# LEGAL SERVICES

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**M E M O R A N D U M** May 3, 2021

**SUBJECT:** SJR 7; Revision, Amendment, Other Issues
(Work Order No. 32-GS1711\A)

**TO:** Senator Jesse Kiehl

**FROM:** Emily Nauman
Deputy Director

You asked whether the changes in SJR 7 constitute a revision to the constitution. You also asked whether I have identified any other issues with the resolution.

Amendment v. Revision

SJR 7 probably constitutes a revision that requires a constitutional convention. Article XIII, sec. 1 of the Constitution of the State of Alaska provides that "*amendments* to [the] constitution may be proposed by a two-thirds vote of the legislature."[1] Article XIII, continues, at sec. 4, that "constitutional conventions shall have the plenary power to *amend or revise* the constitution . . . ."[2]

[1] Emphasis added. Article XIII, sec. 1 in full reads:

> Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature. The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next general election. If a majority of the votes cast on the proposition favor the amendment, it shall be adopted. Unless otherwise provided in the amendment, it becomes effective thirty days after the certification of the election returns by the lieutenant governor.

[2] Emphasis added. Article XIII, sec. 4 in full reads:

> Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention.

The Alaska Supreme Court has expounded on the difference between an amendment and a revision. In *Bess v. Ulmer*[3] the Court relied on the Proceedings of the Alaska Constitutional Convention, language from a treatise by Judge John A. Jameson, and on California cases applying the distinction between amendment and revision.[4] The Court adopted a modified version of California's qualitative/quantitative analysis, crafting a test that relates the qualitative and quantitative elements to one another on a sliding scale.[5] This "hybrid" test requires consideration of both the qualitative and quantitative impact of a proposed constitutional change in determining whether it is an amendment or a revision.[6] The standard that the Court fashioned is as follows:

> [A]n enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof [while] even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.
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> The process of amendment, on the other hand, is proper for those changes which are "few, simple, independent, and of comparatively small importance." The core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole.[7]

Thus, the *Bess* standard requires evaluation of the qualitative and quantitative effects of a proposed change to the constitution.

Quantitative Effects

In my opinion, a court is likely to interpret the changes suggested in SJR 7 as being beyond the legislature's quantitative amendment power under the *Bess* standard: apart from providing for a vote of the people before the establishment of a tax, the changes are likely not "few, simple, and independent." SJR 7 amends art. IX, by adding two new sections. Although SJR 7 is drafted to add and amend only a few sections of the Constitution, arguably, art. II, secs. 14, 16 - 18; art. X, sec. 2; and art. XI, secs. 1 - 3, 7

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[3] 985 P.2d 979 (Alaska 1999). I am attaching a copy of the case for your review.

[4] *Id*.

[5] *Id.*, 985 P.2d at 987.

[6] *Id*. at 987 - 988.

[7] *Id.*, 985 P.2d at 987 (citing, *Amador*, 583 P.2d at 1286 and *Jameson* at sec. 540).

could also require changes.[8] Even if the number of quantitative changes are minimized, as they are in SJR 7, the change still likely has a substantial qualitative effect.

Qualitative Effects

I believe it likely that a court would find SJR 7 to "substantially alter the substance and integrity of the state constitution as a document of independent force and effect," and therefore constituting a revision.[9] It has long been recognized that the power of taxation lies, when discussing separation of powers issues, squarely within the powers of a state legislature. As the Court in *Bess* noted, a revision "fundamentally changes[s] and subordinate[s] the constitutional role of any branch in the governmental process."[10] The power of taxation is a fundamental constitutional role of the 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."[11] The Alaska Supreme Court has also recognized "taxation is inherently a function of the legislature."[12] Given the importance of the taxing power and the historical

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[8] Article II must be amended at various locations to accommodate the timing of enactment of a bill contingent upon voter approval. Article XI might also need to be amended in several spots to accommodate for this new type of ballot question. Article XII, sec. 11 could be amended to attune to the possibility that a law passed by the legislature may not be enacted.

[9] *Bess*, 985 P.2d at 987, quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990) (note omitted).

[10] *Bess*, 985 P.2d at 989.

[11] *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.")

[12] *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

assignment of that power to the legislature, a disruptive curtailment of that power likely constitutes a significant change to the structure of the constitution amounting to a revision. 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. However, given that the power to tax is so deeply rooted in the state legislature, I believe this argument is unlikely to sway the court. Ultimately I believe a court would find that limiting the power of the legislature to impose a tax would "necessarily or inevitably alter the basic governmental framework of the Constitution," by fundamentally changing the legislature's near exclusive control on the revenues and expenditures of the state, as prohibited by amendment under *Bess*.[13]

Summary

In summary, it is my opinion that the changes to the constitution proposed in SJR 7, preventing the legislature from establishing a tax without a vote of the people would constitute a revision to the constitution. Please be aware that the analysis in this memo relies primarily on the test developed in *Bess*; it is the only case outlining the difference between an amendment and a revision for purposes of interpreting the state constitution. The *Bess* decision itself indicated that the Court was looking to decide these types of questions on a case-by-case basis. These two facts make predicting the outcome of a revision versus amendment question difficult. The distinction may become clearer as additional case law is developed.

Other Issues

You also inquired whether I identified any other legal issues with SJR 7. This memorandum was prepared on an expedited basis, therefore, I did not have time to give the resolution a complete review. Two issues jumped out at me immediately, however. First, it is not clear what changes to tax law would constitute "establishing a tax." Would this include if an existing tax was expanded to include a new product?[14] What if a product that is already taxed is subject to a second tax?[15] What if a product or income stream is subject to tax, but a law changes the form of that tax?[16] Given the ambiguity, it

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under its authority.") 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.

[13] *Bess*, 985 P.2d at 988 (internal quotations removed).

[14] For instance, what if the salmon enhancement tax (AS 43.76.001) were expanded to include halibut or pollock?

[15] There is an example of this in current law, see AS 43.50.090, the cigarette tax, and AS 43.50.190, the additional tax levy on cigarettes.

[16] For example from a gross tax to a profits tax, or from a profits tax to a unit tax?

seems that each change to the tax law could be subject to litigation to determine whether the change constitutes "establishing a tax." And second, art. IX, sec. 1(b) added by the resolution, does not provide for the possibility of a tie vote[17].

If I may be of further assistance, please advise.

ELN:mjt
21-256.mjt

Attachment

[17] Note however that this same issue appears in the existing constitutional language related to passage of initiatives (art. XI, sec. 6, Constitution of the State of Alaska).