demands an even greater degree of equality in the electoral process than does the equal protection clause." Karst, Equality as a Central Principle in the First Amendment, 43 U. Chic. L. Rev. 20, 53 (1975).

[4] *See* Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) ("Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." (Footnote omitted.)).

[5] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35, 97 S. Ct. 1782, 53 L. Ed. 2d 261 (1977) ("For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 2d 1628 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

[6] Such conduct, if engaged in by individuals, would constitute electioneering. Where engaged in by the state, it would assuredly be declared unconstitutional. Further, when assigning ballot titles to proposed initiatives, the Office of the Attorney General is required to be objective, non-prejudicial and non-argumentative. Idaho Code § 34-1809. Such requirement stems from legislative recognition that state government has no role in favoring or discouraging any one viewpoint on the ballot form.