**South Dakota Judicial Accountability Committee**
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July 26, 2006

Larry Long, Attorney General
State of South Dakota
1302 E. Hwy 14, Suite 1
Pierre, South Dakota 57501-8501

Re: Your Attorney General Explanation/Statement for
2006 Ballot Measure "Amendment E"

Dear Attorney General Long:

We have read the explanation/statement that you prepared on Amendment E, pursuant to your statutory duty, SDCL 12-13-9. We have come to the irrefutable conclusion that it is misleading in several respects (delineated below) and therefore assert that it is clearly in violation of SDCL 12-13-9. Despite your comments in Mr. Brokaw's July 13, 2006 Associated Press article, we would remind you of your duty to serve all the people and that your duty was to write "… an objective, clear and simple summary to educate the voters of the **purpose** and effect of the proposed amendment to the Constitution …" as mandated by SDCL 12-13-9.

Rather than going to court[1], we first want to attempt to appeal to your conscience, morality, oath of office, and statutory duty, and therefore would request that after you read this letter you reconsider your explanation/statement on Amendment E and rewrite the explanation/statement properly and in compliance with the law. Please let us know promptly, and in writing, of your decision, as time is of the essence for a "NO" response since it will force us to go to court.

## ***Preliminary Consideration***

We are sure you are aware SDCL 12-13-9 was amended this year and several changes were made to the law. Most importantly, although earlier South Dakota Supreme Court cases (among them *Hoogestraat v. Barnett*, 1998 SD 104 and *Schulte v. Long*, 2004 SD 102) interpreted 12-13-9 as requiring an objective standard for the explanation, the legislature expressly affirmed that standard by adding the word "objective" to the

[1] It is claimed by our critics that Amendment E would open the floodgates of litigation. That is false, as the floodgates were opened a long time ago – and not by us. See '*THE LITIGATION EXPLOSION: What Happened When America Unleashed the Lawsuit,"* Walter K. Olson (1991) Plume Printing. Fact is, our adversarial system is largely not working, and rather than getting truth from conflict, we are getting less truth and more conflict. See *"Justice System is Broken, Lawyers* [ABA] *Say,"* June 24, 2004, LA Times p.A14, article reporting the release of an American Bar Association report/study at the Wash., D.C. news conference where ABA president Dennis Archer stated: "**The system is broken. We need to fix it**."

amended law, now in effect, which you **are** subject to. Thus, clearly showing the will of the People to ensure a fair election and reputing biased or partisan efforts on the part the office of the attorney general regarding ballot measures.

As will be shown below, with your explanation of Amendment E, you have not heeded the Court's, or the Legislature's (the People's) mandate to you (and your office) to be objective.[2] Moreover, we must point out that Associate Supreme Court Justice Saber (as well as the circuit court judge), dissenting in the *Schulte* decision found you to be partisan and stated that your statement on the initiative at issue in that case was, "inaccurate and misleading." There Justice Saber stated (bold emphasis added):

> "… In other words, the word 'eliminate' is inaccurate and the word 'modify' would be accurate. In that regard, **the Attorney General's statement is inaccurate and misleading**.
>
> "The circuit court properly recognized that the Attorney General's ballot explanation **crossed the line** from explanation to advocacy. Even if the Attorney General's statement was accurate, 'it [would be] the accuracy of an advocate.' Gromley v. Lan, 438 A2d 519, 526 (NJ) 1981). Only with the omission of the offensive provision will the ballot explanation become concise and narrowly crafted as is required by SDCL 12-13-9, or accurate.
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> "I dissent for all of these reasons.
>
> **"A postscript to Attorney General Larry Long**: In *Hoogestraat* at paragraph 18, Justice Gilbertson said: "At stake here is the impartiality and integrity of the voting booth.' *Hoogestraat*, 1998 SD 104. (Although he has apparently changed his mind, **it is not too late for you to do the right thing**.)
>
> **"You have won an advantage for your party, a political advantage**. But you are the Attorney General for all the people of the State of South Dakota, your job is to fully and faithfully perform the duties of the chief law enforcement officer in the State of South Dakota **for all of the people**.
>
> **"I encourage you to remove the offending language from the ballot and the voting booth.** Do the right thing for all the people of South Dakota.
>
> "KONENKAMP, Justice, **joins** this dissent, except for the postscript."

Thus in *Schulte v. Long*, two people of note, South Dakota Associate Supreme Court Justices Saber and Konenkamp, found your prepared statement to be "inaccurate and misleading." We do also, and we also join Justice Saber in his statements that, "it is not too late for you to do the right thing" and to give back the "political advantage" you have won (taken illegitimately) for the power establishment.[3]

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[2] So much for the touted doctrine of separation of powers, the so-called checks & balances.

[3] It is simply a myth that an attorney general (state or federal) is the "attorney for the people." Fact is, an attorney general is the attorney for the government. For example, see your website which states in

Attorney General Long, please consider withdrawing your explanation/statement on Amendment E and redrafting it so that it gives the voters of South Dakota an "objective" and fair account of Amendment E. Please, voluntarily do the right thing. Do not force us to use the courts to compel you to adhere to SDCL 12-13-9.

***Your Explanation/Statement on Amendment E***

First, like many other Amendment E opponents, (South Dakota Senate and House and the No-On-Amendment E Group for example), you falsely claim that Amendment E concerns and covers "Citizens serving on juries, school boards, city councils, county commissioners, or in similar capacities[4], and prosecutors". Please explain in writing, on what basis did you conclude that Amendment E concerns and covers anyone other than judges? The language of Amendment E clearly states (bold emphasis added):

1. Preamble. We, the People of South Dakota, find that the **doctrine of judicial immunity** has the potential of being abused; that when **judges** do abuse their power, the People are obliged – it is their duty – to correct that injury, for the benefit of themselves and their posterity. In order to insure **judicial**

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pertinent part (bold emphasis added):

> "State law prohibits the Attorney General or members of his staff from providing private legal advice to the general public. The Attorney General **serves as legal advisor for the state** officials and certain local officials."

Anyone who still believes an attorney general is largely objective or still believes that an attorney general would not jettison the interest of the people (and the Constitution), to instead advocate for the government interest, should read *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001), the case about the Ruby Ridge tragedy, where Idaho attempted to criminally charge FBI agent/sniper for blowing off Vicki Weaver's head. The case is a good history lesson that documents the failures of Attorney General Janet Reno to properly investigate and charge those in the FBI who indisputably violated the Constitution, illegally changing the rules of engagement, whereby the FBI declared war on and shot American citizens at Ruby Ridge.

Still in doubt? See *U.S. v. Edwin P. Wilson,* 289 F.Supp.2d 801 (USDC-SD, Texas 2003), where U.S. District Court Judge Lynn Hughes reversed and vacated a criminal conviction based on massive prosecutorial and other governmental agencies misconduct, including perjured testimony, manufactured evidence and the withholding of evidence. Judge Hughes wrote there in part:

> [at 809] "**Honesty comes hard to the government**. It describes its nondisclosure as 'information allegedly concealed by the Briggs declaration.' (Gov't answer at 64.) This is a semantic game—the information was not *allegedly* concealed; it was **actively concealed** …"
>
> [P] "**The investigation is a dodge**; there was no need to investigate: it **knew** the affidavit was false before it offered it. …"
>
> * * *
>
> [at 815] "In the course of American justice, one would have to **work hard to conceive of a more fundamentally unfair process** with a consequently unreliable result than the **fabrication of false data by the government**, under oath by a government official, presented knowingly by the prosecutor in the court room **with the express approval of his superiors in Washington**."

Still in doubt? See the recent books by Judge (retired) Andrew P. Napolitano *"THE CONSTUTUTION IN EXILE: How the Federal Government has Seized Power by Rewriting the Supreme Law of the Land,"* (2006) Nelson Current and *"CONSTITUTIONAL CHAOS: What Happens When The Government Breaks Its Own Laws,"* (2004) Nelson Current.

[4] Or in similar capacities? Clearly this is a vague statement. What does this mean Attorney General Long? You left out "… the butcher, baker and candlestick maker." How is this vague statement about "similar capacities" related to Amendment E?

**accountability** and domestic tranquility, we hereby amend our Constitution by adding these provisions as section 28 to Article VI, which shall be known as "The J.A.I.L. Amendment."

The clear language is the "doctrine of judicial immunity", "when judges do abuse their power", and to insure "judicial accountability". Nowhere in the language of Amendment E does it state or invoke jurisdiction over juries, school boards, city councils, county commissions or prosecutors. That is an invention by our opponents which you have adopted as your own, Attorney General Long. Directly on point here is *Pierson v. Ray*, 386 U.S. 547 (1967), an 8/1 decision written by Chief Justice Warren, that affirmed (we believe wrongly – see dissent by Justice Douglas) an appeals court decision granting immunity for judges, exempting judges from liability, under Title 42, section 1983, the civil rights statute - despite clear language that imposed liability on "**Every person**" who under color of law subjects or causes any citizen of the United States to the deprivation of any rights secured by the constitution and law. Amendment E clearly speaks only of judges, yet you perversely concoct an unfounded interpretation that wants to include "every person." Please explain, Attorney General Long.

2. 1. Definitions. Where appropriate, the singular shall include the plural; and for purposes of this Amendment, the following terms shall mean:
    1. Blocking: Any act that impedes the lawful conclusion of a **case**, to include unreasonable delay and willful rendering of an unlawful or void **judgment** or **order**.[5]
    2. **Judge**: Justice, judge, magistrate judge, judge pro tem, and, all other persons claiming to be shielded by judicial immunity.[6]

* * *

3. 2. Immunity. No immunity shall extend to any **judge** of this State for any deliberate violation of law or conspiracy, intentional violation of due process of law, deliberate disregard of material facts, **judicial** acts without jurisdiction, blocking of a lawful conclusion of a case, or any deliberate violation of the Constitutions of South Dakota or the United States, notwithstanding Common Law, or any other contrary statute.[7]
4. 3. Special Grand Jury. For the purpose of returning power to the People, there is hereby created within this State a thirteen-member Special Grand Jury with statewide jurisdiction having power to judge both law and fact. This body shall exist independent of statutes governing county Grand Juries. Their responsibility shall be limited to determining, on an objective standard, whether any civil lawsuit against a **judge** would be frivolous or harassing, or

[5] "Case", "judgment" and "order", are largely legal and judicial terms of art that would commonly cause one to first think – judge or judiciary.
[6] The term "judge" is clearly and simply defined here and it does not mention, and thereby does not include juries, school boards, city councils, county commissions or prosecutors. Attorney General Long, why do you lawyers always seem to make the simple - complicated, the clear - muddy? Ditto footnote 5, above.
[7] As explained in footnotes 4 and 5, above, the language here clearly states only "any judge" and uses terms of art usually related to the judiciary.

fall within the exclusions of immunity as set forth in paragraph 2, and whether there is probable cause of criminal conduct by the **judge** complained against.[8]

5. Section 6 "Annual Funding", Section 9 "Compensation of Jurors", Section 10 "Annual Budget", in consistent manner, use only the terms "judges" and "judge", and likewise never mention, reference or allude to juries, school boards, city councils, county commissioners, or prosecutors.
6. Most particular are Sections 15. Procedures, 16. Indictment, 17. Criminal Procedures, 18. Removal, 19. Public Indemnification and 22. Challenges, which in consistent manner, as shown directly below here in bold emphasis, specifically only use the terms "the subject judge", "judge", "judge's answer", "against the judge", "The Jurors [Special Grand Jurors] shall keep in mind … that they are entrusted by the People of this State with the duty of restoring judicial accountability…and are not to be swayed by artful presentation by the **judge**", "…find probable cause of criminal conduct on the part of any **judge** against who a complaint is docketed, it shall have the power to indict such **judge** …", "… the defendant **judge**, …", "… a complaint of criminal conduct against a **judge**…", "Whenever any **judge** has received three strikes, the **judge** shall be permanently removed from office,…", "…such removed **judge**… such **judge**…", "No **judge** complained against, or sued civilly by a complainant pursuant to this Amendment… nor shall any **judge** be reimbursed…" and "No **judge** under the jurisdiction of the Special Grad Jury…" There simply is no mention, reference or allusion to juries, school boards, city councils, county commissioners, or prosecutors in the contorted context - that your explanation/statement of Amendment E states.

> **15-Procedures.** The Special Grand Jury shall serve a copy of the filed complaint upon **the subject judge** and notice to the complainant of such service. The **judge** shall have twenty days to serve and file an answer. The complainant shall have fifteen days to reply to the **judge's answer**. (Upon timely request, the Special Grand Jury may provide for extensions for good cause.) In criminal matters, the Special Grand Jury shall have power to subpoena witnesses, documents, and other tangible evidence, and to examine witnesses under oath. The Special Grand Jury shall determine the causes properly before it with their reasoned findings in writing within one hundred twenty calendar days, serving on all parties their decision on whether or not immunity shall apply as a defense to any civil action that may thereafter be pursued **against the judge**. A rehearing may be requested of the Special Grand Jury within fifteen days with service upon the opposition. Fifteen days shall be allowed to reply thereto. Thereafter, the Special Grand Jury shall render final determination in writing within thirty days. All allegations in the complaint shall be liberally construed in favor of the complainant. **The Jurors shall keep in mind, in making their decisions, that they are entrusted by the People of this State with the duty of restoring judicial accountability and a perception of justice, and are not to be swayed by artful presentation by the judge**. They shall avoid all influence by judicial and government entities. The statute of limitations on any civil suit brought pursuant to this Amendment

[8] The plain, simple and clear language here states and refers only to "judge"; again there is no mention, reference or even allusion to juries, school boards, city councils, county commissions or prosecutors. That is simply an invention Attorney General Long.

against a judge shall not commence until a final decision by the Special Grand Jury. Special Grand Jury files shall always remain public record following their final determination. A majority of seven shall determine any matter.

**16-Indictment**. Should the Special Grand Jury also **find probable cause of criminal conduct on the part of any judge against whom a complaint is docketed, it shall have the power to indict such judge**, except where double jeopardy attaches. The Special Grand Jury shall, without *voir dire* beyond personal impartiality, relationship, or linguistics, cause to be impaneled twelve special trial jurors, plus alternates, which trial jurors shall be instructed that they have power to judge both law and fact. The Special Grand Jury shall also select a non-governmental special prosecutor and a judge with no more than four years on the bench from a county other than that of **the defendant judge**, to maintain a fair and orderly proceeding. The trial jury shall be selected from the same pool of jury candidates as any regular jury. The special prosecutor shall thereafter prosecute the cause to a conclusion, having all the powers of any other prosecutor within this State. Upon conviction, sentencing shall be the province of the special trial jury, and not that of the selected judge. Such sentence shall conform to statutory provisions.

**17-Criminal Procedures.** Criminal Procedures. In addition to any other provisions of this Amendment, **a complaint for criminal conduct against a judge** may be brought directly to the Special Grand Jury, when all the following conditions have been met: (1) an affidavit or declaration of criminal conduct has been lodged with the appropriate prosecutorial entity within ninety days of the commission of the alleged crime; (2) the prosecutor declines to prosecute, or one hundred twenty days has passed following the lodging of such affidavit or declaration, and prosecution has not commenced; (3) an indictment, if sought, has not been specifically declined on the merits by a county Grand Jury; and (4) the criminal statute of limitations has not run. Any criminal conviction (including a plea bargain) under any judicial process shall constitute a strike.

**18-Removal**. **Whenever any judge has received three strikes, the judge shall be permanently removed from office**, and thereafter shall not serve in any State judicial office. Judicial retirement for **such removed judge** shall not exceed one-half of the benefits to which **such judge** would have otherwise been entitled. Retirement shall not avert third-strike penalties.

**19-Public Indemnification**. **No judge complained against, or sued civilly by a complainant pursuant to this Amendment**, shall be defended at public expense or by any elected or appointed public counsel, **nor shall any judge be reimbursed** from public funds for any losses sustained under this Amendment.

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**22-Challenges**. **No judge under the jurisdiction of the Special Grand Jury**, or potentially affected by the outcome of a challenge hereto, shall have any jurisdiction to sit in judgment of such challenge. Such pretended adjudication shall be null and void for all purposes and a complaint for such misconduct may be brought at any time, without charge, before the Special Grand Jury by class action, or by any adversely affected person.

Second and most perversely, is your total failure to state in your explanation/statement, that Amendment E, if passed, would create a "Special Grand Jury", "For the purpose of returning power to the People."[9] Such is the clear and simple language set forth in Section 3 of Amendment E. Why have you omitted such clear and simple language from your explanation/statement, Attorney General Long?[10] By any "objective" interpretation, such language or its equivalent is mandated by SDCL 12-13-9.

Such was mandated by the prior version of SDCL (*Hoogestraat* and *Schulte*), but now compelled even more by the addition of the express term "objective" to the statute. Further, the mandate for an "objective" standard is heightened even greater, because another material change was made to SDCL 12-13-9 in the 2006 amendment, the addition of the words "**to educate the voters**". Thus the new and presently operative version of 12-13-9, in pertinent part reads (bold added):

> "…The attorney general's statement shall consist of the title, the explanation, and a clear and simple recitation of the effect of a 'yes' or 'No' vote. The explanation shall be an **objective**, clear, and simple summary **to educate the voters** of the **purpose** and effect of the proposed amendment to the Constitution, the initiated measure, or the referred law. …"

The prior version of SDCL 12-13-9 read in pertinent part:

> "… The explanation shall state succinctly the **purpose** and legal effect of the proposed amendment to the Constitution, the initiated measure or the referred law. The explanation shall be a clear and simple summary of the issue …"

Interpreting that prior version of 12-13-9, the Court in *Hoogestraat* stated in pertinent part (bold emphasis added):

> "This Court has, however, considered whether a ballot satisfied the requirements of SDCL 12-13-9 which, at that time, required the Attorney General to prepare a 'concise' statement of 'the **purpose** and legal effect of each proposed constitutional amendment … particularly with reference to existing law.' Barnhart v. Herseth, 88 SD 503, 513, 222 NW2d 131, 136 (1974).

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[9] How does power return to the People? You are not claiming or doubting that all power belongs and resides in the People, are you Attorney General Long? Because in fact, Article VI-Bill of Rights, Section 26-Power Inherent in the People, states in pertinent part:

> "… All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit, and they have the right in lawful and constituted methods to alter or reform their forms of government in such manner as they may think proper…"

That language is there Attorney General Long to continually remind those in government of the fundamental principle. Power returns to the People through four (4) vehicles: the right to petition, voting, sitting on a trial jury and a grand jury. Those vehicles have largely been manipulated and taken away from the People by the government. The People only loan the power to government – their servant. It returns when the People take it back, through measures like Amendment E.

[10] Moreover, the term "Special Grand Jury" is used thirty-four (34) times in the language of Amendment E, yet it is not mentioned once by you Mr. Long. Please explain.

> "The *Barnhart* court noted that the language '**purpose** and effect' led to the conclusion that a ballot explanation of a proposed constitutional amendment 'was to be identified to the electorate in easily understood language enabling voters to **distinguish** this amendment from the other … propositions on the ballot[.]' *Barnhart,* 88 SD at 514, 222 NW 2d at 137. **The court rejected the argument that a ballot explanation must educate the electorate** since the voters are presumed familiar with proposed constitutional amendments through the publicity given the amendments in the time leading up to the election. *Id.* '[T]he basic purpose of a ballot summary is to **identify an amendment to an informed electorate rather than to educate it**.' *Id.,* 88 SD at 515, 222 NW at 137.
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> "**Consequently, the focus of the ballot explanation is restricted**. It must clearly, simply, and succinctly identify and summarize the **purpose** and legal effect **to an already educated** and informed voter who has ten minutes in which to vote. SDCL 12-13-9; SDCL 12-18-15; Barnhart, 88 SD 514, 222 NW2d at 137. The legal effect that must be succinctly stated refers to the result that the proposed constitutional amendment will have upon the existing law. *See* black's Law Dictionary 514 (6th ed 1990. It does not refer to collateral, **theoretical** or potential consequences which may or may not occur."

As SDCL 12-13-9 was just amended and expressly added the terms "objective" and "educate"[11], clearly the statutory duties of the attorney general have been elevated regarding 12-13-9, and the attorney general's explanation/statement must now in a **neutral** fashion "educate" the voters.

But instead of adhering to the requirements laid out in the statute, you have chosen to distort and misrepresent the facts and the plain meaning of words, and thereby have deceived the voters of South Dakota. You have attempted to mislead and misdirect the voters, rather than explain and educate them about the **purpose** and legal effect of Amendment E. You have engaged in partisanship, disinformation, and campaigning.

Again, you have omitted the clear and simple **purpose** of Amendment E, which is to create a citizen's "Special Grand Jury, for the purpose of returning power to the People" (Amendment E, Section 3)[12] and have omitted its legal effect, which if passed by the voters, "We, the People of South Dakota, find that the doctrine of judicial immunity has the potential of being greatly abused; that when judges do abuse their power, the People are obliged – it is their duty – to correct that injury, for the benefit of themselves and their posterity. In order to insure judicial accountability and domestic tranquility, we hereby amend our Constitution." (Amendment E, Preamble.)

Those blatant omissions not being enough, you go even further in your partisan and calculated manner and choose to repeatedly (three [3] times) use the term "volunteers".

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[11] With the addition of these terms, the Legislature has in part gone against *Hoogestraat* and *Schulte* (which verbatim quoted the above language from *Hoogestraat*).

[12] Amendment E's purpose is also to "… insure judicial accountability." (Amendment E, Preamble.)

That term is not used anywhere in Amendment E. As such, could you please explain your use of that term Attorney General Long?

**Section 13. Selection of Jurors**, of Amendment E states (emphasis added):

> "The Jurors shall serve without compulsion and their **names shall be publicly drawn at random by the Secretary of State from the list of registered voters** and **any citizen submitting his/her name to the Secretary of State for such drawing**. The initial Special Grand Jury shall be established within thirty days after the fulfillment of the requirements of paragraph 5."

The clear and simple language above, plainly states that the Secretary of State will "publicly draw[n]" jurors at random" from the list of registered voters and any citizen submitting his/her name…"[13] Clearly your use of the term "volunteers" is **not** objective and is clearly misleading, if not in fact false. First, jurors are "drawn" by the Secretary of State. There is no mention of the term drawn in your explanation/statement. Second, once drawn, a juror would "serve", do their duty and public service, like any regular South Dakota trial or grand juror. Third, based on the widely documented ever diminishing participation of Americans in their government, it would seem that few jurors would be drawn from those submitting their name, as opposed to those jurors from the list of registered voters. We further note, that your statement reversed the order, putting "those who submit their names" ahead of registered voters. Why did you do that? Regardless, whether a selected juror comes from the list of registered voters or from one submitting their name, they would be a citizen. It readily appears that you have a fear of South Dakota citizens participating and determining their own government.

Fourth, you clearly show your bias and partisanship to protect and serve your government allies and brethren, where you editorialize (bold emphasis added):

> "The proposed amendment to the State Constitution would allow thirteen **volunteers** to **expose** these decision makers to fines and jail, and **strip** them of public insurance coverage and up to one-half of their retirement benefits, for making decisions which break rules defined by the **volunteers. Volunteers** are drawn from those who submit their names and registered voters."

Again there is your repeated use of the term "volunteer". One has to ask, would you have ever referred to a trial or grand jury juror as a volunteer? We think not, yet you do here repeatedly, thus your bias is obvious. Mentioned above also was your backward phrasing (the tail wagging the dog), regarding jurors drawn from the voter list versus those who could submit their name, and thus why you may have chosen the term "volunteer." Your bias is obvious. Next, rather than use the loaded term "expose", you could have used the term "to account" or "hold to account" or

[13] Of course, any juror selected must meet the qualifications set forth in **Section 12. Qualifications of Jurors** – be at least thirty (30) years old, a U.S. citizen for nine (9) years and an inhabitant of South Dakota for two (2) years, and not be in the legal/judicial system.

"hold accountable". Your prejudicial government mindset is obvious here, and demonstrates your favoritism of government over the People. Such is further supported by the fact that nowhere in your explanation/statement did you use the word "account" or "accountability", the backbone of Amendment E. In fact, your designated title has "… relating to judicial decisions." when a more correct, clearer and objective title would have used the language "… relating to judicial accountability." Further, you conveniently left out and did not tell the voters that Article VI of the South Dakota Constitution is titled "Bill of Rights."

Next is where you state, "strip them of public insurance coverage…" Nowhere in Amendment E is such stated. Your bias is demonstrated by the use of the term "strip", when you could have used more neutral terms, such as "forfeit", "lose", "be held personally liable". The same arguments apply where you use the loaded term "penalize" in "The volunteers may penalize any decision-maker…" Moreover, you leave out the fact that Amendment E requires that: (a) before a complaint can be filed with the Special Grand Jury "…the complainant shall have first attempted to exhaust all judicial remedies" (Section 11. Jurisdiction); (b) the Special Grand Jury, "on an objective standard," can in fact determine the complaint "against a judge would be frivolous and harassing…", thus the judge's immunity would stand/apply (Section 3); and, c) the judge has the opportunity to answer and defend against any complaint and thereby prove his/her actions were in good faith or proper Procedures (Section 15). The same would apply to retirement benefits. Last is your clause "… for making decisions which break rules defined by the volunteers." Wrong, the rules are defined by Amendment E, not by your supposed "volunteers". Your bias is shown here, because what you stated could equally be stated about any law the legislature drafted and passed, or likewise any court decision.[14] Clearly, you could have instead put in one, or more, or all of the seven (7) deliberate violations that were actually set forth in **Section 2. Immunity.** Alternatively, you could have stated that "if the jury finds that the judge acted maliciously or corruptly, the judge would lose immunity and be subject to civil suit."

Fifth and finally, your explanation/statement is clearly vague where you write:

> "If approved, the proposed amendment will likely be challenged in court and may be declared to be in violation of the US Constitution. If so, the State may be required to pay attorney fees and costs."

A question for you, Attorney General Long: By your not stating, "If approved, the proposed amendment will likely be challenged in court and may be declared to be in violation of the **South Dakota Constitution**", would you, the Attorney General of South Dakota, be conceding and admitting that Amendment E, if approved, would **not** be challenged in a South Dakota court, and **would** be congruent with the **South Dakota Constitution**? Please answer.

Further, your above language does in fact put forth two large and ever increasing problems in our American society today. (Both due to the fact that our law is

[14] In fact, this is exactly the type of offending language and tactics that Justice Sabers found that you committed in the *Schulte* case.

fraught with uncertainly and plagued with politics.) What issue today is not challenged in court? What issue can not be found unconstitutional? (And found unconstitutional with a 5/4 vote.[15] See "*A Court* [U. S. Supreme Court] *in Disarray, Unable to Find Common Ground On Major Issues*," by attorney Michael Halley, Los Angeles Daily Journal, July 26, 2006, p. 8, stating: "Rationales for the judgments of the court that fail to persuade even a bare majority of the justices can hardly be expected to inspire the people's confidence.")

Although your above language concerning Amendment E's possible court challenge appears to be mandated by SDCL 12-13-9, we question why you chose to use it only with Amendment E and Referred Law 6, but not with any of the other proposed ballot amendments and measures? Does not 12-13-9 mandate that you do so? Please explain.

The biggest problem though, Attorney General Long, is that you (like the South Dakota Legislature, the No-On-E Group and largely the media) ignore our core arguments about the doctrine of judicial immunity, that the doctrine itself is unconstitutional.

Our core arguments against the doctrine of "absolute judicial immunity" {AJI) are:

1. there is no authority in our U.S. Constitution giving immunity to judges (maybe that is why none of the U.S. Supreme Court cases on AJI ever provide any constitutional basis or authority) – **an act repugnant to the constitution is void;**
2. the doctrine comes from judges (Associate Supreme Court Justice Stephen J. Fields authored the seminal cases *Brigham v. Randall*, 74 U.S. 523 (1868) and *Bradley v. Fisher*, 80 U.S. 335 (1872) – but judges giving judges immunity violates the doctrine of separation of powers, the so-called checks & balances, (maybe that is why none of the U.S. Supreme Court cases on AJI ever mention this) **- an act repugnant to the constitution is void;**
3. AJI turns the fundamental concept of the sovereignty of We the People on its head, by placing the judiciary over, above and beyond the people, and;
4. AJI is a reprehensible doctrine that includes even **corrupt** and **malicious** acts, and in fact breeds abuse of power, such as the U.S. Supreme Court condoning eugenics – see *Stump v. Sparkman*, 435 U.S. 349 (1978).

[15] See "*THE SUPREME COURT: From Taft to Warren,"* Alpheus Thomas Mason (1958) Louisiana University State Press. There the myth that the judiciary is independent, a-political, above the fray, is readily dispelled, where in the "Forward" of the book, Mr. Mason writes:

> "With disarming candor Justice John Marshall Harlan (grandfather of the present Justice Harlan) told a class of law students: 'I want to say to you young gentlemen **that if we don't like an act of Congress, we don't have much trouble to find grounds for declaring it unconstitutional.'"**

You ignore the Constitution at our peril, Attorney General Long. Could you please respond to these core arguments in writing? Could you explain to us and the citizens and voters of South Dakota the Constitutional basis/authority for AJI? Why AJI does not violate the doctrine of separation of powers? How AJI does not invert our sovereignty? How could the Supreme Court condone eugenics, with its *Stump* decision?[16] Clearly, as "attorney for the people" you have done the research and written a memo as to what the law is on each of these questions. Correct?

Attorney General Long, here is more support for our core arguments: In his book "*FEDERAL JURISDICTION*" (3rd Ed) Aspen Law & Business, Aspen Publishers, Professor Erwin Chemerinsky,[17] at page 501, under "*Criticism of Absolute Immunities"*, wrote:

> "Still the **question arises as to whether *absolute* immunity is necessary to achieve these goals**. The choice is not limited to selecting between absolute immunity and good faith immunity. For example, certain functions could be protected by according immunity **except for malicious acts,** or immunity **except for intentional violations of rights**. Admittedly, such a standard would open the door to litigation, but it might be preferable to protect officials from meritless suits by employing strict pleading requirements or aggressive use of summary judgment **rather than by according them absolute immunity for even egregious actions**."
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> [at 502 under "*Absolute Immunity for Judicial Acts*"] " …The Supreme Court has held that immunity does not exist if judges act in the "clear absence of all jurisdiction." (ftnt.45 - citing ***Stump*** and two law review articles discussing it.) The Court, however, has **given a narrow construction to this limitation** on absolute immunity. In ***Stump v. Sparkman*** a state court judge was sued for issuing an order to sterilize a fifteen-year-old girl. (ftnt.46 omitted.) The girl's mother went to the judge in his chambers and asked him to sign an order approving a tubal legation for her daughter. The mother said that the girl was 'somewhat retarded' (although she attended public school and was promoted each year with her class) and that she was staying out overnight with older men. The mother said that sterilizing the girl would 'prevent unfortunate circumstances.'
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> "Although the **judge lacked statutory authority** to issue such an order, he did so. The girl was told that her appendix was being taken out, when actually she was surgically sterilized. She learned the true nature of the operation two years later when she was married and unable to conceive a child. She then sued, among others, the judge who approved the operation.

[16] Assuming that "Referred Law 6", HB 1215, also on the upcoming ballot and also explained by you Attorney General Long, is passed, doctors would be prohibited from performing any abortions and a violation would be commission of a felony. Yet perversely under *Stump* (its upholding of AJI and currently the law), judges could still order abortions – with immunity and thus impunity. The height of hypocrisy?

[17] Erwin Chemerinsky is a noted professor on Constitutional Law. After a long tenure at the University of South California, he recently left for and is now on the faculty at Duke University.

> "A compelling case can be made that the judge was **acting without jurisdiction**. There was **no authority** for the judge to hear such a case or issue such an order. No case was filed with the court, there were no pleadings and no docket number was assigned. The matter was handled entirely ex parte, **neither the girl nor any representative for her was present or allowed to respond**. Nonetheless, the Court said that the judge had absolute immunity to the suit for money damages. The Court emphasized that because the judge sat in a court of general jurisdiction he was acting in excess of jurisdiction, but not in the absence of it. (ftnt. 47 omitted.) As such, the judge was protected by absolute immunity. *Stump* is a **very troublesome decision** because it involves a judge acting without any legal authority, inflicting great harm, without the barest rudiments of procedural due process."

"A very troublesome decision"? This is in fact tyranny, Attorney General Long!

Although Professor Chemerinsky's criticisms of absolute immunity for judges does not go far enough, as his book also is <u>absent</u> any discussion or analysis of whether there is a constitutional basis for absolute immunity, he is to be commended because he goes much further than most and in fact cites ***<u>Bradley v. Fisher</u>*** twice under *"Absolute Immunity for Judicial Act*."

Professor Chemerinsky also wrote ***"SEE NO EVIL – Sovereignty Immunity Puts States Above the Law, Implying They Can Do No Wrong,"*** March 21, 2001, *Los Angeles Daily Journal*, p.6. Done shortly after <u>*Board of Trustees of University of Alabama v. Garrett*</u> <u>(2001)</u> decision was delivered, Chemerinsky there wrote in part:

> "This is the latest in a series of decisions that have accorded **state governments broad immunity** from suit in federal and state courts. …"
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> "The **underlying question in all these cases is whether sovereign immunity is justified**. I believe that sovereign immunity is **an anachronistic relic** that is **inconsistent** with basic precepts of constitutional law. Simply put, the Supreme Court's sovereign-immunity decisions **put protecting state governments ahead of safeguarding people's rights.**
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> "The Constitution **does not mention** sovereign immunity. The only relevant provision is the 11th Amendment, but it only bars suits against state by citizens of other states and citizens of foreign countries. The 11th Amendment was adopted early in American history to repeal a specific clause of Article III of the Constitution, which authorized such suits.
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> "Sovereign immunity is a doctrine based on a **common-law principle borrowed from English law**, which assumed that 'the King can do no wrong.' However, Article VI of **the Constitution states** that the Constitution and laws made pursuant to it are the supreme law and, as such, **should prevail over** claims of sovereign immunity**.** [P] Yet,

> sovereign immunity is i**nconsistent** with a central maxim of American government that: **no one, not even the government, is above the law**. The **effect** of sovereign immunity is to **place government above the law** and ensure that some individuals who have suffered egregious harm will be unable to receive redress for their injuries.
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> "The judicial role of enforcing and upholding the Constitution is **rendered illusory** when the government has complete immunity to suit. Moreover, sovereign immunity **undermines** the basic principle, announced in *Marbury v. Madison*, 5 U.S. (1 Cranch.) 103 (1803), that **'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury**.'"

Professor Chemerinsky was correct.[18] The title of his article says it all: ***Sovereign Immunity Puts States*** [and the federal government] ***Above the Law, Implying They Can Do No Wrong.*** Clearly sovereign immunity would include judges, and would include the federal government. He is correct again that with immunity government will ***See No Evil*** and see no wrong on its part. (FBI sniper Horiuchi illegally killing Vicki Weaver: Judge Stump signing the order to sterilize Linda Sparkman.) He just did not go far enough. Because all of the arguments that Professor Chemerinsky makes against allowing immunity for a state, would equally apply to the doctrine of absolute judicial immunity and equally apply to the federal government.

1. immunity is an anachronistic relic;
2. immunity is inconsistent with basic precepts of constitutional law;
3. immunity puts government ahead of safeguarding people's rights;
4. immunity is not mentioned in the Constitution;
5. immunity is borrowed from England – "the King can do no wrong";
6. immunity is contrary to Constitution (Art.VI) being the supreme law;
7. immunity is contrary to the central maxim no one is above the law;
8. immunity places government above the law;
9. immunity ensures some citizens injured by gov't. will have no remedy;
10. immunity renders the judicial role-upholding the Constitution illusory;
11. immunity undermines the very essence of civil liberty.

Attorney General Long, why are you afraid of letting the People decide this issue? Why have you gone to such lengths to distort the language of Amendment E, when in fact your statutory duty mandates an objective, clear and simple explanation/statement?

We fought the Revolutionary War because the King did wrong, and did a lot of it. We did not throw off the yoke of the King and secure our independence, our liberty, and our sovereignty to now be under the yoke and tyranny of judges. But that is exactly what the doctrine of absolute judicial immunity does! Absolute immunity is repugnant to the

[18] Judge Napolitano, mentioned above in footnote 3, makes the same arguments in his book *"CONSTITUTIONAL CHAOS"*, at Part 4, ***"Prospects for Liberty-What Can We Do-Apply the Law to Everyone-Sue the Bastards,"*** page 186.

Constitution! It is thus **void!** Judges giving judges immunity flies in the face of separation of powers and it is therefore repugnant to the Constitution and is thus **void!**

Further support for our core arguments is found in Robert Craig Waters' paper, *"Judicial Immunity vs. Due Process: When Should a Judge Be Subject to Suit?"* The Cato Journal, Vol.7, No.8 (Fall 1987), page 461.[19] Mr. Waters starts his paper: (bold emphasis added):

> "In the American judicial system**, few more serious threats to individual liberty can be imagined than a corrupt judge**. Clothed with the power of state and authorized to pass judgment on the most basic aspects of everyday life, a judge can deprive citizens of liberty and property in complete disregard of the Constitution. **The injuries inflicted may be severe and enduring**. …[Waters then provides egregious examples: *Stump v. Sparkman*, *Lopez v. Vanderwaterm*, 620 F.2d 1229 (7th Cir. 1980), *Dykes v. Hosemann*, 776 F.2nd 942 (11th Cir. 1985) and *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985).]
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> [at 462] … the simple expedient of disguising a corrupt act as a routine judicial function guarantees immunity from suit**. In no other area of American life are public officials granted such a license to engage in abuse of power and intentional disregard of the Constitution and laws they are sworn to defend.** Those who are harmed, no matter how extensive and irreparable the injury, they are deprived of any method of obtaining compensation. …
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> [at 469] …[S*tump*] In this way, the Supreme Court excused a gross departure from due process that would have subjected virtually every other sate official to suit. The effect was plain**: under the doctrine of judicial immunity, a victim can be forced to bear the full burden of a serious irreparable injury inflicted by a state-court judge in blatant violation of the Constitution.**
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> The *Stump* test for immunity **affords no impediment to a corrupt judge**. At best, it cloaks a judge with immunity if he merely "indicates" his official status while performing any act not expressly prohibited by law. (ftnt. 44 omitted.) At worst, it **offers a road map for corruption with total impunity.** Those subject to a corrupt judge's power may **find little comfort in the Supreme Court's pronouncements that judicial immunity in effect is a necessary evil, the price to be paid for a 'fearless' judiciary**.45 [45 See *Ferri v. Ackerman*, 444 U.S. 193 (1970)]. With power to abridge liberty and seize property, state-court **judges are the masters of everyday life in America.** …
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> [at 470] Few would question the worthiness of such abstract principles as impartiality and fearlessness, even if the Supreme Court's assessment of judicial courage is surprisingly pessimistic. However, high-flying abstractions often serve only to **hide** the underlying issue, which in this

[19] The paper lists Mr. Waters as "Judicial clerk to Justice Rosemary Barkett of the Florida Supreme Court.

> case is **the injury a corrupt judge can inflict on innocent people**. **Congress and the court must seriously question any device that affords greater protection to the unscrupulous than to the principled**. In this instance the risk of such a disturbing result is very grave. By resorting to the current immunity doctrine, an **unscrupulous judge could escape liability even for acts of revenge, gross favoritism, improper seizure of property, unjust incarceration, or serious injury inflicted in 'a judicial capacity.'** …
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> [P] … The irony is unmistakable**: those who are the guardians of the Constitution are themselves privileged to violate it with corrupt impunity. Any damage inflicted on innocent citizens must be borne by the injured**, not by the state of its insurers. Due process, one of the most hallowed and ancient of rights, apparently has no place in the law when a citizen attempts to seek recompense from a judge who has wrongfully caused an injury. [P] … The judiciary in effect is **wielding a judge-made rule of law to limit a constitutional right, turning the idea of constitutional supremacy on its head.** When a local judge chooses to act corruptly, the logical result of any sweeping immunity doctrine is the destruction of due process rights. Instead of fearless impartiality, the doctrine thus protects only malice and arbitrary administration of the laws.
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> … **Judges should not be privileged to violate rights of citizens unfortunate enough to find themselves in a biased, corrupt, or irresponsible court**. … [P] … To preserve the integrity of the judicial process, the courts always should presume that a trial court properly exercised its jurisdiction. But they should permit a plaintiff to overcome this presumption by **showing that the judge acted with actual malice, consisting of a knowing or reckless disregard of due process**. Specifically, if the court is to enjoy immunity, it must afford three things—notice, a chance to be heard, and a method of appeal. Then, and only then, would an irrebuttable presumption of immunity exist, requiring dismissal of any subsequent suit against the judge.

Attorney General Long, this is exactly what Amendment E does. Yet with your explanation/statement on Amendment E, voters are not made aware of this. You have contorted and distorted the plain language of Amendment E. You have demonstrated that you are partisan. You have, in fact, "taken a side" and "advocated against" Amendment E; you have "crossed the line" and have "allow[ed] debate to enter the voting booth on the face of the ballot"; and by, through, and with your explanation/statement, you have committed **fraud** upon the citizens and voters of South Dakota.

As Justice Sabers instructed and appealed to you, there is still time for you to do the right thing. We believe that you can do better, Attorney General Long. So please, voluntarily rewrite your explanation/statement on Amendment E in an objective, simple, clear and educational manner, that follows the law: SDCL 12-13-9. Please do not force us to take you to court.

Attorney General Long, please write a truthful, objective, clear and simple statement that educates the voters of South Dakota on Amendment E. The State of South Dakota belongs to the People of South Dakota, and so does the issue of whether Amendment E should pass.

Section 27, of Article VI, of our South Dakota Constitution, states (bold emphasis added):

> "**Maintenance of free government—Fundamental principles**. The blessings of a free government can **only** be maintained **by a firm adherence to justice**, moderation, temperance, frugality and virtue **and by frequent recurrence to fundamental principles**."

That is all Amendment E seeks to do, Attorney General Long. Why are you so afraid of Amendment E that you felt compelled to write the explanation using distorted and misleading language?

Again, Attorney General Long, should you decide <u>not</u> to rewrite your explanation/ statement, please advise us in writing as soon as possible, so that we can prepare to go to court.

Also, if you would, please answer in writing the questions herein that we have asked of you. We have asked these questions on behalf of our backers and supporters, the 46,800 South Dakota voters who signed the petition that put Amendment E on the ballot and, in fact, for **ALL** the citizens and voters of South Dakota. Please don't let them down! We have also asked these questions because the media has failed to do its job and has failed to ask these fundamental questions of those in government.

Should you have any questions or need any further information, please feel free to call or to write to us. We thank you for your anticipated courtesy and cooperation.

Concerned,

Bill Stegmeier,
Treasurer, South Dakota
Judicial Accountability Committee

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Ccs [various press]