July 7, 1997

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

RE: Certificate of Review
Initiative Regarding State Term Limits and Lobbying Reform

Dear Mr. Cenarrusa:

A proposed initiative petition was filed with your office on June 26, 1997. 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 timeframe 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 petitioners are 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 petitioners would like to propose language with these standards in mind, we recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative purports to make two changes to Idaho law. First, the proposed initiative would give counties, municipalities and school districts the option to eliminate term limits via local citizen initiative. In addition, the proposed initiative would place certain restrictions on lobbying activities by former Idaho legislators and legislative employees.

Section 1

Section one of the proposed initiative states that, upon passage, the statute should be referred to as "The State Term Limits and Lobbying Reform Act of 1998."

Section 2

Section two of the proposed initiative would add two new sub-sections to Idaho Code § 34-907. Currently, Idaho Code §§ 34-907(1)(a)-(d) contain the ballot access, or "term limit," restrictions for statewide elected officials, Idaho legislators and county officials. A new section would state that, "[t]he people shall have the right through the county initiative process provided in Idaho Code § 31-717 to eliminate the term limits created herein for county commissioners or any other county elected officials."

A second new section would create the following restriction:

> Any person who currently serves or subsequent to the enactment of this act serves as a member of the Idaho House of Representatives or Senate or is employed by the Idaho legislature shall not, for compensation, lobby, solicit, or represent any organization, business, government, or state recognized legal entity before any member, employee or representative of the Idaho state government until the number of years served in or employed by the Idaho legislature have intervened.

This section also would establish a maximum penalty of either a $10,000 fine or a two year prison sentence, or both, for an intentional or willful violation of the new lobbying limitation. As it is currently written, section two contains two potential constitutional problems that will probably prevent implementation of the proposed initiative.

Article 3, § 16 of the Idaho Constitution states:

> 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 is not expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

The Idaho Supreme Court has provided the following guidance in applying article 3, § 16:

> To comply with Article 3, Section 16, the statute must disclose, either by express declaration or by clear intendment, or at least portend the common object in order that it may be determined whether all parts are congruous and mutually supporting, and reasonably designed to accomplish the common aim.

Amer. Fed. of Labor v. Langley, 66 Idaho 763, 768, 168 P.2d 831 (1946).

An initial question that must be addressed is whether article 3, § 16, applies to initiative legislation as to legislation adopted by the legislature. In Luker v. Curtis, 64 Idaho 703, 706, 136 P.2d 978 (1943), the Idaho Supreme Court compared the power of initiative to the power of legislation:

> This power of legislation, reclaimed by the people through the medium of the amendment to the constitution, did not give any more force or effect to initiative legislation than to legislative acts but placed them on equal footing. The power to thus legislate is derived from the same source and, when exercised through one method of legislation, it is asserted, is just as binding and efficient as if accomplished by the other method; that the legislative will and result is as validly consummated the one way as the other.

(Emphasis added.) The supreme court reiterated its adherence to the "equal footing" rule for initiative and legislative acts in Westerberg v. Andrus, 114 Idaho 401, 404, 757 P.2d 664 (1988). It is this office's opinion that the supreme court's "equal footing" rule most likely means that article 3, § 16's "single subject" rule applies to initiative legislation in the same manner, and to the same extent, that it applies to laws enacted by the legislature.

Section 2 of the proposed initiative attempts to enact legislation concerning two distinct subjects: county term limits and restrictions on lobbying. To avoid violating article 3, § 16, these two subjects must be "considered as falling within the same subject matter" or be "necessary as ends and means to the attainment of each other." State v. Banks, 37 Idaho 27, 31, 215 P. 468 (1923). The Banks court determined that the sale of general fund treasury notes and the sale of refunding bonds are separate subjects that cannot be included in one piece of legislation. *Id.* In another case, the Idaho Supreme Court has determined that a salary increase for a state employee contained in an appropriations bill violates article 3, § 16. Hailey v. Huston, 25 Idaho 165, 136 P. 212 (1913).

County term limits and lobbying restrictions are no more closely related than the topics at issue in Banks and Hailey. Certainly, they are not "necessary as ends and means to the attainment of each other." Based on the Idaho Supreme Court's precedent, this office concludes that a reviewing court is likely to rule that the entire proposed initiative is void. *See* Banks, 37 Idaho at 32 ("where [article 3, § 16, is violated] the act is absolutely void").

Assuming, for the purposes of complete review, that the proposed initiative survives an article 3, § 16, challenge, the proposed lobbying restriction may also violate

the freedom of association protected by the First Amendment to the United States Constitution and article 1, §§ 9 and 10 of the Idaho Constitution.

Statutes restricting former state elected officials, and other state employees, from doing business with the state are referred to as "revolving door" statutes. *See, e.g.,* In Re Advisory from the Governor, 633 A.2d 664, 667 (R.I. 1993). A number of states have considered First Amendment challenges to "revolving door" statutes.

The Ohio Court of Appeals considered the following "revolving door" restriction in State v. Nipps:

> No public official or employee shall represent a client or act in a representative capacity for any person before the public agency by which he is or within the preceding twelve months was employed or on which he serves or within the preceding twelve months had served on any matter with which the person is or was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion.

419 N.E.2d 1128, 1131 (Ohio 1979). The Ohio court ruled that the challenged statute did not violate the First Amendment because:

> The statute in question is not a blanket prohibition on all representation by defendant before his former employer, but only in those matters in which he, as an official or employee of the state, was directly concerned and in which he personally participated by a substantial and material exercise of administrative discretion.

Nipps, 419 N.E.2d at 1132. The court also determined that:

> The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.

Id.

The lobbying restriction in the proposed initiative is not limited to matters in which former officials and employees either were directly concerned or personally participated. In addition, the prohibition is not limited to one year. Finally, the proposed initiative does not contain any findings that would help a reviewing court understand why a more narrowly tailored proposal, such as the Ohio statute, would not adequately address

the interests of the petitioners. Because the proposed initiative's lobbying restriction is so broad, and since there are no findings to guide a reviewing court, a reviewing court might rule that the lobbying restriction violates the First Amendment to the United States Constitution, article 1, §§ 9 and 10 of the Idaho Constitution, or both.

Section 3

Section 3 of the proposed initiative adds the local initiative term limits option to the provision establishing municipal term limits, Idaho Code § 50-478.

Section 4

Section 4 of the proposed initiative probably intends to add the local initiative option to the provision establishing school district term limits. However, that addition is omitted from the version of the proposed initiative submitted to this office.

Section 5

Section 5 establishes the effective date of the proposed initiative.

Section 6

Section 6 contains a severability clause. However, as explained above, the Idaho Supreme Court has ruled that statutes violating article 3, § 16, are "absolutely void." Therefore, the severability clause may not save the remainder of the statute.

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:
MATTHEW J. MCKEOWN
Deputy Attorney General