

LEGAL SERVICES

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MEMORANDUM

March 15, 2017

SUBJECT: Voter Approval of Legislation in HB 115
(Work Order No. 30-LS0125\E)

TO: Representative Neal Foster
Co-Chair of the House Finance Committee
Attn: Jane Pierson

FROM: Emily Nauman 
Legislative Counsel

You have asked whether an amendment that requires an advisory vote to make the enactment of a portion of HB 115 is constitutional. It is my understanding that your committee is considering two advisory vote amendments, one on portions of HB 115 related to use of the permanent fund and the other related to the imposition of an income tax. It is important to acknowledge that the question has not been considered by a court in this state, but it is likely that a provision of a bill that makes sections of HB 115 effective only if approved by the voters would be held unconstitutional as an improper delegation of the legislative law-making power and because such a referendum is not specifically authorized by the state constitution.¹

Article II, sec. 1 of the Constitution of the State of Alaska provides that the legislative power of the state is vested in the legislature. Laws may be enacted in Alaska by the legislature acting under the power vested in it by article II and by the people acting under the power of initiative and referendum as established in article XI. By making a bill contingent on the approval of the voters, a court would likely find that the legislature has improperly delegated their law-making power to the public.

The state constitution provides the method for proposing an initiative or referendum in sections 1, 2, and 3 of article XI. Since the constitution reserves the power of initiative and referendum to the people, the legislature may not usurp that power. A court might

¹ Note however, in other contexts, the attorney general has previously concluded that the Alaska Supreme Court would uphold a delegation of legislative power to the people, at least when the topic is not appropriation, Attorney General Opinion J66-479-82 (Feb. 9, 1982) and Attorney General Opinion J66-545-82 (April 23, 1982).

well hold that the method for exercising the power of initiative and referendum set out in those sections is exclusive.

In *U.S. v. Northern Commercial Co.*, 6 Alaska 94 (1918), the territorial legislature provided that an act be submitted to a referendum vote of the people. The court struck the Act down, holding that neither the organic law creating the legislature, nor any other Act of Congress authorized the submission of such an act to the popular vote. In *People v. Barnett*, 176 N.E. 108 (Ill. 1931), the court struck down a statute on similar grounds. The court concluded that the legislature alone has the power, duty, and responsibility to legislate.

Under the Constitution of the State of Alaska, it is quite possible that the courts would hold that neither the governor nor the legislature is authorized to submit an act to the popular vote for binding effect. This conclusion is bolstered by the fact that the delegates to the Alaska Constitutional Convention considered and rejected a proposal that would have authorized bills to be referred to the voters. Section 21 of Committee Proposal 5, dated December 14, 1955, stated:

SECTION 21. Any bill failing of passage by the legislature may be submitted to referendum by order of the governor either in its original form or with such amendments which were considered by the legislature, as he may designate. Any bill which, having passed the legislature, is returned thereto by the governor with objections, and, upon reconsideration is not approved by the majorities required by this constitution, may be submitted to referendum by a majority of all the members sitting as one body. Bills thus submitted to referendum shall be voted on at the next succeeding regular election occurring at least sixty days after action is taken to submit them, unless the legislature shall provide for their submission at an earlier date. This section shall not apply to bills containing appropriations, raising or earmarking revenues, nor to local or special bills.

This section on legislative referendum was considered by the delegates as a body on January 11, 1956, recorded at pages 1737, 1777 - 1778, Minutes of the Daily Proceedings, Alaska Constitutional Convention. In explaining the intent of Section 21, Committee Proposal 5, Delegate McCutcheon stated at page 1777 of the Proceedings:

MCCUTCHEON: The terminology is taken directly out of the model constitution. The point is that at the time our Committee was drafting this particular section, or considering it I should say, there was some doubt in my mind, and I think in the minds of others on our Committee, that there may not be an initiative device in the constitution. With the initiative device, this certainly may be stricken in too. You do have initiative protection. This device was placed in the legislative article in the event that there was no initiative. It was a device that was designed to get good

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legislation out before public opinion to react on, but since there is an initiative device, the public can take any bill that is offered in the legislature and put it as an initiative measure.

Based on Delegate McCutcheon's statement, Delegate Gray moved to delete Section 21, stating at page 1778:

Taking Mr. McCutcheon's suggestion and word, that if this article is unnecessary, if it is already cured by initiative, why I'll make a motion to strike Section 21 because it is superfluous.

Delegate Gray's motion carried, strongly suggesting that the Alaska Constitution does not allow the governor or the legislature to refer legislation to a popular vote for binding effect.

One other note, art. IX, sec. 6 expressly bars the use of a referendum to dedicate revenues or make or repeal appropriations. Making an appropriation of funds out of the earnings reserve account contingent on an advisory vote might have the effect of repealing an appropriation by preventing it from taking effect. Although this legislation does not effectuate the appropriation.

In conclusion, providing for a binding vote of the people through an "advisory vote" would likely be subject to legal challenge and could be found unconstitutional.

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