May 1, 1998

The Honorable Fran Ulmer
Lieutenant Governor
P.O. Box 110015
Juneau, AK 99811-0300

Re: Regulations Implementing Ballot Measure No. 4, SLA 1996, on Congressional Terms Limit
Our file: 663-97-0427
1998 Op. Att'y Gen. No. 2

Dear Lt. Governor Ulmer:

I. INTRODUCTION AND SHORT ANSWER

The Division of Elections has proposed regulations to implement the material from Ballot Measure 4 of the 1996 general election that was codified at AS 15.15.510, AS 15.15.515, AS 15.15.520, and AS 15.15.525. Under the terms of Ballot Measure 4 the regulations must be in effect by June 1, 1998. Therefore, the deadline for filing these regulations with the office of the lieutenant governor is May 1, 1998. In the course of reviewing the proposed regulations I have determined that these provisions of the ballot measure are clearly unconstitutional, and that the implementing regulations are therefore also unconstitutional.

Therefore, under the authority of AS 44.62.060(b), I am disapproving the proposed regulations implementing AS 15.15.510, AS 15.15.515, AS 15.15.520, and AS 15.15.525 from Ballot Measure No. 4, SLA 1996. My reasoning in support of this decision follows.

II. BACKGROUND

Ballot Measure No. 4, SLA 1996, is an initiated law that you certified on November 27, 1996, and became effective on February 25, 1997. The title of the ballot measure is "An Initiative Requiring Ballot Information Pertaining to Congressional Term Limit Voting Records and Certain Acts or Omissions of Candidates for Congressional and Legislative Office." The short title of the measure is "the Congressional Term Limits Act of 1996." This type of term limits measure is commonly referred to as a "scarlet letter" law.[1] Ballot Measure No. 4 is codified at AS 15.15.500 -- 15.15.535.

AS 15.15.500 is a statement of findings and a declaration on the desirability of Congressional term limits. AS 15.15.505 is a statement of the purpose and intent of the ballot measure to secure an amendment of the U.S. Constitution requiring Congressional term limits. AS 15.15.510 requires that all primary, special, and general elections ballots shall have "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any state legislator who fails to take certain enumerated actions to secure Congressional term limits. AS 15.15.515 similarly requires ballot language for members of the U.S. Congress. AS 15.15.520 requires that candidates for U.S. Congress and the state legislature be given the opportunity to take a term limits pledge. Those who decline to take the pledge will have "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to their names on every primary and general election ballot. AS 15.15.525 designates you and state election officials as responsible for determining

[1] Term limits initiatives similar to Ballot Measure No. 4 were enacted in eight other states at or before the time that Alaska enacted the ballot measure: Arkansas, Colorado, Idaho, Maine, Missouri, Nebraska, Nevada, and South Dakota. The Congressional Term Limits Act of 1996 initiative was proposed by U.S. Term Limits, Inc., a national term limits organization, and voted into law in these nine states. The result is that these initiatives are standardized.

whether the above-quoted, capitalized language should appear on the ballots, and requires a 45-day comment period following this determination during which a lawsuit may be brought to challenge the determination. AS 15.15.530 is a severability clause. AS 15.15.535 provides that the short title of the ballot measure is "The Congressional Term Limits Act of 1996."

Pursuant to AS 15.45.070, our office reviewed the initiative that became Ballot Measure No. 4 in late 1995, before the measure was placed on the ballot. Our review of the initiative is set out in 1995 Inf. Op. Att'y Gen. (Nov. 22; 663-96-0165). In our informal opinion we expressed concern that the measure might not be constitutional. We nonetheless advised that you should certify the initiative, citing the general rule that an initiative application in proper form should be certified even if the bill proposed for the initiative is *likely* to be unconstitutional. *See* 1994 Inf. Op. Att'y Gen. (Aug. 1; 663-94-0532).

Now, because we must review the proposed regulations implementing Ballot Measure No. 4, we must revisit the constitutionality of Ballot Measure No. 4 itself. If the statute is *clearly* unconstitutional, the regulations cannot be filed.

III. AUTHORITIES AND ANALYSIS

A. All Other Jurisdictions That Have Considered Term Limits Measures Like Ballot Measure No. 4 Have Found Them Unconstitutional

All four courts which have reviewed term limits initiatives such as Ballot Measure No. 4 have held them to be unconstitutional. *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996), *cert. denied*, 117 S. Ct. 1081 (Feb. 24, 1997); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52 (D.

Me. 1997); *Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997); and *Duggan v. Moore*, 4:97CV3074 (D. Neb., Jan. 15, 1998).[2]

In *Donovan v. Priest* and *League of Women Voters*, the courts found that the term limits measures proposed by initiative violated article V of the U.S. Constitution. Article V of the U.S. Constitution sets out the only two ways to propose amendments to the U.S. Constitution.[3] These courts held that the term limits initiatives proposed in Arkansas and Maine violated article V of the U.S. Constitution by attempting to create a third way to propose amendments to the U.S. Constitution, by popular vote through the initiative process.

The Maine court in *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52, 56 (D. Me. 1997), explained this principle as follows:

> It is not within the province of the citizens of a state to propose or ratify amendments to the Constitution. It is an undisputed principle of article V

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[2] Staff of the Nebraska Attorney General's Office indicate that they plan to appeal this decision to the 8th Circuit Court of Appeals.

[3] Article V to the U.S. Constitution provides:

> **Amendment of the Constitution.** The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendment to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

> that constitutional amendment cannot be accomplished by citizen referendum. Supreme Court jurisprudence clearly supports this axiom.

The court in *League of Women Voters* cited *Hawke v. Smith*, 253 U.S. 221 (1920), and *Leser v. Garnett*, 258 U.S. 130 (1922), in support of its decision. In the *Hawke* and *Leser* cases the Court struck down state constitutional provisions allowing ratification of proposed amendments to the U.S. Constitution by citizen referendum, finding that the citizen vote process violated the amendment process set forth in article V of the U.S. Constitution.

However, the court in *League of Women Voters* also acknowledged, and distinguished, the later case of *Kimble v. Swackhamer*, 439 U.S. 1385 (Rehnquist, Circuit Justice (1978)). In this case, Justice Rehnquist upheld a purely advisory referendum requested by the Nevada state legislature regarding the citizens' position on the proposed equal rights amendment to the Constitution. In *League of Women Voters*, the court explained that the "scarlet letter" term limits initiative fell in the spectrum between the two extremes of *Hawke* and *Leser* on the one hand, and *Kimble* on the other. It concluded that the scarlet letter initiative was more like the prohibited initiatives considered in *Hawke* and *Leser* because the initiative was a coercive attempt to compel the state legislature to propose an amendment to the U.S. Constitution:

> The Act effectively coerces Maine's elected officials through its ballot labeling provisions. Given this coercion, the State's legislators cannot act in the deliberative and independent manner required by article V of the [U.S] Constitution. The Act is, therefore, unconstitutional, and the Court finds that all requirements for an injunction exist.

The Arkansas Supreme Court used a similar analysis in *Donovan v. Priest*, 931 S.W.2d 119, 127-128 (Ark. 1996), *cert. denied*, 117 S. Ct. 1081 (Feb. 24, 1997):

> Article V prohibits the action proposed by the measure at hand. Clearly, the proposed Amendment 9 is nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people of this state. This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told. Although the proposed Amendment 9 does not compel such action by the legislature on threat of loss of salary, it is nonetheless binding on the legislators in an extorsive manner as failure to heed the amendment's instructions will result in their threatened potential political death. [T]he proposed duties given to the Secretary of State by Amendment 9 are not merely ministerial; rather, they amount to substantive penalties that are equivalent to an officially sanctioned recommendation by the State of Arkansas not to vote for such candidates because they disregarded the instructions and wishes of the voters.

The *Donovan* court held that the scarlet letter term limits initiative violated article V of the U.S. Constitution, as follows:

> The proposed Amendment 9 is clearly violative of the provision in Article V of the United States Constitution that all proposals of amendments to that Constitution must come either from Congress or state legislatures--not from the people. It is an indirect attempt to propose an amendment to the United States Constitution, and as such violates the narrow, specific grants of authority provided in Article V. The proposed Amendment 9 would virtually tie the hands of the individual members of the General Assembly such that they would no longer be part of a deliberative body acting independently in exercising their individual best judgments on every issue. Consequently, the measure is an impermissible use of the initiative power reserved to the people of this state in Amendment 7 to the Arkansas Constitution and is clearly contrary to law.

Id. at 128.

Following the court's decision in *Donovan* the state of Arkansas filed a request for certiorari with the U.S. Supreme Court. The U.S. Supreme Court denied the petition for certiorari in the *Donovan* case, thereby allowing the Arkansas Supreme Court's decision to stand.

In *Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997), the Idaho Supreme Court found that the ballot legend provisions of the scarlet letter term limits initiative violated the legislator's or candidate's freedom of speech under article I, section 9 of the Idaho Constitution, and legislators' freedom of speech and debate under article I, section 6 of the U.S. Constitution.[4] The *Simpson* court focused on that part of the initiative that required the lieutenant governor's office to investigate an incumbent's voting record, and found that this was an impermissible questioning of a legislator in violation of article I, section 6 of the U.S. Constitution:

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[4] Article I, section 9 of the Idaho Constitution provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty.

Article I, section 6 of the U.S. Constitution provides:

> **Compensation; privileges; disabilities.** The Senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.
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> No Senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time, and no person holding any office under the United States, shall be a member of either house during his continuance in office.

> The ballot legend in subsection (2) of section 2 of Proposition 4 serves as a state-imposed consequence against members of congress for speaking a certain way. The ballot legend violated the United States' Constitution's mandate that members of congress shall not be questioned for speech and debate in either house, especially by the executive branch.

Id. at 1374.

After identifying the constitutional problems in the initiative, the *Simpson* court used the severability clause set out in the initiative to sever those parts of the initiative requiring a ballot legend, and action by the secretary of state. It then held that without the ballot legend language the initiative did not violate article V of the U.S. Constitution.

> We declare that the ballot legend and pledge portions of Proposition 4 are unconstitutional, but that the instructions to members of congress and legislators do not violate article V of the United States Constitution and are severable.

Id. at 1373.

Thus, according to the Idaho Supreme Court, when the unconstitutional provisions were stricken from the initiative, it became purely advisory and required neither ballot legend nor action by the secretary of state.

Earlier this year the federal district court for Nebraska struck down major provisions of Nebraska's constitutional amendment enacting a scarlet letter term limits measure, and issued a permanent injunction against implementation of those provisions. *Duggan v. Moore*, 4:97CV3074 (Jan. 15, 1998). It held that the requirement of ballot legends and action by the secretary of state to implement ballot legends violated article V of the U.S. Constitution, and incumbent legislators' freedom of speech rights under the First Amendment to the U.S. Constitution. The court in *Duggan* severed the unconstitutional provisions from the Nebraska term limits amendment and let stand the

parts of the amendment expressing the voters' views on term limits. This is the same resolution as was reached by the Idaho Supreme Court in *Simpson*, explained above.

B. Alaska Courts Would Reach the Same Conclusion

The Alaska Supreme Court would likely follow other courts in finding that scarlet letter term limits measures such as proposed in Ballot Measure No. 4 are unconstitutional. In the context of ballot access issues, the Alaska Supreme Court has interpreted the freedom of speech provisions of the Alaska Constitution as providing greater protections than the U.S. Constitution. *Vogler v. Miller*, 651 P.2d 1 (Alaska 1982). Furthermore, in *Alaskans for Legislative Reform v. State*, 887 P.2d 960 (Alaska 1994),[5] the court struck down a term limits initiative finding that the measure unconstitutionally imposed an additional qualification for legislative office, declaring:

> When the plaintiffs' initiative is analyzed appropriately, it is clear that the limitations it would impose on candidates' and voters' rights are "qualifications" as that term has been used by constitutional delegates, political thinkers, legal scholars, and courts. The barriers it would erect against incumbency are constitutionally forbidden. The Alaska Constitution sets the qualifications for legislative office. Term limits are not included in those qualifications. To the extent that incumbency might be a political evil, the constitution provides a method -- frequent elections -- for discouraging it. If this method should prove to be inadequate, the only way that term limits might be imposed would be a constitutional amendment.

Id. at 966

[5] The initiative at issue in *Alaskans for Legislative Reform v. State*, 887 P.2d 960 (Alaska 1994), would have limited terms of members of the Alaska legislature to two consecutive senate terms, four consecutive house terms, or eight consecutive years in any combination of house or senate service.

These cases, read together, strongly suggest that the Alaska Supreme Court would find that the requirements in Ballot Measure No. 4 impose additional qualifications for Congressional office beyond those set out in the U.S. Constitution.[6]

C. Disapproval of Proposed Regulations as Unconstitutional

I find the reasoning of the courts which have considered this issue and concluded that ballot legend provisions were unconstitutional to be persuasive. I believe the Alaska Supreme Court would so hold.

A regulation can have no more validity than the statutes upon which it rests. Where, as here, the underlying statutes (AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525 from Ballot Measure No. 4) are clearly unconstitutional, the proposed implementing regulations, if allowed to

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[6] It is uncertain whether the Alaska Supreme Court would follow *Simpson* and *Duggan* on severability. The test for severability of an initiated law is set out in *McAlpine v. University of Alaska*, 762 P.2d 81, 94 (Alaska 1988). Under this test it is possible that the Alaska court might honor the express severability clause set out in Ballot Measure No. 4. However, for the purposes of this memorandum we need not address this point because the implementing regulations under review relate to the unconstitutional ballot legend provisions of Ballot Measure No. 4.

become law, would also be unconstitutional.[7] Under the authority of AS 44.62.060(b), I hereby disapprove those regulations.[8]

Sincerely,

Bruce M. Botelho
Attorney General

BMB:kh

cc: Sandi Stout, Director
Division of Elections

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[7] The relevant part of AS 44.62.060(b) provides:

> (b) In the performance of duties under AS 44.62.125, the Department of Law shall advise the agencies on legal matters relevant to the adoption of regulations and may advise the agencies on the need for and the policy involved in particular regulations. In addition, the department shall prepare a written statement of approval or disapproval after each regulation has been reviewed in order to determine
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> (1) its legality, constitutionality, and consistency with other regulations.

[8] In advising you on this matter I have considered the Alaska Supreme Court's decision in *O'Callaghan v. Coghill*, 888 P.2d 1302, 1304 (Alaska 1995).