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The Constitutionality of Sections 48(a) and 49 of CSSB 46 (FIN) (S) Version of Bill

I. Relevant Provisions of the Bill

A. Section 48(a)¹

“*Sec. 48. CONTINGENCIES. (a) Each of the appropriations made in sec. 4 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature and enactment into law of every appropriation, without reduction of any appropriation, made in sec. 4 of this Act.”

B. Section 49²

“*Sec. 49. NONSEVERABILITY. Notwithstanding AS 01.10.030, in the event that a court of competent jurisdiction finds the contingency in sec. 48(a) of this Act is invalid, then the contingency in sec. 48(a) of this Act is not severable from the appropriations made in sec. 4 of this Act if

¹ p 145 lns 19-22

² p 145 ln 29 – p 146 ln 6

(1) the governor has vetoed, whether by striking or reducing, any appropriation in sec. 4 of this Act; and

(2) the legislature, by action or inaction, has failed to override all vetoes of, including reductions to, appropriations made in sec. 4 of this Act in the time and manner allowed under art. II, sec. 16, Constitution of the State of Alaska.”

C. Section 4³

Contains 105 appropriations from around the state, ranging from \$20,000⁴ to \$65,700,000⁵, covering 12 pages of the bill.

II. Relevant Constitutional Provisions

A. Article II, Section 15

“15. Veto ~ The Governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.”

B. Article II, Section 16 provides in relevant part:

“16. Action Upon Veto ~ Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items,

³ p 98 ln 1 - p 110 ln 13

⁴ Sitka – Wastewater Treatment Plant Renewable Energy Feasibility Study (HD 2) p 109 lns 17-20

⁵ Alaska Energy Authority - Susitna Hydroelectric Energy Plan (HD 12-35) p 98 ln 31 – p 99 ln 4

although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature....”

III. Constitutional Arguments

A. Article II, Section 15

This provision provides that the governor has the right to “veto, strike or reduce items in appropriation bills.” Because, as discussed in the other memoranda, sections 48(a) and 49 would deny him this right, they are unconstitutional. Each appropriation in section 4 is a separate item, being independent from all others. Merely relating to “energy” does not make them so interdependent that they would be considered separate items, any more than separate roads would be, though they were interconnected. Even if it could be argued that some projects depend upon others or are related to them, by tying so many items together under section 36, the legislation is fatally overbroad.

I also note that section 48(a) says, “each of the appropriations made in sec. 4 of this Act is contingent on...enactment into law of every appropriation, without reduction of any appropriation, made in sec. 4 of this Act.”⁶ Similarly, section 49 refers to “the appropriations made in sec. 4 of this Act”⁷, “any appropriation in sec. 4 of this Act”⁸, and “all vetoes of, including reductions to, appropriations made in sec. 4 of this Act.”⁹ This

⁶ p 145 lns 19-22

⁷ p 145 ln 31 – p 146 ln 1

⁸ p 146 lns 2-3

⁹ p 146 lns 4-5

language shows that the legislators, themselves, considered each appropriation a separate line item.

The primary purpose of the sentences in Article II Section 15 permitting the line item veto or reduction is to give the governor the flexibility to veto or reduce individual appropriations and, secondarily, to prevent logrolling by the legislature. Operating together, sections 48(a) and 49 frustrate these purposes.

At the same time, Article II Sections 14¹⁰, 15, and 16 set forth the procedure to pass bills (including appropriations), veto legislation and line item veto or reduce appropriation items¹¹, and override vetoes¹². Taken together, they operate to limit the legislature's authority vis à vis the governor to the procedure specified.

Though advocates of section 48(a) and 49 argue that the legislature may specify that certain provisions of law are non-severable, that argument cannot prevail when the result would be unconstitutional. For example, if an appropriation item provided that it could only be spent on an unconstitutional purpose (for example to aid in discrimination or the promotion of a particular religion), and if it were made the subject of a non-severability clause that would cause the entire budget bill or a large part of it to fall, undoubtedly courts would refuse to enforce the non-severability clause, because enforcing it would lead to an unconstitutional result.

In State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), the Alaska Supreme Court held that the legislature could not annul regulations by concurrent regulation, because that would circumvent the constitutional legislative process, including the governor's right to veto the annulling legislation.

¹⁰ Article II, Section 14 sets forth the procedure by which the legislature enacts bills into law.

¹¹ Article II, Section 15, *supra*.

¹² Article II, Section 16, *supra*.

In Legislative Research Commission v. Brown, 664 S.W. 2d 907, 925, 927-28 (Ky. 1984), the Kentucky Supreme Court applied similar reasoning to hold unconstitutional a statute requiring “the budget to be introduced as a resolution, rather than a bill.” 664 S.W. 2d at 925 (emphasis in original). The language of that case is, in my opinion, both instructive and persuasive. Kentucky Constitution Section 88, like Article II, Section 15, giving the governor line item veto power, refers to appropriation “bills” not resolutions. Both constitutional provisions provide the method by which bills must be sent to the governor “for either approval or disapproval (veto). See 644 S.W. 2d at 928, Alaska Constitution Article II, Section 15. They both also specifically allow line item veto by the governor.

No case has been cited containing sections like sections 48(a) and 49. The closest analogy is Brown. However, because the effect of the two sections is the same as the resolution in Brown -- to deprive the governor of the ability to “veto, strike or reduce items in appropriation bills” -- I believe Brown would be followed by Alaskan courts.

This conclusion is supported by the Alaska Supreme Court’s decision in A.L.I.V.E. There, as stated above, the court struck down a statute authorizing the annulment of regulations by resolution, because it deprived the governor of the right to veto legislation that would annul regulations. Applying the same reasoning to the two sections at issue here, I believe Alaska courts would be likely to follow Brown, and declare the two sections unconstitutional and allow line item vetoes to stand.

B. Article II, Section 16

This section sets forth the procedure to override a gubernatorial veto. The legislature must meet in joint session with each legislator getting an equal vote, having received the governor's veto message "with a statement of his objections"¹³, to reconsider passage "of the vetoed bill or item". "Appropriation bills or items"¹⁴ will still become law, despite the veto, if "three fourths of the membership of the legislature" vote to override the veto.

The entire process, in Article II, Section 16 is unconstitutionally thwarted by sections 48(a) and 49. Because sections 48(a) and 49 eliminate the entire line item veto process, the procedure in Article II, Section 16 is unconstitutionally denied.

Both the governor and the legislature are denied the right to have the legislature consider the governor's veto message on an item-by-item basis.

By passing sections 48(a) and 49 as part of one capital appropriation bill, requiring only 11 senate votes (as opposed to 21 house votes), all legislators votes are not considered equally as they must be under Article II, Section 16, which states that "the legislature shall meet... in joint session.... [A]ppropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature...."

Not only does this violation have the effect of (1) giving senators more power than they are allowed and representatives less power than they are entitled to, but it also (2) denies the minority on the issue (those who vote to sustain the vetoes) the weight to which they are entitled under Article II, Section 16. Constitutionally three fourths of the members (45 legislators) must vote to override. Only 16 members (1/4 plus one) need vote

¹³ See Article II, Section 15

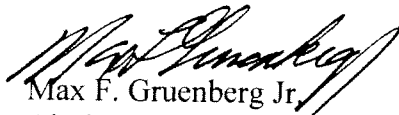
¹⁴ Emphasis added

to sustain vetoes. However, in passing sections 48(a) and 49 as part of a budget bill, only 32 votes (21 plus 11) are required. Conversely, under Article II, Section 16, only 16 members need vote to sustain vetoes, while under Article II, Section 14¹⁵, 29 are required to block passage of the appropriation bill. These are additional constitutional rights of legislators, both individually and collectively, that are protected under the constitution.

Though no case has been found directly on point, for these reasons I conclude that sections 48(a) and 49 also violate Article II, Section 16 of the Alaska Constitution.

I believe it is important to consider Article II, Section 16 for another reason as well. All the reported cases that have been cited involve the balance of power between the executive and legislative branches. Article II Section 16 involves the balance of power within the legislature – both (1) between the houses (legislating together with each member getting an equal vote as opposed to legislating separately, with each senator having twice the voting power of each representative), and (2) between the majority and minority on the issue of veto-override (only 32 votes are needed to pass the bill, while 45 votes are need to override the vetoes under the constitution).

Finally, these arguments on Article II, Section 16 give each legislator a direct and individual interest in any resulting litigation. First, these issues give legislators individually and collectively legal standing to enforce their constitutional rights and the right to intervene, individually or collectively, in any litigation as a matter of right.¹⁶


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May 10, 2011

¹⁵ Article II, Section 14 provides in relevant part, "No bill may become law without an affirmative vote of a majority of the membership of each house."

¹⁶ See Alaska R. Civ. P. 24(a)