



December 15, 2005

By Electronic Mail

Mr. Thomas Barnett
State Bar of South Dakota
222 East Capitol Avenue
Pierre, SD 57501

Re: J.A.I.L.

Dear Mr. Barnett:

This letter is in response to your requested analysis of the Judicial Accountability Initiative Law. Please do not hesitate to contact me if you have any questions or concerns.

At best, JAIL¹ infringes on specific Constitutional rights. At worst, it may well portend a fundamental abdication of the core governmental structures guaranteed under the United States Constitution. The most troubling aspect of JAIL is that it will be interpreted not by democratically-selected citizens of South Dakota,² nor by their duly elected legislative, executive and judicial representatives. Instead, JAIL creates a super-legislative, super-judicial body, that so alters South Dakota's structure of government as to potentially jeopardize the state's adherence to the federal constitutional guarantee of a republican form of government. On a more basic and direct level, JAIL threatens the due process rights not only of the judges subject to the initiative, but also of litigants subject to the jurisdiction of South Dakota's courts. In short, it is a constitutionally overbroad "solution" to a problem even JAIL's proponents acknowledge that South Dakota does not have.

I. Descriptive Summary

¹ The Judicial Accountability Initiative Law is hereinafter referred to alternatively as "JAIL" or the "Initiative".

² JAIL creates a "Special Grand Jury," which is composed of South Dakota citizens, but as is explained below, Jurors' terms are temporary, and their presence is in no way the result of a democratic process. Therefore, the extent to which the members of the Grand Jury (to whom broad powers of fact and law are granted) are proxies for South Dakota's electorate will fluctuate wildly and unpredictably. *See also* infra, FN 12.

a. Substantive Law

Under JAIL, “no immunity shall extend” to judges for “deliberate violation[s] of law, fraud 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.”³ ¶ 2. The Initiative operates on a three-strikes-and-you’re-out system—judges who receive three strikes “shall be permanently removed from office” and retirement benefits for removed judges may not exceed one half of what the judge would otherwise have received. ¶ 18. A “strike” in turn is defined as “[a]n adverse immunity decision or a criminal conviction against a judge.” ¶ 1.

b. Special Grand Jury

JAIL creates a thirteen-member Special Grand Jury. ¶ 3. The Special Grand Jury is granted statewide jurisdiction to determine both law and fact, and to determine, “on an objective standard,” “probable cause of criminal conduct by the judge complained against” (among other matters). ¶ 3. Rather than operating as a court of original jurisdiction for judicial misconduct claims, the Special Grand Jury may not consider complaints of misconduct “unless the complainant shall have first attempted to exhaust all judicial remedies available in this State within the immediately preceding six-month period.” ¶11. Where complainants choose to proceed to the United States Supreme Court, the six-month period commences upon a final disposition from that Court. ¶ 11.

The Special Grand Jury is to be composed of jurors serving one year terms, and meeting certain qualification standards that, most notably, render ineligible “elected and appointed officials, members of the State Bar, judges (active or retired), judicial, prosecutorial and law enforcement personnel.” ¶¶ 12, 13.

The Special Grand Jury is granted all necessary administrative powers, and is granted the powers of subpoena and witness examination in criminal matters. ¶ 15. The Initiative empowers the Special Grand Jury to make written determination of the “causes properly before it” and the decision “whether or not immunity shall apply as a defense to any civil action that may thereafter be pursued against the judge.” ¶ 15.

c. Standard of Review

The “Procedures” section, in addition to setting forth timing schedules for complaints, states that “[a]ll allegations in the complaint shall be liberally construed in favor of the complainant.” ¶ 15. According to the Initiative, “Jurors shall keep in mind, in making their decisions, that they are entrusted by the People of [South Dakota] with the duty of restoring judicial accountability and a perception of justice, *and are not to be*

³ “Blocking” is defined as “[a]ny act that impedes the lawful conclusion of a case, to include unreasonable delay and willful rendering of an unlawful or void judgment or order. ¶ 1.

swayed by artful presentation by the judge.” ¶ 15. Under JAIL, a “majority of seven shall determine any matter.” ¶ 15 (emphasis added).

d. Criminal Procedure – Trial Jury

If the Special Grand Jury “find[s] probable cause of criminal conduct on the part of any judge against whom a complaint is docketed it shall have the power to indict” the judge “except where double jeopardy attaches.” ¶ 16. In such an instance the Special Grand Jury then impanels “twelve special trial jurors [hereinafter, the “Trial Jury”] plus alternates, which trial jurors shall be instructed that they have power to judge both law and fact.” ¶ 16. The Special Grand Jury also selects 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.” ¶ 16. The Trial Jury is “selected from the same pool of jury candidates as any regular jury.” Upon conviction, sentencing is the province of the Trial Jury and not of the selected judge. ¶ 16.

JAIL also creates a mechanism for complaints of criminal conduct to be brought directly to the Special Grand Jury. The procedure is utilized where all of the following conditions are met: (1) there is a lodged declaration of criminal conduct; (2) an otherwise appropriate prosecutor declines prosecution; (3) an indictment if sought “has not been specifically declined” by a county Grand Jury; and (4) the criminal statute of limitations has not yet run. ¶ 17.

e. Funding

The funding for JAIL and the Special Grand Jury will be primarily, though not exclusively, provided by deductions of 1.9% of the gross judicial salaries of all South Dakota state judges.⁴ ¶¶ 6, 7.

⁴ Whether South Dakota may permissibly reduce the salaries of its judges in mid-term is a question this memorandum does not address. While federal judges enjoy protection against salary diminution under Article III of the Constitution, state judges lack such protection. Several states have adopted “no ruling no pay” statutes (i.e., passed by legislatures rather than by citizen initiatives) aimed at speeding up judicial decisions, and courts have generally found such laws to violate separation of powers principles. See L Anthony Sutin, *Check Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. Legis. 221, 258-60 (2000) (surveying cases and finding that:

What the holdings . . . suggest is that there is a third realm of judicial activity, neither subjective nor adjective law, a realm of proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power. This is the area of minimal functional integrity of the courts, what is essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court. Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge or how he shall comport himself in judging or which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of the separation

f. Challenges to JAIL

According to one of JAIL’s more ambiguous provisions “[n]o 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.” ¶ 22 (emphasis added).

g. Synthesis in brief

The most important sub-textual synthesis is this: (1) it is the Special Grand Jury that first, “liberally construe[s]” “all allegations . . . in favor of the complainant” ¶ 15; (2) the Special Grand Jury then determines “whether or not immunity shall apply as a defense to any civil action that may thereafter be pursued against the judge” ¶ 15; (3) “strikes” include “adverse immunity decisions” ¶2; and finally, (4) “[w]henver any judge has received three strikes, the judge shall be permanently removed from office” ¶ 18. The cumulative effect is that the scope of power granted *both* to the Special Grand Jury itself, and to complainants (including repeat complainants with a complete disregard for the merits of their complaints), is both sweeping and lacking in objectively applicable standards. This effectively severs the imposition of “strikes” and the consequence of removal, from the articulated legal standard of “deliberate violations of law etc...”.

II. Introductory Analysis

a. External Materials

As an initial matter, it must be noted that because of the textual ambiguity and the spectrum of possibilities with respect to JAIL’s scope, this memo proceeds by considering certain available external materials to gain interpretive guidance for JAIL’s text. Generally, whether or not considering external materials in the context of a state constitutional initiative is the proper interpretive approach, is itself a matter of significant disagreement.⁵

of powers and will be held invalid.

Id. (internal quotations and footnotes omitted).

JAIL is plainly distinguishable from the “no ruling no pay” statutes in several ways: it is a state constitutional amendment rather than a statute; financially, it impacts all judges rather than individuals; and while JAIL by its terms addresses “unreasonable delay” it also encompasses a broader range of judicial discretion. Nonetheless, the framework described above is a useful rubric for the consideration of JAIL’s impact on South Dakota’s adherence to separation of powers principles.

⁵ See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model To Direct Democracy*, 56 Vand. L. Rev. 395, 407 (2003) noting that:

Under South Dakota law, however, external materials have been held to be acceptable sources of interpretive guidance for constitutional amendments passed by popular initiative. In *Schulte v. Long*, 687 N.W. 2d 495 (S.D. 2004), the South Dakota Supreme Court addressed an earlier decision, *Barnhart v. Herseth*, 222 N.W. 2d 131, 136 (1974). In *Barnhart*, the Court considered whether a ballot statement conformed with a statutory provision requiring 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.” *Id.* The *Barnhart* court found that “the basic purpose of a ballot statement is to identify an amendment to an informed electorate rather than to educate it.” According to *Schulte*, the *Barnhart* decision was one that “rejected the argument that a ballot explanation must educate the electorate since voters are presumed familiar with the proposed amendments through the publicity given the amendments leading up to the election.” 687 N.W. at 498. The *Schulte* Court went on to say that “[c]onsequently the focus of a ballot explanation is restricted. It must clearly, simply,

Aside from the constitutionally suspect nature of direct democracy, lawmaking by initiative also raises potentially difficult problems of statutory interpretation. These problems were well documented in a seminal article by Jane Schacter, a leading scholar of statutory interpretation. Professor Schacter demonstrated that when courts interpret direct democratic measures, they routinely purport to apply the same intentionalist principles that dominate the interpretation of ordinary legislation. Rather than ascertaining the intent of a legislative body, however, courts in the direct democratic context typically claim to be furthering the “popular intent” of the electorate. Beyond this concession, courts seem unwilling or unable to differentiate measures enacted directly by the electorate from those enacted through the ordinary legislative process when they are confronted with interpretive questions.

Professor Schacter also demonstrated, however, that when courts ascertain the popular intent of the electorate, they rely almost exclusively on formal legal sources of meaning, including the language of the ballot measure, the language of related statutes, canons of statutory construction, legal precedent, and information from ballot pamphlets, which is sometimes used as a substitute for traditional legislative history. At the same time, courts routinely ignore media accounts and advertising as sources of popular intent, even though the social science literature suggests that those sources are most likely to influence the positions of voters in ballot campaigns.

(internal footnotes omitted). See also *id.* at fn 44, (citing Linda A. Cistone-Albers, *Deconstructionist and Pragmatic Analyses Reveal the “Intent to Discriminate” in Proposition 227—A California Initiative*, 27 W. St. U. L. Rev. 215, 252-56 (2000) (describing a federal court’s reliance on “voter intent” in reviewing a ballot initiative); Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 Or. L. Rev. 793, 873-83 (claiming that in Oregon courts, while the touchstone is “voter intent,” the courts have wavered between application of a strict textualist approach and the use of broader historical materials including the measure’s title, materials in the ballot pamphlet, and news articles that “may have influenced the voter thinking at the time.”))

and succinctly identify and summarize the purpose and legal effect of a proposed amendment to an already educated and informed voter who has ten minutes in which to vote.” *Id.* Thus, this memo considers external sources including statements by the drafters and proponents of JAIL, although it cannot be stated for certain to what extent a court of law would do so.

b. No checks. No balances.

(i) Traditional branches lack control

The absence of legislative, executive or judicial checks on the powers granted under JAIL is conspicuous. JAIL lacks a method whereby the other branches of government can exert control over the Special Grand Jury. The other branches play no role in the selection of the Special Grand Jurors. Nor are they empowered to oversee the Special Grand Jury’s decisions in any way. In fact, although JAIL does not state so explicitly, it creates a structure in which the exact opposite arrangement obtains. Because the Special Grand Jury is empowered to determine both law and fact, and because it will necessarily be making those determinations in proceedings that are themselves reviews of judicial proceedings, the questions of law it addresses will effectively be both appellate in nature and not clearly subject to review. JAIL’s proponents willfully obscure the subtleties involved in many legal questions. This will have an anything but subtle impact on the circumstances created by JAIL. The effectively “appellate” questions of law addressed by the Special Grand Jury will actually be reviews of judicial decisions that were originally themselves matters of *conflicts* of law and of Constitutionally and otherwise mandated judicial balancing of competing concerns.⁶

As noted above, JAIL precludes all judges “potentially affected by the outcome of a challenge hereto” from having “any jurisdiction to sit in judgment of such challenge.” Since, by its terms, JAIL does not limit the South Dakota judges over whom it has jurisdiction in any way, and since all South Dakota judges are plainly “potentially affected by the outcome” of challenges to JAIL, the measure effectively insulates itself from judicial review in South Dakota state courts.

(ii) South Dakota Constitution

South Dakota’s State Constitution grants citizens broad powers to alter South Dakota’s systems of government. The South Dakota Constitution states that:

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.

⁶ Where the predicate judicial determinations of law that the Special Grand Jury reviews involve mixed questions of law and fact—over which the Special Grand Jury possesses the power of plenary review—the impact will, of course, be even greater.

S.D. Const. art. VI, § 26.

Thus, provided that the process of enacting JAIL is lawful (which this memo assumes, without addressing), and despite JAIL's introduction of broad internal contradictions into the South Dakota Constitution, the South Dakota Constitution almost certainly allows for the type of seismic structural change JAIL would represent. Nonetheless, it is useful to note that JAIL is inconsistent with a number of provisions of South Dakota's current Constitution—provisions that have served the state for over a century. Most notably, and as discussed in part IV below, it would completely alter the state's system of separation of powers. For example, Article II of the South Dakota Constitution is entitled "Division of the Powers of Government." The *entire* section states as follows: "The powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution." S.D. Const. art. II.

Broad powers at the state level, however, do not insulate JAIL from U.S. Constitutional review. Under 42 U.S.C. Section 1983, liability be imposed for Constitutional violations brought about by JAIL.⁷

III. Due Process

Foremost among the rights jeopardized by JAIL is the right to due process of law.

a. Due Process For Judges

(i) JAIL's procedures for judges

Procedural due process violations have three distinct elements: (1) the existence of either a "property" or "liberty" interest; (2) a deprivation of that interest by a person acting under color of state law; and (3) a constitutionally inadequate process. U.S. Const. amend. XIV. The first and second elements of the inquiry are plainly met in the context

⁷ Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

of JAIL. Judges subject to JAIL stand to lose their employment through removal, and potentially their freedom from restraint through JAIL's criminal procedures.⁸

Mathews v. Eldridge dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government's asserted interest, “including the function involved” and the burdens the Government would face in providing greater process. 424 U.S. 319, 335 (1976). “The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of ‘the risk of an erroneous deprivation’ of the private interest if the process were reduced and the ‘probable value, if any, of additional or substitute safeguards.’” *Hamdi v. Rumsfeld*, 542 U.S. 507, 528 (2004) (quoting *Mathews*, 424 U.S. at 335).⁹

JAIL plainly provides for pre-deprivation hearings.¹⁰ The hearings provided, however, conflict with fundamental principles of justice. First, JAIL requires that in the Special Grand Jury's initial review process “all allegations in the complaint shall be liberally construed in favor of the complainant.” ¶ 15. This would be one matter if the consequences of the Special Grand Jury's initial review process were merely akin to

⁸ The Supreme Court has recognized that a person's employment can constitute “property” within the meaning of the Fourteenth Amendment. For example, in *Board of Regents v. Roth*, the Court stated that in order to possess a property interest in public employment, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” 408 U.S. 564, 577 (1972).

⁹ A substantive rather than procedural due-process violation generally requires a showing of conduct that shocks the conscience. *Rochin v. California*, 342 U.S. 165, 173 (1952). Such a violation will be found only where an abuse of governmental power is so egregious or outrageous that no state post-deprivation remedy is adequate to preserve the constitutional guarantees of freedom from such conduct, regardless of the procedures afforded. Arguably, the wholly unchecked powers of the Special Grand Jury could give rise to successful substantive due process claims as well. Nonetheless, because the procedural due process violations are so patent and substantial, substantive due process analysis is not explored further in this memorandum.

¹⁰ The timing issues involved in due process analysis are generally summarized by courts in the following manner:

Due process usually requires a pre-deprivation hearing where the loss of property or liberty results from established state procedures. *Logan v. Zimmerman*, 455 U.S. 422 (1982). A pre-deprivation process cannot reasonably be required, however, where loss results from a random, unauthorized act of an employee who is a state actor, *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986); in which event due process is satisfied by the availability of adequate state post-deprivation remedies, *Parratt* at 541. The analysis turns on whether the alleged deprivation is foreseeable and will occur at a predictable point, such that pre-deprivation safeguards would be of use in preventing the kind of deprivation alleged. *Zinerman v. Burch*, 494 U.S. 113 (1990).

Young v. Annarino, 123 F.Supp. 2d 915 (W.D.N.C. 2000).

construing a motion to dismiss under Fed. R. Civ. Proc. 12b(6) in favor of the non-moving party. The consequences instead are much more tangible and severe. Regardless of the ultimate outcome of a complaint, the initial review process entails the Special Grand Jury's immunity determination, which if "adverse," constitutes a "strike." In some senses, that aspect of JAIL, while couched as merely preliminary, is the whole ball-game. Even three *unjustified* strikes are sufficient for judges to be "out." A more arbitrary intrusion into the zone of judicial independence is difficult to fathom.

It bears repeating that the Special Grand Jurors are directly instructed "that they are entrusted by the People of [South Dakota] with the duty of restoring judicial accountability and a perception of justice, and are not to be swayed by artful presentation by the judge." ¶15. With that substantial thumb on the scale, the Special Grand Jury makes the determination that results in the deprivation of the protected property interest in the judge's continued employment. So while JAIL does provide for a hearing, viewed from the standpoint of a judge facing a "strike," the hearing it provides is but a simulacrum. Such a "hearing" does not constitute the process "due." The Supreme Court has stated that "[t]he hearing [due] . . . must be a real one, not a sham or a pretense." *Palko v. State of Connecticut*, 302 U.S. 319, 327 (1937).

(ii) *Vagueness*

In addition to JAIL violating the due process rights of the judges against whom "strikes" are registered pursuant to the above procedure, JAIL violates the due process rights of all South Dakota judges through its vagueness. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors to decide, *without any legally fixed standards*, what is prohibited and what is not in each particular case." *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999) (citing cases) (emphasis added).

One example is illustrative of the problems created. According to JAIL, "blocking" includes "[a]ny act that impedes the lawful conclusion of a case, to include unreasonable delay and willful rendering of an unlawful or void judgment or order." ¶ 1. What does that mean? As with almost every other rhetorical question to which JAIL gives rise, the real answer will depend entirely on the Special Grand Jury's interpretation, which, not incidentally, may change wildly from "case" to "case." It is not inconceivable that a Special Grand Jury (a permanent body composed of temporary members) could narrowly construe that provision. Conversely, though, JAIL's proponents offer clues to the range of potential—and at some point, virtually certain—interpretations.

According to a South Dakota J.A.I.L. press release, authored by Bill Stegmeier, whom the release identifies as the "South Dakota JAILer-In-Chief," JAIL "is intended to prevent judicial malfeasance such as ignored laws, ignored evidence, [and] sophistry." http://www.jail4judges.org/PressReleases/PR_2005-11-10.html In other words, judges, experienced members of the bar and the bench, who, in carrying out their role of balancing the competing interests and applicability of related laws, choose one plausible

legal interpretation over another because the former is, in their considered view, superior to the latter, and, who thereby “ignore” an arguably applicable law that the Special Grand Jurors prefer— can be found to have committed the offense of “blocking” merely by doing their jobs.

To fully appreciate the degree to which JAIL encroaches on the very core of the judicial function, consider that even in a utopian scenario in which a solitary “right” answer existed to every legal question, judges would *still* be subject to the arbitrary whims of JAIL’s Special Grand Jury. That is because the Special Grand Jury is subject to *no standards* other than those it self-selects. In the real world of majority opinions and dissents, of competing claims each with merit, the encroachment on the judicial function is all the greater. That encroachment is the result of a law that leaves judges with no guidance. In the words of the Supreme Court, it is the result of a law that “is so vague and standardless that it leaves [judges] uncertain as to the conduct it prohibits.” *Morales*, 527 U.S. at 57. Not only does JAIL leave judges uncertain as to what it prohibits, it leaves judges uncertain as to what it *requires*. Thus, because JAIL is “without any legally fixed standards” it violates South Dakota’s judges’ Constitutional rights of due process.

Likewise, in the context of evidentiary rulings, JAIL presents South Dakota’s judges with a Hobson’s choice, and an unconstitutional one at that. According to Stegmeier: “You want to enter evidence and help your case, and the judge won’t allow it. You appeal the case and lose on the grounds [that] you think the judge acts improperly. The appellate court denies your case and you file it with a special grand jury.” David Kranz, *Don’t like how the court ruled? Sue the judge, group says*, Argus Leader, August 28, 2005. Either South Dakota’s judges comply with rules of evidence including Constitutionally-mandated exclusionary rules—and risk a “blocking” complaint, or they commit gross misconduct. Under JAIL, those are their only options. Yet, constitutionally, neither is an acceptable choice.

b. Due Process For Litigants

Judges’ interest in their continued employment, and their interest in judicial immunity for acts within the judicial function are substantial but they pale in comparison to the due process rights of criminal defendants and civil litigants. The judges are mentioned first, however, because the violations of civil and criminal litigants’ rights to due process are *derivative* of the circumstances JAIL creates for the judges themselves.

Above all, “due process requires a neutral and detached judge in the first instance.” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (internal quotations omitted). JAIL’s revocation of immunity for acts within the scope of a judge’s inherent duties renders neutral detachment an unattainable ideal. As the Supreme Court has recognized, “[t]he doctrine of judicial immunity is supported by a *long-settled understanding* that the independent and impartial exercise of judgment vital to the

judiciary *might be impaired by exposure to potential damages liability.*” *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993) (emphasis added).¹¹

Given the unacceptable subset of options for judges outlined above, litigants will be faced with the proposition of appearing before judges who have a justifiable fear of being forced to defend their rulings before the Special Grand Jury, and who know that the Special Grand Jury’s *only* “standard” is to construe the complaints against them liberally. Under JAIL, lower court judges will be aware that being affirmed on appeal is only one goal they must serve, and one that in no way ensures the absence of a “strike” against them. South Dakota Supreme Court justices will be effectively subjugated to the whims on the Special Grand Jury on questions of law. Why? Because while it appears that the Special Grand Jury will lack jurisdiction to set binding legal precedent in South Dakota’s courts, if the proponents’ interpretation of JAIL holds sway, then the Special Grand Jury will be empowered to remove Supreme Court justices who make decisions with which Special Grand Jurors disagree.¹²

In individual instances, it will be impossible to establish a causal relationship between JAIL and altered judicial decisionmaking. The catch, of course, is that it is impossible to prove the negative—i.e., to prove that particular decisions would not have been exactly the same without JAIL. But judges are human. The issue is not *if*, but rather *when* JAIL will cause a judge to compromise legal analysis based on expectations of Special Grand Jury perceptions. When that happens, litigants—whether corporate, governmental, criminal, civil individual or other—will suffer unconstitutional consequences. Thus, because the Supreme Court has recognized that exposure to damages liability can impair “the independent and impartial exercise of judgment vital to the judiciary,” *Antoine*, 508 U.S. at 436, JAIL violates the “first instance” principle that, “[d]ue process requires a neutral and detached judge.” *Loudermill*, 470 U.S. at 542.

Because the due process violations of litigants under JAIL are so clearly problematic under Supreme Court precedent, not much more need be said, except to note

¹¹ Alexander Hamilton emphasized that “there is no liberty, if not the power of judging be not separated from the legislative and executive powers The complete independence of the courts of justice is ... essential [.]” THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Indeed, “even under constitutions which make no express grant of rule-making power to the judiciary and which have been held to sanction extensive and overruling legislative control of court practice and procedure, an area of strict judicial immunity has been consistently recognized.” A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. Rev. 1, 30 (1958).

¹² Because: (1) the Special Grand Jury selection pool includes citizens who volunteer to serve in addition to the list of registered voters; (2) service is not compulsory; and (3) members of the bar, judges, prosecutorial, and law enforcement personnel are precluded from service, the initial jury pool, and, to a greater extent, the self-selection involved in a willingness of those chosen to serve for one year, will play a substantial role in determining the makeup of the Special Grand Jury. While one can only speculate as to what ideological impact this would have, at the very least the selection process runs counter to the notion of a jury of one’s peers, particularly, of course, for judges.

that the level of JAIL's offenses against the constitution reach their apex in application to criminal defendants. The criminal defendant possesses "the most elemental of liberty interests--the interest in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"). Moreover, in the criminal context, with a few highly unusual exceptions involving co-defendants, *only* the defendant has standing to raise federal exclusionary rules sourced in the Fourth and Fifth Amendments of the U.S. Constitution. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 112 (1976) (Fourth Amendment personal in nature); *Bellis v. United States*, 417 U.S. 85, 89-90 (1976) (Fifth Amendment personal in nature). Therefore, any rule such as JAIL's "blocking" provision, which is directed at "ignored evidence" is inherently *directed at* the rights of criminal defendants¹³ and impacts their rights most substantially.¹⁴ Thus, JAIL does not merely pose Constitutional problems, but actually turns even the most fundamental of U.S. Constitutional protections on their head.

IV. Separation of Powers

As stated above, South Dakota's constitution grants citizens broad powers "to alter or reform their forms of government in such manner as they may think proper" provided only that they do so in "lawful and constituted methods." S.D. Const. art. VI, Section 26. Thus, while there is little doubt that JAIL treads on specific state constitutional provisions and aspirations¹⁵ there is also little reason to believe that the South Dakota constitution prevents citizens from altering their structure of government as JAIL does.

The same provision of South Dakota's constitution which grants that broad authority, however, also offers the unnecessary but accurate reminders that "the state of South Dakota is an inseparable part of the American Union and the constitution of the United States is the supreme law of the land." S.D. Const. art. VI, Section 26. With respect to due process violations, federal courts do not hesitate to adjudicate claims, but with respect to claims based on a state's separation of powers, or lack thereof, federal courts almost invariably characterize the matters as nonjusticiable political questions.

¹³ *See infra*, Part III(a); *see also* http://www.jail4judges.org/PressReleases/PR_2005-11-10.html .

¹⁴ The impact of JAIL in the criminal context, however, will not be visited exclusively on criminal defendants. For example, "ignored" evidence in a case could include that excluded under non-constitutional rules of evidence. To wit, if a criminal defendant were to attempt to introduce hearsay, and the state offered a timely objection which the court sustained, then the Special Grand Jury created under JAIL would, under proponents' reading of the amendment, be able to find the offense of "blocking" as a result of the judge "ignoring" the hearsay.

¹⁵ *See, e.g.,* S.D. Const. Preamble (We, the people of South Dakota . . . in order to form a more perfect and independent government, establish[ing] justice . . . do ordain and establish this Constitution for the State of South Dakota.").

Of the American Constitution's three most distinctive features—federalism, judicial protection of individual rights and separation of powers—only the last has been held inapplicable to the states. . . . Despite the Supreme Court's willingness to impose sometimes rigid formal rules on the branches of the federal government, the Court has not found justiciable limits on the states' choice of governmental structures.

Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 Roger Williams U. L. Rev. 51 (1998) (internal footnotes omitted).¹⁶

Article IV, Section 4 of the United States Constitution, known as the Guarantee Clause, states that: "The United States shall guarantee to every State in this Union, a Republican Form of Government, and shall protect each of them against Invasion and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence." The extent of that guarantee has not historically been interpreted by the courts. As constitutional scholar Erwin Chemerinsky has noted:

It is a well-settled principle that cases brought under this provision must be dismissed as posing a nonjusticiable political question. There are countless Supreme Court decisions that have summarily dismissed challenges to various aspects of state governance brought under this clause. [citing cases]. The Court frequently has ruled in a single sentence, such as: "As to the guaranty to every state of a republican form of government, it is well settled that the questions arising under [this clause] are political, not judicial in character, and thus for the consideration of the Congress and not the courts."

¹⁶ Michael Dorf has noted that the Supremacy Clause of the U.S. Constitution does arguably assume, and perhaps require, some degree of separation of powers in the states.

Indeed the Supremacy Clause treats state courts as distinct from other organs of state government. After declaring the supremacy of federal law, it states that "the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." One should not make too much of this language, because state executive and legislative officials are also obligated to respect the supremacy of federal law. *But neither should one make too little of the specific admonition to state judges.* . . . Reconciling [two recent Supreme Court cases dealing with federalism] would seem to require an argument that state courts, as opposed to executive and legislative bodies, have a distinctive role in enforcing federal law. Such an argument would draw strength from the Supremacy Clause and from the general proposition that the federal Constitution assumes that state governments will be structured along lines broadly similar to those of the federal government.

Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 Roger Williams U. L. Rev. at 55-56 (internal footnotes omitted) (emphasis added).

Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849 (1993-1994) (quoting *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79-80 (1930)).

In recent years, however, there has been growing interest in the Guarantee Clause, first among historians and law professors, and in a recent Supreme Court opinion which summarized the Court's historical reticence with respect to the Guarantee Clause but stated that:

More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. . . . Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances

We need not resolve the difficult question today. Even if we assume that petitioners' claim is justiciable, [still, neither of two alleged facts] can be said to deny any State a republican form of government.

New York v. United States, 112 S. Ct. 2408, 2433 (1992) (internal citations omitted).

It cannot be known *ex ante* whether, and if so, when, and to what extent, the Court will address the Guarantee Clause. But given that the Guarantee Clause is "unique among instances in which the political question doctrine has been used" in that it is "the only instance in which nonjusticiability has the effect of rendering a constitutional provision a nullity"¹⁷ it seems unlikely that the Court's forbearance is limitless. Fortunately, neither the States, nor the federal government regularly acts to jeopardize adherence to a republican form of government, so it is only rarely that the issue even arises. JAIL, however, would test the limits of the Court's forbearance.

The broad quasi-legislative powers granted to the Special Grand Jurors (who are neither elected nor appointed), who are subject only to the check of federal law, but nonetheless exercise sweeping discretion over both law and fact, may qualify JAIL as the exception to the Guarantee Clause rule of nonjusticiability. That possibility remains speculative and subject to years of litigation. If, however, JAIL is implemented as it is written, and interpreted as its proponents suggest, then the possibility of a successful Guarantee Clause challenge is hardly out of the question.

V. Conclusion

Policy choices made via Constitutional Amendment are the purview of the people of South Dakota, subject only to the restraints of federal law. But the U.S. Constitution provides a floor of protection for individual rights below which no state constitutional amendment may go. JAIL represents a substantial violation of the individual due process rights of judges and litigants in South Dakota's courts. JAIL creates a super-legislative, super-judicial body that fundamentally alters South Dakota's system of government in

¹⁷ Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. at 851.

ways that *may* be unconstitutional violations of the Constitutional guarantee of a republican form of government, but that *certainly* lead to derivative constitutional violations in application. Some of the most problematic aspects of JAIL explored in this memo are based on speculation as to Special Grand Jury interpretations of JAIL. JAIL's breadth and ambiguity renders such speculation necessary and prudent.

If South Dakotans pass JAIL they are placing blind faith in the notion that the Special Grand Jury—a permanent body with temporary members who possess sweeping, near absolute powers—will *always* act with absolute integrity. JAIL thus represents a Constitutional gamble of historic proportions. When it comes to fundamental rights, the Constitution does not countenance blind faith. Neither should the citizens of South Dakota.

Respectfully,

/s/ James Sample

James Sample
Associate Counsel

Brennan Center for Justice at
NYU School of Law
161 Avenue of the Americas, 12th Floor
212-992-8648
james.sample@nyu.edu