MEMORANDUM

STATE OF ALASKA
Department of Law

To: The Honorable Loren Leman
Lieutenant Governor

Date: October 20, 2003

File No.: 663-04-0024

Tel. No.: (907) 465-3600

From: James L. Baldwin
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Subject: Precertification review of initiative petition No. 03USENV (Filling Senate Vacancy)

I. Introduction

At your request we have reviewed an application to certify an initiative petition relating to the process to fill a vacancy in the office of United States Senator. We find that initiative petition No. 03USENV presents subject matter that is restricted from enactment through the initiative process and therefore under Article XII, Section 11 of the Alaska Constitution we can not recommend certification.

II. Summary of Bill

The initiative would repeal AS 15.40.010 enacted by the Alaska Legislature pursuant to the Seventeenth Amendment of the United States Constitution. That statute authorizes the Governor to make a temporary appointment to fill a vacancy in the United States Senate when there remains not more than 30 months in the term of office of the predecessor in office. Under the initiative, a special election would be held to fill such a vacancy unless the vacancy occurs within 60 days of a scheduled primary election or after the primary election but during the general election cycle. Presumably a vacancy occurring during that period would be filled according to other statutes in the state election code. *See,* AS 15.25.055; AS 15.25.110.

III. Standard of Review

We review an initiative application to determine if it is in the proper form. AS 15.45.040. This review of the "form" of an initiative includes whether it contains subject matter that cannot be enacted by initiative. AS 15.45.040(4). In the context of a

pre-election review our duty is to determine if the subject matter of the initiative can be enacted directly by the people by initiative. The Alaska Constitution specifies certain subjects that may not be embraced in an initiative measure.[1] The Alaska Supreme Court has expanded these restrictions by determining that to be valid, the initiative must constitute the type of legislation that the body to which it is directed (the people) has the power to enact. *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977). As an example, the Alaska Constitution may not be amended using the procedure for enacting bills into law and as a consequence our constitution may not be amended by the initiative. *Starr v. Hagglund*, 374 P.2d 316, 317 n. 2 (Alaska 1962).

Prior to submission of an initiative to the voters, the requirement of the Alaska Constitution pertaining to the use of the initiative should be liberally construed. *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974). However, the Alaska Supreme Court has tempered this liberal construction with the requirement that there must be strict compliance with limitations on the initiative process. *Citizens for Tort Reform, Inc. v. McAlpine,* 810 P.2d 162, 168 (Alaska 1991) ("[I]t does not necessarily follow that a liberal construction of the people's initiative power requires a narrow construction of the limits that define that power."); *Alaskans for Legislative Reform v. State,* 887 P.2d 960, 962 (Alaska 1994) ("[A]lthough liberal construction of initiative proposals is the general rule, constitutional limitations on the initiative power must also be broadly interpreted.").

IV. Analysis

We must first determine whether the subject of the proposed initiative involves powers assigned to the legislature that are clearly inapplicable for the initiative process.

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[1] The Alaska Constitution provides:

> The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.

Alaska Const. art. XI, § 7.

> Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI.

Alaska Const. art. XII, §11.

The process for filling a vacancy in the Senate is specified in the United States Constitution:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. Const. amend. XVII, § 2 ("the Seventeenth Amendment"). The text of the Constitution is fairly straightforward. A Senate vacancy is filled by special election called by the governor as directed by the legislature. However, the legislature is granted the authority to empower the governor to make a temporary appointment until the vacancy is filled by popular election. The Alaska Legislature has exercised this authority through its enactment of AS 15.40.010.

Because the text of the Seventeenth Amendment to the United States Constitution is specific in authorizing the state legislature to establish or amend the process for filling a vacancy in the United States Senate, we believe it is necessary to consider whether the plain words of the Constitution foreclose the power to change that process by initiative.

The Seventeenth Amendment was ratified by the states in 1913. When originally proposed by the Congress, the main focus of the amendment was to provide for the direct election of U.S. Senators who had previously been elected by state legislatures. *See* U.S. Const. art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six years") (emphasis added).

The plain text of the Seventeenth Amendment, particularly when construed in light of the language it amended, supports the view that the power to direct the manner of filling temporary Senate vacancies cannot be exercised by popular initiative. It is clear that under Article I, Section 3, the term "Legislature" meant a state's legislative body. The language of Article I, Section 3 did not permit U.S. Senators to be chosen through popular election – which is what gave rise to the need for the Seventeenth Amendment. If the term "Legislature" could have been interpreted to permit the people to elect U.S. Senators, the Seventeenth Amendment would have been unnecessary.

The text of the Seventeenth Amendment carries on the distinction drawn in Article I, Section 3, between state legislatures and the people. The Amendment first provides for each state's U.S. Senators to be "elected by the people thereof." The

Amendment then addresses the matter of Senate vacancies – and in so doing differentiates between the executive, the legislature, and the people. The Seventeenth Amendment provides that when a vacancy happens in the representation of a state in the U.S. Senate, "the executive authority of such State" shall hold an election to fill the vacancy and "the legislature of any State" may empower the executive to make temporary appointments "until the people fill the vacancies by election." U.S. Const. amend. XVII. To deal with Senate vacancies, the plain language of the Seventeenth Amendment specifies roles for three separate constitutional actors – "the executive," "the legislature," and "the people." The fact that the Amendment uses all of these terms within the span of a single sentence suggests – as was true under its predecessor, Article I, § 3 – that "the legislature" and "the people" are terms with distinct meanings. The express text of the Seventeenth Amendment would seem to indicate that the authority to empower a state's executive to make temporary Senate appointments rests solely with the state's representative bodies and cannot be exercised by the people through the initiative process.

This interpretation of the Seventeenth Amendment is supported by the Supreme Court's decision in *Hawke* v. *Smith*, 253 U.S. 221 (1920), a case involving the meaning of the term "Legislatures" in Article V of the U.S. Constitution. Article V provides that federal constitutional amendments become effective upon the ratification by "the Legislatures of three fourths of the several States." U.S. Const. art. V. In *Hawke*, the Ohio legislature had ratified the Eighteenth Amendment to the U.S. Constitution, and the question presented was whether that ratification was subject to popular referendum. The Supreme Court held that it was not.[2]

The Court first explained that "Legislatures" was

> not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. *A Legislature was then the representative body which made the laws of the people.* The term is often used in the Constitution with this evident meaning.

Id. at 227 (emphasis added).

The *Hawke* Court then specifically addressed the use of the term in the context of

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[2] *See also, Barlotti v. Lyons*, 189 P. 282 (Cal 1920) (the referendum may not be substituted for action by the legislature in ratifying an amendment to the U.S. Constitution).

Article 1, Section 3, and the Seventeenth Amendment. The Court stated:

> Article 1, section 3, provided that Senators shall be chosen in each state by the Legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment, which made provision for the election of Senators by vote of the people . . . . *That Congress and the states understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the Legislature of any state the power to authorize the executive to make temporary appointments until the people shall fill the vacancies by election.* It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment is shown in the adoption of the amendment. . . . There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.

Id. at 227-228 (emphasis added).

Hawke supports the proposition that in the provision of the Seventeenth Amendment respecting the temporary appointment of Senators, the terms "the legislature" and "the people" are, in the Supreme Court's words, "entirely distinct" in meaning, and that the former does not include the latter. In this regard, it should be noted that the Alaska Constitution prohibits the legislature from repealing an initiated law within two years of its effective date, thereby indicating that law making through the initiative process in Alaska is different than the law making power of the legislature. *See* Alaska Const. art. XI, § 6. In effect, the two-year prohibition would disable the legislature from exercising the powers granted to it by the Seventeenth Amendment.

The question before the Court in *Hawke* concerned Article V of the Constitution. We have not found a case in which the language of the Seventeenth Amendment was directly at issue. In *Davis v. Hildebrandt*, 241 U.S. 565 (1916), the Supreme Court considered the validity of a reapportionment plan for Ohio congressional districts under

Art. I, Section 4 of the United States Constitution (hereinafter "the Elections Clause").[3] In *Davis,* the voters had rejected the reapportionment plan by referendum. The contention was that the rejection was void as applied to elections for federal offices because the referendum was not properly a part of the legislature's law making process. The *Davis* court rejected that argument, but did so looking beyond the Elections Clause. The Court in part relied on the fact that Congress, in 1911, had by statute authorized the states to exercise their reapportionment power through whatever means the states chose and that the authority of Congress under the Elections Clause is plenary. This rationale would not apply to the Seventeenth Amendment because there is no similar grant of authority to Congress or congressional action at issue. *Hawke* supports this reading of *Davis*. In *Hawke*, the Court distinguished *Davis* on the ground that the popular initiative at issue there had been specifically authorized by Congress. *See Hawke*, 253 U.S. at 230 ("As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated.").

Our interpretation of the plain meaning of the text of the Seventeenth Amendment is also not affected by *Smiley v. Holm*, 285 U.S. 355 (1932), decided after *Davis* and *Hawke*. There, the Supreme Court was faced with another challenge to a reapportionment plan, this time in Minnesota. The plan had been enacted by the legislature but vetoed by the governor. When the secretary of state proposed to implement the plan notwithstanding the veto, a lawsuit was filed alleging that the plan was void because the legislature had not overridden the veto. It was argued that the Elections Clause gave the legislature alone the power to establish the means and manner of electing members of Congress and that the governor could have no part in the process. The Court rejected this interpretation stating:

> [T]he term [legislature] was not one of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of

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[3] The Elections Clause reads as follows:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

U.S. Const. art. I, § 4.

> interpretation. A legislature was then the representative body which made the laws of the people ...

Smiley, 285 U.S. at 365 (quoting from *Hawke*, 253 U.S. at 227, quotation marks omitted). The Court reasoned that in interpreting the Constitution it is necessary to consider the nature of the action that is contemplated.

> The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The Legislature may act as an electoral body, as in the choice of United States Senators under article 1, s 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under article 5. .... It may act as a consenting body, as in relation to the acquisition of lands by the United States under article 1, s 8, par. 17. Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view.

285 U.S. at 365 (citations omitted). The gubernatorial veto at issue in *Smiley* was a valid part of the legislative law making process and the Court declared it was bound to honor a validly exercised law making power. The Court stressed that the meaning of the Elections Clause turns on the authority of the state to determine what should constitute its law making process. 285 U.S. at 372.

However, *Smiley* did not involve the initiative process. In that case the legislation at issue had been enacted by the legislature, not by popular referendum, and the issue was whether the Elections Clause permitted the executive to veto the legislature's action. The constitutionality of the initiative process – which results in the enactment of law without the involvement of the legislature in the law making process at all – is a considerably different issue. For these reasons we believe that a court would not extend the rationale in *Davis* and *Smiley* in construing the Seventeenth Amendment.

Whether the term "legislature" as used in the Constitution means merely the embodiment of the law making function or is meant as a discrete unit of state government has been a matter of some debate and consideration in the courts. In light of the text of the Seventeenth Amendment, the constitutional language it amended, and the *Hawke* opinion we feel compelled to enforce the plain text of the Constitution. In finding that the legislature's power to appoint presidential electors was plenary under Article II, Section 1 of the Constitution, the Supreme Court said:

> The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text.

McPherson v. Blacker, 146 U.S. 1, 27 (1892).[4]

V. Conclusion

For the reasons set out in this memorandum, we recommend that you reject the application to certify Initiative No. 03SENV. It would attempt to exercise by the initiative, powers that are clearly provided under the Seventeenth Amendment to the legislature as a distinct enacting body, and it would disable the legislature from exercising those powers. Therefore, the proposed initiative is not a proper exercise of the law making power reserved to the people under Article XII, Section 11 of the Alaska Constitution.

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[4] Our reluctance to depart from the plain meaning of the Constitution is reinforced by Justice Stevens' dissent in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Jones* involved California's blanket primary system, which had been adopted by popular initiative. In his *Jones* opinion, Justice Stevens cast doubt upon whether the Elections Clause (U.S. Const. Art. I, § 4) permitted the adoption of the blanket primary system through the initiative process, stating that "it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives." *Id.* at 602.

Although Justice Stevens ultimately "reserve[d] judgment" on this question because it had not been raised by the parties or the courts below, he observed that "[t]he text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state 'Legislature[s].' " *Id.* Justice Stevens specifically noted that California had language in its state constitution – similar to Alaska's – authorizing the legislative power of the state to be exercised through initiative, but he concluded that "[t]he vicissitudes of state nomenclature . . . do not necessarily control the meaning of the Federal Constitution." *Id.*