

**ALASKA STATE LEGISLATURE**  
**HOUSE STATE AFFAIRS STANDING COMMITTEE**

February 3, 2011  
8:05 a.m.

**MEMBERS PRESENT**

Representative Bob Lynn, Chair  
Representative Wes Keller, Vice Chair  
Representative Paul Seaton  
Representative Peggy Wilson  
Representative Max Gruenberg  
Representative Pete Petersen  
Representative Kyle Johansen

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

OVERVIEW(S): DIVISION OF ELECTIONS

- HEARD

**PREVIOUS COMMITTEE ACTION**

No previous action to record

**WITNESS REGISTER**

GAIL FENUMIAI, Executive Director  
Division of Elections  
Office of the Lieutenant Governor  
Juneau, Alaska

**POSITION STATEMENT:** Presented an overview of the Division of Elections.

SARAH FELIX, Assistant Attorney General  
Labor and State Affairs Section  
Civil Division (Juneau)  
Department of Law  
Juneau, Alaska

**POSITION STATEMENT:** Answered questions during the Division of Elections overview.

**ACTION NARRATIVE**

[8:05:25 AM](#)

**CHAIR BOB LYNN** called the House State Affairs Standing Committee meeting to order at 8:05 a.m. Representatives Keller, Seaton, Wilson, Johansen (via teleconference), Petersen, and Lynn were present at the call to order. Representative Gruenberg arrived as the meeting was in progress.

**OVERVIEW(S): Division of Elections**

[8:05:36 AM](#)

CHAIR LYNN announced that the only order of business was the overview by the Division of Elections.

CHAIR LYNN stated his intent to wait for the internal review following the overview before considering legislation.

[8:09:55 AM](#)

GAIL FENUMIAI, Executive Director, Division of Elections, Office of the Lieutenant Governor, presented an overview of the Division of Elections. She expressed her appreciation for the opportunity to address the questions submitted to her by the committee [included in the committee packet], following the recent election, which she characterized as the election of its kind in Alaska's history.

MS. FENUMIAI listed all the responsibilities of the division, including: conducting all state and federal elections; conducting the regional educational attendance area elections, which are school board elections in unorganized communities throughout Alaska; conducting coastal resource service area elections; maintaining the statewide voter registration list; processing initiative, referendum, and recall petitions; and redistricting, which will happen this year, then reassigning voters to their new precincts.

[8:12:01 AM](#)

MS. FENUMIAI, in response to questions from Chair Lynn, regarding redistricting, outlined the process being undertaken by the division for redistricting, and said the redistricting committee will most likely submit its report in April 2012. In response to a question regarding law suits, [question 1 in the handout], Ms. Fenumiai shared the division's view that none of

the information being shared during the overview will have any impact on ongoing lawsuits against the State of Alaska. She said the Miller v. Treadwell case is still pending. She named a couple other cases: Rudolph v. State of Alaska, which challenges the division's process of counting write-in ballots, and Perry v. Treadwell, which is a state election contest case. She name those involved in both cases.

[8:16:03 AM](#)

MS. FENUMIAI moved on to question 2 from the handout - whether similar [write-in candidate] names could present a problem with regard to [voters'] intent - and said this is a hypothetical question, which is not possible to answer without knowing the extenuating circumstances about the write-in campaign and the election. Notwithstanding that, she stated that the bottom line is that the Alaska Supreme Court has "historically and repeatedly admonished the division to implement and honor voter intent in counting ballots."

[8:16:41 AM](#)

SARAH FELIX, Assistant Attorney General, Labor and State Affairs Section, Civil Division (Juneau), Department of Law, in response to a question by Chair Lynn, said the court, when considering issues of voter intent, looks at marks on the ballot, studies surrounding circumstances of the campaign, and uses a standard by which it seeks to "enfranchise a voter to the maximum extent possible."

[8:17:24 AM](#)

MS. FENUMIAI moved on to question 3 from the handout - regarding custody ballots - and said AS 15.15.030(2) requires that ballots be numbered in sequence to ensure simplicity and prevent fraud. She said state regulations require the following to ensure ballot security in transportation: all hand counted ballots at the precincts must be sealed and mailed to the director's office no later than the day following the election, at which point they are marked as received and stored in an alarm-secured and locked ballot room. She offered her understanding that that is in state ballot regulation 6 AAC 25.060. Ms. Fenumiai stated that all voted ballots counted by optical scan machines on election night are transported that night to a designated location and secured until picked up by a licensed and bonded courier service or licensed security officer. She said chain of custody documents accompany the ballot shipments; access to the

ballots prior to shipment is limited to election personnel, state troopers, or authorized, licensed security officers. Ms. Fenumiai said regulations and the division's practices and policies do not allow any unauthorized person access to ballots. She relayed that during the write-in counting process, the ballots were in the director's office in an alarm-secured room, prior to being taken to the counting facility. Before those ballots were removed, they were logged and itemized to show which ballots were taken, transported to the counting facility by security officers, and rechecked upon arrival. The same thing happened when the ballots were returned to the director's office.

8:19:54 AM

MS. FENUMIAI, in response to a question from Representative Keller, restated who the authorized personnel are. She offered further details about the transfer of ballots from one authorized person to the next. In response to a follow-up question from Representative Keller, she confirmed that she is comfortable with the current process. In response to a question from Chair Lynn, she stated that the transportation and security topics she just relayed are covered in state regulation.

8:22:31 AM

REPRESENTATIVE PETERSEN said a constituent suggested an idea to him wherein a voter could get a receipt after voting and could track that receipt to ensure that his/her vote was counted. He asked Ms. Fenumiai if that idea would be possible.

MS. FENUMIAI responded that there is no way to identify a vote to a voter once it is placed without compromising the privacy of that person's vote.

8:23:35 AM

MS. FENUMIAI moved on to question 4 in the handout - regarding documentation of all ballots printed - and said each voting location is provided with a series of sequentially numbered ballots. This information is provided on documents given to the voting locations. At the end of voting, the election worker identifies the total number of ballots used and subtracts that number from the initial number given. The remaining [unused] ballots are destroyed at the precinct or returned to the division for destruction, she said. Voted ballot stubs are returned to the division. She said this information is also in

6 AAC 25.060. In response to questions from Representative Keller, she explained that in most cases, if there is a small quantity of unused ballots, the election worker at the precinct rips those ballots in half and returns them to the division. When there are a large number of unused ballots, they are put in an envelope for unused ballots and returned to the division for shredding. She offered further details related to the reporting done by election workers. She said she has never experienced an instance where an election worker has been dishonest. She said there is a team of four to six election workers at each precinct, and those workers have sworn an oath.

[8:27:25 AM](#)

MS. FENUMIAI, in response to Chair Lynn, related that the election officers in the four regional offices recruit their workers. She said they try to get people from the precincts in which they will work. The workers have to be registered voters. Ms. Fenumiai noted that many of the division's election workers have been doing this work for many years, and she praised their contribution to the division.

CHAIR LYNN expressed his appreciation of election workers.

[8:28:24 AM](#)

MS. FENUMIAI, in response to Representative Petersen, explained how "spoiled" ballots are tracked. In response to the chair, she explained the steps a voter would take in requesting a replacement ballot; she said each voter is allowed two replacement ballots.

[8:29:36 AM](#)

MS. FENUMIAI directed attention to question 5 on the handout - regarding the division's choice to use voter intent, thus contradicting statute - and noted that the statute in question is AS 15.15.360(a) (10) through (12), which read as follows:

(10) In order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with (1) of this subsection.

(11) A vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that

candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.

(12) If the write-in vote is for governor and lieutenant governor, the vote shall be counted if the oval is filled in and the names, as they appear on the write-in declaration of candidacy, of the candidates for governor and lieutenant governor or the last names of the candidates for governor and lieutenant governor, or the name, as it appears on the write-in declaration of candidacy, of the candidate for governor or the last name of the candidate for governor is written in the space provided.

MS. FENUMIAI explained that "the Miller group" interpreted that statute to mean that the name written in had to match exactly the name of the candidate as it is written on his/her letter of intent, with no room for errors or misspelling. She stated that the division disagrees that consideration of voter intent contradicts statute. She said in the recent Miller v. Treadwell case, the Alaska Supreme Court determined that consideration of voter intent was consistent with the statute on rules for counting ballots. She reiterated that the court has historically and repeatedly admonished the division to consider, honor, and implement voter intent. She deferred to Ms. Felix for further comment.

[8:32:36 AM](#)

MS. FELIX said in the Miller v. Treadwell case the Alaska Supreme Court recognized that the statute would allow for minor misspellings, poor handwriting, and any variation of the candidate's name that was clear enough for the director to determine using the standard of voter intent. The court did not find that the candidate's name must be written exactly as on the declaration of candidacy.

[8:34:28 AM](#)

MS. FENUMIAI directed attention to question 6 in the handout - regarding the chain of command in determining voter intent - and stated that the division would go through the process of counting individual write-in ballots if the aggregate number of write-in votes satisfies the threshold set out in regulation. She explained that that means either the highest number of votes received for that race over any other printed candidate on the

ballot or the second highest with a difference of less than half a percent. She said that is found in 6 ACC 25.085. In response to Chair Lynn, she confirmed that there have been write-in candidates in the House race who did not warrant a count because the number of votes was well below the percentage difference.

[8:36:45 AM](#)

MS. FENUMIAI referred to a handout in the committee packet, entitled "Counting Write-In Votes - U.S. Senate Race," and she said five boxes were used for the initial ballot sort following the U.S. Senate race in 2010. The first box, she said, was used for ballots on which the oval was marked next to a candidate's name that was printed on the ballot. Those ballots do not need any further review. The second box was used for those ballots left blank or those with more than one oval marked.

[8:38:32 AM](#)

The committee took a brief at-ease.

[8:39:13 AM](#)

MS. FENUMIAI continued explaining the five-box system. She said box 3 was used for ballots where the oval has been marked, Lisa Murkowski's name was spelled correctly, and the ballot was not challenged. Box 4, she said, was used for those ballots that were challenged by one party or the other because, for example, the name written appeared to be a variation or misspelling of the write-in candidate's name or the name was not written directly on the line. Box 5 was for those write-ins other than Lisa Murkowski. She said she reviewed the ballots in boxes 2 and 4; no other person was involved in making the voter intent decisions. She said the Alaska Supreme Court validated that this was a good process in Miller v. Treadwell.

[8:40:41 AM](#)

MS. FELIX, in response to Representative Gruenberg, said she would give the committee members a copy of the citation from Miller v. Treadwell. In response to a series of questions from Representative Gruenberg, she said the court did not use a preponderance of the evidence, deference to the agency, or substitution of judgment standard in proving the case. She explained that what was used is the voter standard, which is when the Director of the Division of Elections looks at the ballot, views it in totality, considers each part of the ballot

as it relates to all other parts, and makes the determination with the underlying consideration of enfranchising the voter if possible. She indicated that the court determined that the rules of the past were followed and would be upheld.

[8:45:00 AM](#)

MS. FENUMIAI directed attention back to the list of questions on the handout, to question 7 - regarding [nicknames] used when voting for a write-in candidate - and said the ballot counter in such an instance would be the director of the Division of Elections. She said this question is hypothetical, because the decision would depend upon the circumstances of the write-in campaign and what appears on the candidate's write-in letter of intent. She stated that the entire name is taken into consideration when determining voter intent. However, she said, according to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or a political party shall be disregarded in determining the validity of a ballot if the intention of the voter can be ascertained. In response to a question from Representative Seaton, she confirmed that a last name only would be sufficient as a write-in vote; however, she said that would depend on whether or not there were one or more candidates with the same last name, for example.

[8:48:33 AM](#)

MS. FELIX, in response to question from Representative Petersen, stated that the court, in Miller v. Treadwell, analogized the write-in letter declaration of intent to the statute regarding candidates running under a nickname; however, the court did not specify the issue of a candidate using a single name. She said this is a hypothetical question that would have to be decided at the time based upon all the circumstances.

[8:49:38 AM](#)

MS. FELIX, in response to a question from Representative Gruenberg, said that with respect to counting write-ins, the aforementioned U.S. Senate race was governed mainly by state law, which incorporates federal law.

[8:52:45 AM](#)

MS. FELIX, in response to a question from Representative Gruenberg regarding procedure development, stated the following:

The Alaska Supreme Court specifically considered the issue of whether or not what the division did in this case required a regulation to be promulgated under the Administrative Procedure Act, and specifically found that ... these are internal agency procedures that were a common sense interpretation of existing statutes and regulations that did not require promulgation of a new regulation.

[8:54:12 AM](#)

MS. FENUMIAI, in response to a follow-up remark from Representative Gruenberg, said although it would be possible to put into writing the procedure used for write-in voting, it would be difficult to put into writing how to determine voter intent.

[8:55:30 AM](#)

MS. FELIX indicated that there are current regulations resulting from UOCAVA, and the proposed SB 31 would codify in statute the UOCAVA standard that "any abbreviation, misspelling, or other minor variation in the form of the name of the candidate or political party shall be disregarded in determining the validity of the write-in ballot if the intention of the voter can be ascertained." That standard is set out in Miller v. Treadwell.

CHAIR LYNN stated that to determine procedure you have to be able to define intent, and he questioned how that is possible.

MS. FENUMIAI said it is possible to determine that someone who spelled Murkowski with a "y" instead of the "i" or a "c" instead of the first "k" intended to vote for Lisa Murkowski.

MS. FELIX gave an example from Edgmon v. Moses, an older case in which the issue was that there were a number of ballots with funny marks on them, but the court was able to figure out the intent of the voter. She offered further details.

[8:59:33 AM](#)

REPRESENTATIVE GRUENBERG said it would seem in Edgmon v. Moses that the court looked at the determination of the Division of Elections, looked at the ballot, and then made an independent determination. He said in that sense the court used a

substitute standard and did not give discretion to the director of the division.

MS. FELIX said she thinks in that case Representative Gruenberg is correct; however, she pointed out that the Miller v. Treadwell case was different.

[9:00:43 AM](#)

REPRESENTATIVE KELLER thanked the chair for bringing forward this overview. He opined that voter confidence is important. He mentioned the idea of having a group of four or five people make the decisions about ballots, rather than just the director of the division. He asked Ms. Fenumiai if she was comfortable being the sole decision maker for the U.S. Senate Race in 2010.

[9:02:26 AM](#)

MS. FENUMIAI answered yes. She said she consulted with the Department of Law regarding the ballot counting. She stated her belief that any person in her position would take the task very seriously to enfranchise every voter's ballot to ensure it is counted. Regarding the idea of having a group in charge, she said she thinks that would result in many conflicting opinions. She stated that she thinks it is best, for the sake of consistency, for one person to be in charge of making those decisions.

REPRESENTATIVE KELLER responded that each human being has his/her biases, and he has a feeling of unease allowing just one person to decide a person's intent.

[9:04:54 AM](#)

MS. FELIX explained that the process of the write-in count includes observers from every campaign involved and all the political parties, and those people observe the director while he/she is making decisions. Ms. Felix said the process is an open one and "if there were any biases ... going on it would be patently obvious."

MS. FENUMIAI, in response to Chair Lynn, explained that if a decision she made during a write-in count was challenged, then that ballot would go into a "challenged counted envelope" and would be available if the court needed to see it to make a determination.

9:07:01 AM

MS. FENUMIAI, in response to Representative Gruenberg, said the court adjudication process is not governed by the Administrative Procedure Act.

9:10:14 AM

MS. FENUMIAI directed attention to question 8 - regarding the use of a single name in a write-in vote - and stated that under statute, at minimum the last name of the candidate must be provided. She reviewed that if, for example, there was only one Johnson running as a write-in, then writing only "Johnson" would suffice. She moved on to question 9 - regarding how closely a name must match the write-in declaration of candidacy to signal voter intent - and said this, too, is a hypothetical question. Notwithstanding that, she said that if there was, for example, one write-in candidate named John Johnson, the write-in vote for J. Johnson would count if there were no other candidates in that race with that last name and first initial. She reiterated that the last name of the candidate must be provided, at minimum.

MS. FENUMIAI directed attention to question 10 - regarding adopting resolutions to show concurrence with the court's interpretation of existing statute rather than amending statute - and stated that the division views conforming statute to a court decision as a housekeeping measure. Further, she offered her understanding that a resolution would not be sufficient to amend a statute. In response to Representative Seaton, she said the legislature can conform statute to a court's decision, to ensure clarity in future court cases. In response to Representative Gruenberg, she concurred that an intent section can be added to such legislation.

9:16:51 AM

MS. FENUMIAI turned to question 11 - regarding comparisons - and stated that there have been no other write-in races that compare to the one that occurred in November 2010. She noted that in 1998, Robin Taylor ran as a write-in for governor, but received about 40,000 votes. She stated her understanding that in 1954, Senator Strom Thurman of South Carolina was elected senator as a write-in candidate. She said she has not had the opportunity to research write-in candidates in other states. In response to Representative Gruenberg, she said she has not researched whether or not there were any legal challenges resulting from Senator Thurman's election.

MS. FELIX offered her understanding that no information from South Carolina's case was in the brief.

MS. FENUMIAI, in response to Representative Seaton, recollected that there was at one time a write-in candidate running for the school board who won the race; however, she said she cannot remember the year.

[9:19:51 AM](#)

MS. FENUMIAI moved on to question 12, which puts forth a hypothetical situation where Joe Jones and Joan Jones are both write-in candidates and a write-in vote is either misspelled or incomplete. She said the division would expect that the campaigns would work to get the word out on how to properly write the candidate's name. She said in this example, the write-in vote would not be counted, and the courts may challenge that. She stated her assumption that if the vote in question was needed to determine the winner of a race, then a proportionate redistribution of the votes would be done. Ms. Fenumiai directed attention to question 13 - regarding a list of write-in candidates being posted in voting booths - and emphasized that the division never intended for the list to be posted in voting booths; the list was to be made available to voters who requested it. She relayed that there was an incident in Homer where a list was posted, but as soon as the division found out, it had the list pulled, and the 17 ballots that were used during the time the list was posted were pulled aside in case they were challenged at a future date, but there was no challenge to those ballots.

[9:22:51 AM](#)

MS. FELIX, in response to a question from Representative Seaton regarding the rationale in not putting up the list, stated that this is a matter over which there was litigation, and the division developed a policy that it felt was fair in having the list if a voter asked for it. She said the Alaska Supreme Court ultimately upheld the division's decision. In response to a follow-up question, she said challengers of the list claimed that [putting the list up in the voting booth] would have given the write-in voters an unfair advantage and influenced their decision.

[9:26:01 AM](#)

REPRESENTATIVE SEATON explained that he is questioning the fact that not all candidates' names are handed to a voter when requested - just the names of write-in candidates.

[9:26:32 AM](#)

MS. FENUMIAI directed attention to question 14 - regarding the voter registration database - and said the list is available for purchase by the public in hard copy and electronically. She said the public list contains each registered voter's name in ascension number, residence address, mailing address, district, precinct, party affiliation, sex, and 10-year voting history. She said there are a variety of methods by which to search for data. In response to Representative Petersen, she said the division does not have the ability to pull up all registrations done by a specific registrar, but can look at a voter's registration document to ascertain who signed the form as a registrar.

[9:29:53 AM](#)

MS. FENUMIAI, referring to questions 15 and 16 - database searches and citizenship verification - explained that when a voter completes the voter registration application, he/she swears under penalty of perjury that he/she is a citizen of the U.S. In response to a question from Chair Lynn, she said if the division was to find out that a person who registered to vote was not a U.S. citizen, it would take steps to remove that person from the rolls. In response to further comments from Representative Petersen, she said the division hopes that a registrar would not check the citizenship box for someone without getting confirmation from the person that he/she is a citizen of the U.S. She said there are no documentations required to be shown to the registrar. She told Representative Petersen that if he wants specific people checked, then the division would look those people up on the aforementioned microfilmed information. She said she is not sure how far the division's part would go in that regard.

[9:37:24 AM](#)

MS. FENUMIAI, in response to Representative P. Wilson, said prior to every election, the division sends out public service announcements to remind people about updating their voter registration information.

REPRESENTATIVE P. WILSON suggested that it would be good to work on this issue when it is not an election year.

MS. FENUMIAI said she would take that into consideration.

[9:38:37 AM](#)

MS. FENUMIAI, in response to Chair Lynn, confirmed that voters have the right to keep their residence address confidential, as long as they are able to provide the division with a different mailing address. In response to a follow-up question, she stated her assumption that people who have been victims of domestic violence and police officers may not want others to know where they live.

[9:42:30 AM](#)

MS. FELIX noted that AS 15.07.195 gives the right to keep ones residential address confidential. In response to Representative Seaton, she said currently there is no authority for the division to treat a candidate differently from any other voter in regard to having the right to make a residential address confidential.

[9:44:15 AM](#)

MS. FELIX, in response to Representative Seaton, stated that the subject of a voter's residential address was not an issue that arose during Edgmon v. Moses.

[9:47:13 AM](#)

REPRESENTATIVE GRUENBERG directed attention to a one-page memorandum [included in the committee packet] from Legislative Legal and Research Services, dated 2/2/11, which addresses AS 15/15/361.

[9:47:33 AM](#)

MS. FENUMIAI said AS 15.15.161 is a statute that disallows the use of stickers on ballots. She said that statute was enacted when the state converted from punch card voting machines to optical scan voting machines. She explained that the stickers have the potential to damage the optical scan machines; the stickers could peel off and render the optical scan unit dysfunctional. She said the division believes that that statute should remain in place.

REPRESENTATIVE GRUENBERG talked about finding a way to use the stickers during write-in voting to help those who are not fluent in the English language.

[9:49:27 AM](#)

MS. FENUMIAI said the division could talk to the maker of the optical scan machine to see if this is possible. She then addressed questions that she said Representative Gruenberg had submitted to her. First, she said there were no issues with the observers during the write-in ballot counting process from the November 2010 election. Second, she relayed that the write-in counting process was completed on November 17, the U.S. Senate race was certified by her on December 28, and the term began on January 3, 2011; however, the race could not be certified until the court lifted the federal injunction. Finally, she said that for the [write-in counting], the division incurred approximately \$50,000, which covered election worker payments, facility rentals, security, and staff time. She said that does not include the legal costs for the Miller v. Treadwell case, which the Department of Law has estimated will come to approximately \$150,000.

[9:52:19 AM](#)

REPRESENTATIVE SEATON asked Ms. Fenumiai to consider what language may be needed to prevent the possibility that two of the same names are submitted as write-in candidates.

[9:53:42 AM](#)

MS. FENUMIAI said she would address that issue and provide Representative Seaton with further information.

[9:54:12 AM](#)

CHAIR LYNN thanked Ms. Fenumiai for her work on elections and for the overview. He invited committee members to let Ms. Fenumiai know what information they would like from the division in the future.

[9:54:43 AM](#)

REPRESENTATIVE JOHANSEN asked Ms. Fenumiai to consider the use of "heat stamps," such as the copy and draft stamps used by the legislature.

9:55:24 AM

REPRESENTATIVE SEATON said he would like a report on how the hand count of 5 percent of each House district has functioned and whether there have been any cases in which the hand tallies and the machine counts have not corresponded. He said he would also like to know how the requirement for candidate name rotation has been working. Last, he said he would like to see an analysis of the mail-in ballot, such as is used in Oregon, to figure out if it would work in Alaska.

9:56:37 AM

REPRESENTATIVE PETERSEN mentioned a situation where a radio talk show host solicited people with names similar to that of a write-in candidate already running for office to sign up as write-in candidates "at the last minute." He opined that that situation caused complications related to the election, and he asked if legislation is needed to prevent something like that from happening in the future.

CHAIR LYNN recommended considering the First Amendment when looking into that issue.

9:57:37 AM

REPRESENTATIVE KELLER thanked the many election workers, and remarked on the privilege of voting in the U.S. He stated support for local oversight.

CHAIR LYNN remarked upon the current troubles in Egypt, and he said although debate can be heated, the U.S. has "a peaceful transition of government."

9:59:40 AM

#### **ADJOURNMENT**

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 10:00 a.m.