

# LEGAL SERVICES

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## MEMORANDUM

April 12, 2019

**SUBJECT:** Drafting and Legal Concerns: CSSJR 4(STA)  
(Work Order No. 31-GS1070\U)

**TO:** Senator Shelley Hughes  
Attn: Buddy Whitt

**FROM:** Emily Nauman  
Deputy Director 

You asked for a summary of drafting and legal concerns with CSSJR 4(STA). I hope you find the following discussion helpful.

1. Power of the Legislature. As noted in the revision discussion below, this resolution will act as a substantial limitation on a fundamental power of the legislature. Please be aware that, if passed, this amendment will significantly restrict the power of future legislatures to raise revenue from taxes, a structural shift in the constitutional framework. As you proceed, please consider the amendment, and its lasting impact, carefully.
2. New Taxes and Increased Tax Rates. The phrase "increases the rate of an existing state tax" would benefit from being made more precise. It is unclear whether the phrase captures the reduction of credits or deductions that could result in an increased rate of tax, without amending the actual tax rate. Similarly, it is unclear whether, if an existing tax is expanded to capture a new group of taxpayers or products while leaving the rate of tax the same, that constitutes a "new tax"? An example of this ambiguity is currently proposed before the legislature: the bill to tax electronic cigarettes under the existing tobacco tax. Does imposing the tobacco tax on electronic cigarettes constitute a "new tax"?
3. Structure of Voting. It is unclear from the draft how a ballot should be prepared for a bill that has multiple elements. For instance, if a bill contains both tax and other, related statutory changes, are only the tax portions voted on? Are technical changes related to or dependent on a change in tax rates or establishment of a new tax required to go before voters? Do collection and reporting mechanisms go into place, even if the tax is rejected? What about a bill that proposes a new state tax and increases an existing tax, is the intent that voters vote on those items separately? What happens if a single bill raises some taxes and lowers or repeals others thus changing the structure of the tax system but keeping the

rate the same?<sup>1</sup> Would only the items that increase taxes appear on the ballot? Would the changes be grouped together or voted on separately? The same issue arises if multiple tax changes are proposed by initiative. Please also be aware that if a proposal contains both a regulatory process and a related funding mechanism, the funding mechanism may fail but the regulatory process would still become law.<sup>2</sup>

4. Referendum. The bill does not address the effect of a referendum. What happens if a referendum results in an increased tax rate (a bill decreasing a tax rate is enacted for a period of time, then is the subject of a referendum, resulting in a return to a higher tax rate)? The resolution only addresses the initiative process.

5. Repeal. The change made in art. XI, sec. 6 would benefit from clarification. It is unclear whether the phrase "[e]xcept as provided in Section 1 of Article IX" applies to the second half of the sentence (the ability of the legislature to repeal the act) or just the first half of the sentence (an initiated law becomes effective 90 days after certification).

6. Section 1 Reference. Should the reference to sec. 1, art IX appearing in sec. 3 of the bill (p. 2, l. 19) be changed to specify secs. 1(b) and (c) of art. IX?

7. Revision. The proposed changes to the constitution appear to be a revision, not an amendment. Under art. XIII, sec. 1, Constitution of the State of Alaska, an *amendment* to the constitution may be made with a two-thirds vote of each house of the legislature and a majority vote of the electorate. Under art. XIII, sec. 4, a *revision* to the constitution may only be made at a constitutional convention. The Alaska Supreme Court has issued a single decision that attempts to delineate an amendment from a revision. In *Bess v. Ulmer*, the Alaska Supreme Court analyzed three proposed amendments to the Constitution of the State of Alaska to determine whether the proposed *amendments* were actually *revisions* to the constitution requiring a constitutional convention.<sup>3</sup> The *Bess* court laid out guidelines for determining whether a change to the constitution constitutes an amendment or a revision. A court will analyze the quantity and quality of the proposed changes: whether the proposed changes are "few, simple, independent, and of comparatively small importance" or "whether the changes are so significant as to create a need to consider the constitution as an organic whole."<sup>4</sup>

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<sup>1</sup> Imagine a bill that raises the base tax rate but increases the amount of credits for certain activity.

<sup>2</sup> A good example is the marijuana initiative, which was coupled with a tax on marijuana.

<sup>3</sup> 985 P.2d 979, 981 (Alaska 1999).

<sup>4</sup> *Id.* at 987 (quoting Judge John A. Jameson, *A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding*, sec. 540 (Chicago, Callaghan and Company, 4th ed. 1887)).

A. Quantitative Effects. The proposed changes in the attached resolution amend one section and add a new subsection to an existing section in the constitution. Relative to the remainder of the Constitution of the State of Alaska, the resolution contains a small number of changes that are discrete.

B. Qualitative Effects. The amendment prevents the legislature from imposing a new tax or increasing a tax without voter approval. The result will be a fundamental shift in the constitutional authority of the legislature to tax. As identified in *Bess* the changes seem to "substantially alter the substance and integrity of the state constitution as a document of independent force and effect."<sup>5</sup> It has long been recognized that the power of taxation lies, when discussing separation of powers issues, within the powers of a state legislature. The United States Supreme Court stated "[taxation] is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare" and continued that a state legislature "[has] the sole power to authorize [a] tax."<sup>6</sup> The Alaska Supreme Court has also recognized "taxation is inherently a function of the legislature."<sup>7</sup> The Alaska Supreme Court seems to back away from the rigidity of the language of the United States Supreme Court, perhaps because the people may legally shape the tax law of the state by initiative. Given the importance of the taxing power and its historical assignment of that power to the legislature, a

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<sup>5</sup> *Bess*, 985 P.2d at 987, quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990) (note omitted).

<sup>6</sup> *Meriwether v. Garrett*, 102 U.S. 472, 515, 26 L. Ed. 197 (1880). See also *State ex rel. S. Bank v. Pilsbury*, 105 U.S. 278, 291, 26 L. Ed. 109 (1881) ("The equality and uniformity required throughout the State were only obtainable by confining the exercise of the power of taxation to the legislature, whose authority was coextensive with the territorial limits of the State."); *City of New Orleans v. Clark*, 95 U.S. 644, 654, 24 L. Ed. 521 (1877) ("Of the expediency of the taxation or the wisdom of the appropriation [the legislature] is the sole judge."); *Lane Cty. v. State of Oregon*, 74 U.S. 71, 77, 19 L. Ed. 101 (1868) ("The extent to which [a tax] shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government.").

<sup>7</sup> *Dissolution of Mountain View Pub. Util. Dist. No. 1, In re*, 359 P.2d 951, 955 (Alaska 1961) ("Taxation is inherently a function of the legislature and can be exercised only under its authority.").

limitation of that power may constitute evidence of a significant change to the structure of the constitution amounting to a revision.<sup>8</sup>

Increasing the concern, the changes to the constitution will have a lasting impact on the amounts available to the legislature for appropriation each year. Because the appropriation power of the legislature acts to balance the power of the executive branch, the changes will also likely result in a shift of constitutional authority amongst the branches of government. It is difficult to predict how a court might determine the issue, as there have not been any other Alaska cases on this issue post-*Bess*. However, given the qualitative nature of the changes, including the resulting shifting of powers between governmental branches, a court is likely to see the changes as a revision.

8. Tax Year. A tax change made by initiative will likely be made mid-tax year. Currently, there is no constitutional authority that allows an initiative to have an effective date. Allowing an initiative to propose an effective date would require more significant revisions to the constitution. As drafted, if a tax law is passed by initiative, under art. IX, sec. 1(c), proposed in sec. 1 of the bill, the tax will be implemented 90 days after approval by the legislature, regardless of when a tax year begins.<sup>9</sup>

9. Notwithstanding. Art. II, sec. 18, Constitution of the State of Alaska, should be amended to acknowledge the alternate effective dates proposed by the resolution. This office does not generally recommend the use of the word "notwithstanding" without also providing notice in the section of law the amended section is being exempted from.

10. Resolution. Proposed art. IX, sec. 1(c) states that if voters pass an initiative imposing a new tax or increasing an existing tax, the change does not take effect "unless the legislature, by resolution, approves the initiated law by a majority vote in joint session." This resolution, once approved by both bodies in joint session, does not appear to be a type of resolution currently envisioned in the Uniform Rules. Therefore, it is difficult to be sure how the resolution would be treated by the legislature and what requirements would apply. Under Uniform Rule 49(5), a joint resolution is adopted by both houses and is treated in all respects as a bill, including the three readings and committee assignment requirements. A joint resolution, however, would not be approved in joint session. Under Uniform Rule 49(4), a special concurrent resolution is "adopted by a majority vote of the full membership of the legislature in joint session without recourse to three readings." However, the special concurrent resolution is reserved for "disapproval of an executive order of the governor." CSSJR 4(STA) does not specify the form or other details of the resolution; therefore, it is impossible to know whether three readings requirements or committee assignments are required.

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<sup>8</sup> On the other hand, the court might consider the change an amendment on the basis that it is similar to existing initiative and referendum authority to add or repeal taxes, and thus does not constitute a significant revision to the general structure of the constitution.

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11. Delay in Revenues. Because of the voter approval requirement, the collection of a new or increased tax enacted by the legislature would be delayed. In the event of a funding emergency, this may limit the options the legislature has to react.

If I may be of further assistance, please advise.

ELN:amt

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