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MEMORANDUM

February 11, 2004

SUBJECT: Proposal for treatment of the permanent fund
(Work Order No. 23-LS1718)

TO: Senator Con Bunde

FROM: Tamara Brandt Cook
Director

In view of Bess v. Ulmer, 985 P.2d 979 (Alaska 1999), you have asked me to consider a proposed constitutional amendment under which all of the money available for appropriation from the Alaska permanent fund would be required to be used for a permanent fund dividend program. The proposal includes enactment of a graduated state income tax on individuals, with the maximum level of the tax not to exceed in each year the amount of the dividend for that year. Although I am not clear on this point, for purposes of this response, I am presuming that the tax would be statutorily rather than constitutionally imposed.

BACKGROUND

In the Bess case, the Alaska Supreme Court considered separate proposed amendments to the state constitution passed by the legislature. The decision is based on Art. XIII of the state constitution which provides that the state constitution may be changed by amendment or by revision. A constitutional amendment may be proposed by vote of two-thirds of the legislature (Art. XIII, sec. 1) or through a constitutional convention (Art. XIII, sec. 4). The court concluded that an amendment that amounts to a constitutional revision may only be proposed through a constitutional convention, and not by the legislature.

In considering whether the proposed constitutional amendment relating to prisoners' rights was an amendment or a revision, the court took note of both the qualitative and quantitative nature of the change proposed by the amendment. In the court's view, the proposed amendment would potentially alter 11 sections of the Alaska Constitution and would "substantially alter the substance and integrity of the state Constitution as a document of independent force and effect." (Bess, at 987) Thus the court concluded that, both quantitatively and qualitatively, the amendment was an impermissible constitutional revision. (Bess, at 988)

In reviewing a proposed constitutional amendment relating to marriage, the Supreme Court found that the proposed change, *as rewritten by the court*, was validly within the

amendatory power of the legislature. The change was "sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment. Few sections of the Constitution are directly affected, and nothing in the proposal will 'necessarily or inevitably alter the basic governmental framework' of the Constitution." (Bess, at 988; quoting Brosnahan v. Brown, 651 P.2d 274, 289 (Cal. 1982); footnotes omitted)

The Supreme Court also reviewed a proposed constitutional amendment that changed the procedure for redistricting of the Alaska Legislature. Even though the proposed amendment made substantive changes to nine sections of article VI of the Alaska Constitution, the court found the quantitative effect of the change to be minimal. (Bess, at 988) The court likewise found the qualitative effect of the amendment to be unremarkable. The court concluded that the amendment did not involve the transfer of executive power to another branch of government or otherwise fundamentally change the constitutional role of any branch of the government. Though the proposed change was substantial it was not so significant as to comprise a revision.

DISCUSSION

The Bess decision casts a shadow over the power of the legislature to propose certain constitutional amendments. The Alaska Supreme Court was not able to precisely identify the difference between a constitutional amendment and a constitutional revision except to say that changes that are "few, simple, independent, and of comparatively small importance" can be considered amendments. (Bess, at 987) On the other hand, "an 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." (Bess, at 987; quoting Amador Valley Joint Union High School District v. State Board of Equalization, 583 P.2d 1281, 1286 (Cal. 1978)) In the view of the court, the distinction between amendments and revisions hinges on "whether the changes are so significant as to create a need to consider the constitution as an organic whole." (Bess, at 987) The Bess court adopted, but did not describe, what it called a hybrid test to determine which proposed constitutional changes were amendments and which were revisions. The hybrid test was derived from a series of decisions by the California Supreme Court and considered both quantitative and qualitative factors.

It appears to me that the proposal under which all appropriations from the permanent fund would be used for a program of dividend payments might meet at least the four factors identified by the court: (1) the proposal is simple to express and understand; (2) it is complete within itself; (3) it relates to only one subject; and (4) it substantially affects only one section of the constitution. Note, however, that it can be reasonably argued that the proposal is not so simple as it seems and, potentially, implicates several sections of the constitution in addition to Art. IX, sec. 15; examples being Art. II, sec. 1, and Art. IX, secs 6, 7, and 8.

Assuming, optimistically, that the proposal does meet the four factors, recall that the court also suggested in Bess that if a fundamental power of one of the branches of state government is significantly altered, this could result in the type of "sweeping change" that is not permitted to be accomplished in an amendment to the state constitution. Surely, placing all of the wealth of the permanent fund effectively beyond the reach of the legislative power of appropriation would be viewed as a significant alteration of a fundamental power of one of the branches of state government. The complicating factor here, of course, is that the original amendment to the state constitution under which the permanent fund was established was, itself, a significant restriction on the legislative power of appropriation. I cannot presume to guess how the court will view the proposal in light of this factor, but it is, I think, safe to say that the proposal will face a difficult test if challenged under the reasoning in Bess.

LIMITING DIVIDEND PROGRAM TO CURRENT RECIPIENTS

Although you did not specifically ask about this aspect, there is another part to the proposal that bears considering. I understand that the proposal includes a suggestion to limit the permanent fund dividend program to current recipients, using as a model the phase-out of the statutory longevity bonus program. Please be aware that it is not clear that this approach would withstand constitutional attack. The phase-out of the longevity bonus program was challenged on the grounds that it violated the equal protection clause of the U.S. Constitution and the equal rights clause of the state constitution. (Maggard v. Sipe, Case No. 3AN-94-03905 CI, Third Judicial District, Superior Court) The Superior Court judge granted summary judgment for the state.

In the Maggard case the court found that classifying persons based on the date they applied for the longevity bonus program does not amount to a durational residency requirement because under the phase-out a life-long Alaskan who is not 65 by the end of 1996 will not get payments, but a person who turned 65 and moved to the state in 1992 will get the payments. Factually, the court concluded, the longevity bonus phase-out did not result in distinguishing between long-term residents and newcomers because the element of age also restricts eligibility under that program. This is not true of the permanent fund dividend program. So, even if the reasoning in the Maggard case is correct as to the longevity bonus program, it is not clear that the same result would be arrived at if applied to the permanent fund dividend program. Furthermore, while it can be persuasively urged that the state has a legitimate interest in protecting the "expectation rights" of older residents who may have made significant choices based on the belief that they would receive longevity bonus payments indefinitely, a similar argument is much less compelling when applied to the permanent fund dividend program, available as it is to all residents, even tiny children who could not have formed an expectation of receiving dividends indefinitely. Recall, also, that the Maggard decision, being a lower court ruling, has no precedential value.

TBC:med

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