HB

192

HOUSE COMMITTEE REPORT

(7)
Date Referred: March 22, 1989 FURTHER REFERRALS:

Date of Committee Action: _____

The JUDICIARY Committee considered: HB 192

HOUSE BILL NO. 192 [ABSENTEE BALLOTS/COURT ORDERED ELECTIONS]
"An Act relating to absentee ballots, to certain court orders regarding elections, and to the governor's power to appoint legislators; and providing for an effective date."

RECOMMENDATIONS:
[ ] be replaced with _____ [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact_____
[ ] zero fiscal note_____
[ ] zero with analysis_____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s)_____
[ ] zero fn/analysis _____

SIGNING DO PASS:

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

_____
Chairman's Signature

HOUSE COMMITTEE REPORT

3/22

(7)
Date Referred: February 23, 1989   FURTHER REFERRALS: JUDICIARY

Date of Committee Action: ________

The STATE AFFAIRS Committee considered: HB 192

HOUSE BILL NO. 192   [ABSENTEE BALLOTS/COURT ORDERED ELECTIONS]
"An Act relating to absentee ballots, to certain court orders regarding elections, and to the governor's power to appoint legislators; and providing for an effective date."

RECOMMENDS:

[X] replacing with CS HB 192(STA) ______ [ ] the same title / [X] a new title
[ ] the attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ______ ______ Committee

ADOPTS: ________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[X] zero fiscal note Elections
[ ] zero with analysis

APPROVES PREVIOUS:

[ ] fiscal note(s) published: ________
[ ] zero fiscal notes(s) published: ________

SIGNING DO PASS:

[signature] BOUCHER
[signature] MACLEAN
[signature] SPOHNHOLZ
[signature] MENARD
[signature] DONLEY

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

[signature] ZAWACKI
[signature] HAYLEY

[signature]
Chairman's signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 192
PUBLISH DATE: 2/23/89

FISCAL NOTE

REQUEST:

Revision Date: 12/7/89
Title: Absentee Ballots, certain court orders re: elections, and to the governors power to appoint legislators
Sponsor: The Judiciary Committee
Requestor: The Judiciary Committee
SPONSOR: The Judiciary Committee

Agency Affected: Office of the Governor
BRU: Elections
Components: 1 - Elections
11 - Primary & General

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Linda Edgeworth
Phone: 465-4611
Division: Division of Elections
Date: 12/8/89

Approved by Commissioner: (Acting)
Date: 12.11.89
Agency: Division of Elections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 192 (Jud)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: 3/1/90
Title: Relating to Absentee Voting from outside the Unit d States
Sponsor: Rules/Governor
Requestor: Rules/Governor

Agency Affected: Office of the Governor
BRU: Elections
Components: 1 Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The fiscal impact for FY 90 is -0-

Prepared by: Linda Edgeworth
Phone: 465-4611
Division: Division of Elections
Date: 3/1/90

Approved by Commissioner: [signature]
Date: 3.1.90
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

TABLE OF CONTENTS

HB 192: Absentee Ballots/Court Ordered Elections

Item 1: HB 192 by The Judiciary Committee

CSHB 192 (SA)

Item 2: Fiscal Note

Item 3: Research Request 89.137: Procedures for Resolving "Failed" Elections to State Legislatures

Item 4: Comments by Division of Elections January 31, 1989

Item 5: Alaska Statute: Sec. 15.20.081

Item 6: Memorandum from Rep. Goll re: HB 192 March 20, 1989

House Committee on State Affairs

RECAP OF
HB 192

Absentee Ballots/Court Ordered Elections

Received February 22, 1989
by The Judiciary Committee

Heard March 21, 1989

Committee Substitute adopted March 21, 1989

Passed Out of Committee March 21, 1989
5 Do Pass
2 No Recommendation

HOUSE COMMITTEE REPORT

(7)
Date Referred: February 23, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: _____

The STATE AFFAIRS Committee considered: HB 192

HOUSE BILL NO. 192 [ABSENTEE BALLOTS/COURT ORDERED ELECTIONS]
"An Act relating to absentee ballots, to certain court orders regarding elections, and to the governor's power to appoint legislators; and providing for an effective date."

RECOMMENDS:

[X] replacing with CS HB 192 (SA) [ ] the same title [X] a new title
[ ] the attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):
[ ] fiscal impact
[X] zero fiscal note
[ ] zero with analysis

APPROVES PREVIOUS:
[ ] fiscal note(s) published:
_____
[ ] zero fiscal notes(s) published:
_____

SIGNING DO PASS:

O.G. Parker
Eileen L. McClean
Bill Lee
Scott Hamilton
Wayne L. Dooley

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

Jim Barnett (no rec)
Lloyd Hackley (no rec)

O.G. Parker
Chairman's signature

Item 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 192
PUBLISH DATE: 2/23/89

FISCAL NOTE

REQUEST:

Revision Date: 3/20/89
Title: Absentee Ballots, certain court orders re: elections, and to the governor's power to appoint legislators
Sponsor: The Judiciary Committee
Requestor: The Judiciary Committee
SPONSOR: The Judiciary Committee

Agency Affected: Office of the Governor
BRU: Elections

Components: I - Elections
II - Primary & General

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Linda Edgeworth
Division: Division of Elections
Phone: 465-4611
Date:

Approved by Commissioner: Sandra Stuart
Agency: Division of Elections
Date: 3/20/89

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Item 3

RECEIVED

JAN 2 . 1989

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-1100
Mail Stop 1100
(907) 465-3991

January 24, 1989

MEMORANDUM

TO: Representative Peter Goll

FROM: Karen Oakley
Legislative Analyst

RE: Procedures for Resolving "Failed" Elections to State Legislatures
Research Request 89.137

You asked what constitutional and statutory provisions guided the procedures that were followed in resolving the extremely close race for House District 13, Seat A. In that election, the results of a recount were appealed to the Alaska Supreme Court, which set aside the results and ordered a new election. The temporary vacancy thereby created in the House was recently filled by appointment by the Governor. You asked why this case was handled as it was and how a similar case would be handled in other states.

This memo explains the constitutional and statutory provisions that guided the procedures followed in the most recent election for representative for House District 13, Seat A. A second memorandum to follow next week will describe how a similar situation would have been handled in other states.

THE 1988 ELECTION FOR THE REPRESENTATIVE FOR HOUSE DISTRICT 13, SEAT A

House District 13, which includes east Anchorage, is served by two representatives, both elected at large. In the 1988 General Election, Democrat David Finkelstein and Republican W.E. "Brad" Bradley vied for Seat 13-A in what turned out to be a very close election. A brief chronology of subsequent events follows:

- After the General Election, the Division of Elections certified Finkelstein as the winner based on counts of 3,549 votes for Finkelstein and 3,546 votes for Bradley, a three vote margin.

- At Bradley's request, a recount was conducted. The Division of Elections then certified Bradley as the winner based on counts of 3,563 votes for Bradley and 3,554 votes for Finkelstein, a nine vote margin.

- Upon certification of Bradley as the winner, Finkelstein filed an appeal with the Alaska Supreme Court.

- The Alaska Supreme Court referred the appeal to Superior Court Judge Joan Katz as a Special Master. Judge Katz concluded that because of various errors relating to the counting of ballots, the election should be set aside and a new election held.

- The Alaska Supreme Court reviewed the findings of Judge Katz. They remanded the case to the director of the Division of Elections with specific instructions regarding the counting of certain of the challenged ballots.[1] Nine absentee votes, which were found to be illegally cast and which had not been commingled, were to be deducted from the totals of the candidates for whom they were cast. After deducting these nine votes, a provisional winner was to be declared. The director was then to deduct, based on a proportionate formula, 51 illegally counted but commingled ballots from the totals of the candidates. If the provisional winner remained the winner aft · deduction of these 51 ballots, the director was to certify the provisional winner as the winner. If the provisional winner did not remain the winner, the director was ordered to promptly hold a new election.

- The director of the Division of Elections recounted the ballots as ordered by the court. After the first step in the recount process, Bradley was declared the provisional winner; after the second step, Finkelstein was the winner. Because the provisional result was overturned, a new election was ordered. Due to federal election requirements, a new election cannot be held any sooner than late March or early April.

- On January 17, 1989, Governor Steve Cowper appointed Democrat Ann Spohnholz to the House District 13-A seat until a new election can be held and a winner declared.

- On January 18, 1989, the House voted 27 to 12 that the Governor's appointee was qualified to be seated pending a new election.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This section discusses the constitutional and statutory provisions which determined the procedures followed in the present case involving the House District 13-A seat. Two topics are of concern: What procedure is followed when the results of a recount in a legislative race are appealed? What procedure is followed when there is a vacancy in the legislature because the results of an election have been set aside by court order?

---

[1] A copy of the court order is attached.

Appeal of a Recount of a Legislative Election

Because Finkelstein won the General Election by a margin of only three votes, Bradley was authorized, pursuant to AS 15.20.430, to request that the Division of Elections conduct a recount. When the results of that recount showed that Bradley was the winner, Finkelstein had two options for appealing certification of the recount result: Pursuant to AS 15.20.510, he could appeal to the Alaska Supreme Court, or, pursuant to AS 15.20.520, he could appeal to the Alaska House of Representatives.

The authority for appeal of a recount to the House is found in Article II, Section 12 of the Alaska Constitution, which states that the houses of each legislature are the judge of the election and qualification of its members. There is no similar constitutional right to appeal a recount of a legislative election to the courts; that right is found only in statute. Presumably, the 1960 legislature, which passed both AS 15.20.510 and AS 15.20.520, wished to provide two options for candidates and other citizens to appeal results of a recount.

Finkelstein chose to appeal to the Alaska Supreme Court. AS 15.20.510 specifies the duties and powers of the court in considering the appeal of a recount as follows:

> . . . The inquiry in the appeal shall extend to the questions whether or not the director has properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate . . . the vote should be attributed. The court shall enter judgement either setting aside, modifying, or affirming the action of the director on the recount.

The court order of January 11, 1989, which remanded the case back to the Division of Elections with specific instructions, essentially "set aside" the prior certification of the recount by the director.

Procedure for Filling Legislative Vacancies Due to a "Failed" Election

Article II, Section 4 of the Alaska Constitution addresses vacancies in the legislature. It provides:

> A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment.

Alaska Statutes 15.40.320 - 15.40.470 set forth the procedures to be followed when filling certain types of legislative vacancies. For the purposes of the Election Code, "vacancy" is defined in AS 15.60.010(34). This statute provides that a

> 'vacancy' exists in an office when the person elected or appointed to the office resigns, retires, dies, is recalled, is rejected by majority vote on the question at an election, is convicted of a corrupt practice, is removed by impeachment, or is expelled.

The type of vacancy that was created in the House of Representatives when the court set aside the results of the recount for House District 13, Seat A does not appear to be covered by the Election Code. Since no provision is made in law for filling this type of legislative vacancy, the constitution provides that the governor shall fill the vacancy by appointment.

For the types of legislative vacancies specified in AS 15.60.010(34), confirmation by a majority of the members of the political party of the predecessor in the same house as the predecessor is required pursuant to AS 15.40.330(a). In the present case, confirmation by the full house was apparently not required by statute. Article II, Section 12 of the Alaska Constitution provides, however, that

> . . . Each [house] is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members. . .

Thus, the vote of the house "confirming" the Governor's appointment of Ann Spohnholz to fill the vacancy until another election can be held was within the prerogative of the house to be "judge of the election and qualifications of its members."

I hope you find this information useful. If you need additional information, please let me know.

Attachment

Item 4

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P O BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

January 31, 1989

The Honorable Peter Goll
Alaska State Representative
P. O. Box AV
Juneau, Alaska 99811

Dear Representative Goll:

The work draft of a bill related to absentee ballots, court ordered elections, and the governor's power to appoint legislators was presented to the Division of Elections for our review and recommendations, in order that they might be considered prior to the bill being introduced. I appreciate the opportunity afforded us to participate in this process.

The scope of our comments is limited to the provisions of the draft bill relating directly to our responsibilities for implementation and general administration of the election process. We offer no suggestions or comments relative to the power of the legislature to judge the election or qualifications of its members, actions taken by the courts, or authority of the Governor to fill vacancies by appointment, as these issues are beyond the scope of our authority or expertise.

I hope that the comments enclosed are helpful to you and your committee. Please feel free to contact me if I or a member of my staff can be of further assistance.

Sincerely,

Sandra J. Stout

Sandra J. Stout
Director

Enclosures

01-A2LH

COMMENTS ON WORK DRAFT
6-0512A (COOK)
BY GOLL

Division of Elections
Sandra J. Stout
Director

January 31, 1989

"An Act relating to absentee ballots, to certain court orders regarding elections, and to the governor's power to appoint legislators."

The draft bill attempts to address the issues that were raised during the suit brought before the Supreme Court relative to the 1988 General Election for House District 13, Seat A.

Sections 1 and 2 deal with the Supreme Court's ruling in Finkelstein v. Stout, et. al., regarding ballots witnessed by two witnesses who each signed on a different date. The court ruled that these ballots should not have been counted. These sections are designed to clarify that the voter's certificate is to be signed in the presence of the witnesses, and that the witnesses sign their attestation at the same time and place. As indicated in testimony presented at the House Judiciary hearing on January 25, 1989, we believe that a statutory remedy is not necessary to satisfy the requirements of the court's ruling. We suggest that the remedy could be accomplished administratively through a re-design of the forms used for by mail voting, and through clarification of the instructions provided to voters and the witnesses as part of the by mail ballot packet. Attached are samples of the kinds of modifications which could be made which would satisfy the court's ruling.

Our major concern with the wording of Section 1 in the work draft, is that while the requirements are made very clear, they also create a potential "mine field" of opportunities for voters or their witnesses to err in completing their forms, resulting in the voters' ballots not being counted. Requiring that we provide three different places where different individuals must write in a date, may cause more confusion, rather than less, on the part of voters and their witnesses. As brought out in the Supreme Court testimony, by displaying three different lines on which dates can be written, it could be construe' or interpreted by the voters

and their "civilian" witnesses that different dates are actually permissible.

If the legislature deems it advisable to provide clarification in statutes in addition to administrative remedies already contemplated, we would suggest simplification within the work draft wording of Section 1 as follows:

Section 1. AS 15.20.081(d) is amended to read:

(d) Upon receipt of an absentee ballot by mail, the voter, in the presence of a notary public, commissioned officer of the armed forces including the National Guard, district judge or magistrate, United States postal official, registration official, or other person qualified to administer oaths, may proceed to mark the ballot in secret, to place the ballot in the small envelope, to place the small envelope in the larger envelope, and to sign the voter's certificate on the back of the larger envelope in the presence of an official listed in this subsection who shall sign as attesting official and shall date the signature. If none of the officials listed in this subsection is reasonably accessible, an absentee voter shall sign the voter's certificate in the presence of [HAVE THE BALLOT WITNESSED BY] two persons over the age of 18 years, who shall sign as witnesses and attest to the date on which the voter signed the certificate in their presence, and, in addition, the voter shall provide the certification prescribed in AS 09.63.020.

Based on this suggested wording, the Division, would also recommend that Section 2 relating to AS 15.20.203(b) be eliminated as subsection (2) sufficiently addresses the

issue of deficient witnessing as grounds for not counting a ballot cast by mail.

Sections 3 and 4 provide for the conduct of new elections should an election be set aside by the court. We note that the general wording of Section 3 relative to court action in recount appeals is carried forward in Section 4 to provide conformity relative to court ordered elections as a result of election contests.

The Division of Elections raises no objection to the general content of these sections except the stipulation that the new election be held within 30 days of the election order. In practical terms this time frame would be virtually impossible to implement. One of the major factors is the requirement that Alaska request preclearance from the United States Department of Justice prior to enforcing any change in election procedure under Section 5 of the Voting Rights Act of 1965, (42 U.S.C. 1973, et seq.). Special elections are considered changes in normal procedure, and are therefore subject to this preclearance requirement. The U. S. Department of Justice is allowed 60 days for their review. While expedited preclearance can be requested, granting of special handling is granted at the discretion of the Department. Therefore, every attempt should be made to accommodate the 60 day period. That means that the period of time between the order calling for a new election and election day is usually somewhat longer than 60 days because decisions regarding any special procedures which will be necessary in the conduct of the special election must also be addressed in the preclearance request.

The Division would recommend that the selection of the actual date remain somewhat discretionary in order that the Director can adequately review the scope of the court's order, seek legal counsel regarding any special procedures which may be necessary, and to determine the time necessary to provide adequate public notice, prepare and distribute election materials, and to appoint and train election personnel.

The Division would recommend the following relative to the scheduling of the new election:

The director shall promptly schedule a special election to be held not more than 90 days after the date of the court's order, and the director shall supervise the election in the general manner prescribed by this title.

Finally, with regard to an effective date for this bill if it is introduced, we note that the Division anticipates that many of our forms will have to be revised. Our current stock of supplies and forms were ordered prior to the 1988 statewide elections in quantities expected to last through December of 1989, at which time we would begin design and ordering for the next major election cycle. Because no statewide elections are anticipated for this year, and in order to avoid the expense of total replacement of current stock at this time, consideration might be given to postponing the effective date for Section 1 until January 1, 1990.

DATE: January 31, 1989

Sandra J. Stout
Director

Item 5

denied, 441 U.S. 60 L. Ed. 2d 376

t. [Repealed, § .061, 15.20.071.

representative. ay apply for an to the following

trict in which the ection up to and

AS 15.20.048(b);

to and including

oting station des- absentee voting

ian's designee on entitled to vote oard chairman in een designated. sonal representa- entee ballot shall al to the personal by the applicant sician or a state- applicant will be sical disability. absentee ballot to an absentee ballot roceed to mark the elope, to place the the voter's certifi- nal representative er. The voter must ot later than elec- ballot to the per- the election official

who provided the ballot. The absentee ballot must be returned to the election official not later than 8:00 p.m. on election day.

(d) Each election official shall keep a record of the name and signature of each personal representative requesting an absentee ballot and the name of the person on whose behalf the ballot is requested. The election official shall record the date and time the absentee ballot is provided and the time the ballot is returned to the election official.

(e) A candidate for office at that election may not act as a personal representative. (§ 87 ch 100 SLA 1980; am § 8 ch 85 SLA 1986)

Effect of amendments. — The 1986 amendment in subsection (c) in the second sentence deleted "the back of" preceding "the envelope" and substituted "witness and date the signature of the voter" for "sign as attesting witness and date his signature," added the third sentence, in the fourth sentence substituted "the" for "his" preceding "personal representative," in the present last sentence deleted "within three days from the date it is obtained but" following "election official," and deleted the former last sentence, concerning the untimely return of an absentee ballot.

NOTES TO DECISIONS

Former sections governing absentee ballot voting construed. — See Hammond v. Hickel, Sup. Ct. Order (File Nos. 4281, 4282, 4283, 4284, 4285, 4291), 588 P.2d 256 (1978), cert. denied, 441 U.S. 907, 99 S. Ct. 1998, 60 L. Ed. 2d 376 (1979).

Sec. 15.20.080. Date for application in person. [Repealed, § 231 ch 100 SLA 1980. For current law, see AS 15.20.061.]

Sec. 15.20.081. Absentee voting by mail. (a) A qualified voter may apply by mail to the director for an absentee ballot. The application shall include the address to which the absentee ballot is to be returned, the applicant's full Alaska residence address, and the applicant's signature. Persons residing outside the United States and applying to vote absentee in federal elections in accordance with AS 15.05.011 need not include an Alaska residence address in the application.

(b) An application for an absentee ballot by mail must be postmarked not less than ten days before the election for which the absentee ballot is sought. The absentee ballot application shall permit the person to register to vote under AS 15.07.070 and to request an absentee ballot for each state election held within that calendar year for which the voter is eligible to vote.

(c) After receipt of an application by mail, the director shall send the absentee ballot and other absentee voting material to the applicant by the most expeditious mail service. The material shall be sent as they are ready for distribution. The return envelope sent with the materials shall be addressed to the election supervisor in the district in which the voter is a resident.

(d) Upon receipt of an absentee ballot by mail, the voter, in the presence of a notary public, commissioned officer of the armed forces including the National Guard, district judge or magistrate, United States postal official, or other person qualified to administer oaths, may proceed to mark the ballot in secret, to place the ballot in the small envelope, to place the small envelope in the larger envelope, and to sign the voter's certificate on the back of the larger envelope in the presence of an official listed in this subsection who shall sign as attesting official and shall date the signature. If none of the officials listed in this subsection is reasonably accessible, an absentee voter shall have the ballot witnessed by two persons over the age of 18 years and, in addition, shall provide the certification prescribed in AS 09.63.020.

(e) An absentee ballot must be marked on or before the date of the election. Except as provided in (h) of this section, a voter who returns the ballot by mail shall use a mail service at least equal to first class and mail the ballot not later than the day of the election to the election supervisor for the election district in which the voter seeks to vote. The ballot may not be counted unless it is received by the close of business on the 10th day after the election. If the ballot is postmarked, it must be postmarked on or before election day. After the day of the election, no ballots shall be accepted unless received by mail.

(f) The director may require a voter casting an absentee ballot by mail to provide proof of identification or other information to aid in the establishment of the voter's identity as prescribed by regulations adopted under the Administrative Procedure Act (AS 44.62).

(g) The director shall maintain a record of the name of each voter to whom an absentee ballot is sent by mail. The record must list the date on which the ballot is mailed and the date on which the ballot is received by the election supervisor and the dates on which the ballot was executed and postmarked.

(h) An absentee ballot returned by mail from outside the United States or from a military APO or FPO address that has been marked and mailed not later than election day may not be counted unless the ballot is received by the election supervisor not later than the close of business on the 15th day following the election. (§ 87 ch 100 SLA 1980; am § 63 ch 6 SLA 1984; am §§ 9 — 11 ch 85 SLA 1986)

Effect of amendments. — The 1984 amendment made a series of technical and internal reference changes in subsection (d).

The 1986 amendment in subsection (b) in the first sentence deleted "more than six months nor" following "postmarked not" and substituted "ten" for "seven" and added the second sentence; in subsection (e) deleted "and attested" following "marked" in the first sentence, in the second sentence substituted "Except as provided in (h) of this section, a" for "If the" and "a mail service at least equal to first class" for "the most expeditious mail service" and "for the" for "in his," inserted "who" preceding "returns," deleted "he" following "ballot by mail" and added "in which the voter seeks to vote" at the end of the sentence, and added the third and last sentences of the subsection; and added subsection (h).

(2) a clerk or deputy clerk of a court of the State of Alaska or of the United States;

(3) a notary public;

(4) a United States postmaster; or

(5) a commissioned officer under AS 09.63.050(4). (§ 1 ch 37 SLA 1981)

Collateral references. — 58 Am Jur 2d, Oath and Affirmation, §§ 6 — 10

67 C.J.S., Oaths and Affirmations, §§ 5 — 7

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 ALR3d 483

Sec. 09.63.020. Certification of documents. (a) A matter required or authorized to be supported, evidenced, established, or proven by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making it (other than a deposition, an acknowledgment, an oath of office, or an oath required to be taken before a specified official other than a notary public) may be supported, evidenced, established or proven by the person certifying in writing "under penalty of perjury" that the matter is true. The certification shall state the date and place of execution, the fact that a notary public or other official empowered to administer oaths is unavailable, and the following:

"I certify under penalty of perjury that the foregoing is true."

(b) A person who makes a false sworn certification which the person does not believe to be true under penalty of perjury is guilty of perjury. (§ 1 ch 37 SLA 1981)

Collateral references. — 1 Am Jur 2d, Acknowledgments, §§ 32 — 79

1 C.J.S., Acknowledgments, §§ 83 — 145

Sec. 09.63.030. Notarization. (a) When a document is required by law to be notarized, the person who executes the document shall sign and swear to or affirm it before an officer authorized by law to take the person's oath or affirmation and the officer shall certify on the document that it was signed and sworn to or affirmed before the officer.

(b) The certificate required by this section may be in substantially the following form:

Subscribed and sworn to or affirmed before me at _____ on _____.

(date)

_____

Signature of Officer

_____

Title of Officer

Item 6

REPRESENTATIVE
PETER GOLL

P O BOX V
JUNEAU, ALASKA 99811
(907) 465-4925

STATE OF ALASKA
HOUSE OF REPRESENTATIVES

M E M O R A N D U M

TO: Representative H. A. "Red" Boucher, Chair
House State Affairs Committee

FROM: Representative Peter Goll

RE: HB 192, relating to absentee ballots, court ordered elections, and the governor's power to appoint legislators.

DATE: March 20, 1989

I requested that this bill be drafted in the aftermath of the Supreme Court's ruling in Finkelstein v. Stout, et. al.. One of the issues decided by the court was that ballots witnessed by two witnesses who signed on different dates should not have been counted.

Section 1 clarifies the procedure required for the witnessing of absentee ballots by two witnesses when a person qualified to administer oaths is not available. The new language requires that the voter's certificate be signed in the presence of two witnesses, and that the witnesses sign their attestation at the same time and place.

Section 2 of the bill adds a new subsection to existing law dealing with appeal from the decision of the Director of the Division of Elections after a recount. Present law provides that the "court shall enter judgment either setting aside, modifying, or affirming the action of the director on recount." The new section provides that if the court finds that it is not possible to ascertain whether certain ballots are valid or to which candidate or proposition the vote should be attributed, and the ballots, if counted, could change the outcome of the election, the court shall set aside the recount results and order a new election.

The court has had implied authority to order a new election when it "sets aside" an election. This bill merely provides statutory authority for such an action in both sections 2 and 3. Those sections also require that the election be held within 90 days from the date of the court's order.

Finally, sections 2 and 3 effectuate Art. II, Sec. 4 of the Alaska Constitution which provides:

> "A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment."

AS 15.40.320 - 15.40.470 set out the procedures to be followed when filling certain types of legislative vacancies. The type of vacancy which occurred when the Bradley - Finkelstein election was vacated is not presently covered by statute and this bill merely addresses that type of vacancy by providing that the governor shall appoint a qualified person to serve until the results of a new election are certified and the successor takes office.

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

January 31, 1989

The Honorable Peter Goll
Alaska State Representative
P. O. Box AV
Juneau, Alaska 99811

Dear Representative Goll:

The work draft of a bill related to absentee ballots, court ordered elections, and the governor's power to appoint legislators was presented to the Division of Elections for our review and recommendations, in order that they might be considered prior to the bill being introduced. I appreciate the opportunity afforded us to participate in this process.

The scope of our comments is limited to the provisions of the draft bill relating directly to our responsibilities for implementation and general administration of the election process. We offer no suggestions or comments relative to the power of the legislature to judge the election or qualifications of its members, actions taken by the courts, or authority of the Governor to fill vacancies by appointment, as these issues are beyond the scope of our authority or expertise.

I hope that the comments enclosed are helpful to you and your committee. Please feel free to contact me if I or a member of my staff can be of further assistance.

Sincerely,

Sandra J. Stout

Sandra J. Stout
Director

Enclosures

01-A2LH

COMMENTS ON WORK DRAFT
6-0512A (COOK)
BY GOLL

Division of Elections
Sandra J. Stout
Director

January 31, 1989

"An Act relating to absentee ballots, to certain court orders regarding elections, and to the governor's power to appoint legislators."

The draft bill attempts to address the issues that were raised during the suit brought before the Supreme Court relative to the 1988 General Election for House District 13, Seat A.

Sections 1 and 2 deal with the Supreme Court's ruling in Finkelstein v. Stout, et. al., regarding ballots witnessed by two witnesses who each signed on a different date. The court ruled that these ballots should not have been counted. These sections are designed to clarify that the voter's certificate is to be signed in the presence of the witnesses, and that the witnesses sign their attestation at the same time and place. As indicated in testimony presented at the House Judiciary hearing on January 25, 1989, we believe that a statutory remedy is not necessary to satisfy the requirements of the court's ruling. We suggest that the remedy could be accomplished administratively through a re-design of the forms used for by mail voting, and through clarification of the instructions provided to voters and the witnesses as part of the by mail ballot packet. Attached are samples of the kinds of modifications which could be made which would satisfy the court's ruling.

Our major concern with the wording of Section 1 in the work draft, is that while the requirements are made very clear, they also create a potential "mine field" of opportunities for voters or their witnesses to err in completing their forms, resulting in the voters' ballots not being counted. Requiring that we provide three different places where different individuals must write in a date, may cause more confusion, rather than less, on the part of voters and their witnesses. As brought out in the Supreme Court testimony, by displaying three different lines on which dates can be written, it could be construed or interpreted by the voters

and their "civilian" witnesses that different dates are actually permissible.

If the legislature deems it advisable to provide clarification in statutes in addition to administrative remedies already contemplated, we would suggest simplification within the work draft wording of Section 1 as follows:

Section 1. AS 15.20.081(d) is amended to read:

(d) Upon receipt of an absentee ballot by mail, the voter, in the presence of a notary public, commissioned officer of the armed forces including the National Guard, district judge or magistrate, United States postal official, registration official, or other person qualified to administer oaths, may proceed to mark the ballot in secret, to place the ballot in the small envelope, to place the small envelope in the larger envelope, and to sign the voter's certificate on the back of the larger envelope in the presence of an official listed in this subsection who shall sign as attesting official and shall date the signature. If none of the officials listed in this subsection is reasonably accessible, an absentee voter shall sign the voter's certificate in the presence of [HAVE THE BALLOT WITNESSED BY] two persons over the age of 18 years, who shall sign as witnesses and attest to the date on which the voter signed the certificate in their presence, and, in addition, the voter shall provide the certification prescribed in AS 09.63.020.

Based on this suggested wording, the Division, would also recommend that Section 2 relating to AS 15.20.203(b) be eliminated as subsection (2) sufficiently addresses the

issue of deficient witnessing as grounds for not counting a ballot cast by mail.

Sections 3 and 4 provide for the conduct of new elections should an election be set aside by the court. We note that the general wording of Section 3 relative to court action in recount appeals is carried forward in Section 4 to provide conformity relative to court ordered elections as a result of election contests.

The Division of Elections raises no objection to the general content of these sections except the stipulation that the new election be held within 30 days of the election order. In practical terms this time frame would be virtually impossible to implement. One of the major factors is the requirement that Alaska request preclearance from the United States Department of Justice prior to enforcing any change in election procedure under Section 5 of the Voting Rights Act of 1965, (42 U.S.C. 1973, et seq.). Special elections are considered changes in normal procedure, and are therefore subject to this preclearance requirement. The U. S. Department of Justice is allowed 60 days for their review. While expedited preclearance can be requested, granting of special handling is granted at the discretion of the Department. Therefore, every attempt should be made to accommodate the 60 day period. That means that the period of time between the order calling for a new election and election day is usually somewhat longer than 60 days because decisions regarding any special procedures which will be necessary in the conduct of the special election must also be addressed in the preclearance request.

The Division would recommend that the selection of the actual date remain somewhat discretionary in order that the Director can adequately review the scope of the court's order, seek legal counsel regarding any special procedures which may be necessary, and to determine the time necessary to provide adequate public notice, prepare and distribute election materials, and to appoint and train election personnel.

The Division would recommend the following relative to the scheduling of the new election:

The director shall promptly schedule a special election to be held not more than 90 days after the date of the court's order, and the director shall supervise the election in the general manner prescribed by this title.

Finally, with regard to an effective date for this bill if it is introduced, we note that the Division anticipates that many of our forms will have to be revised. Our current stock of supplies and forms were ordered prior to the 1988 statewide elections in quantities expected to last through December of 1989, at which time we would begin design and ordering for the next major election cycle. Because no statewide elections are anticipated for this year, and in order to avoid the expense of total replacement of current stock at this time, consideration might be given to postponing the effective date for Section 1 until January 1, 1990.

DATE: January 31, 1989

Sandra J. Stout
Director

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

April 3, 1989

The Honorable Peter Goll
Co-Chairman
House Judiciary Committee
P. O. Box V
Juneau, AK 99811

Dear Representative Goll:

We have appreciated the opportunity to work with you on House Bill 192. We support the bill, however, we would suggest the following amendment:

Lines 22 and 23: Delete the words "and date".

We believe that the date of the voter's signature and attestation by the witnesses is already adequately covered in lines 24 through 26.

Our objective is to make the witnessing requirement as simple as possible, and to eliminate any potential confusion we can. As was brought up in Finkelstein v. Division of Elections by displaying more than one line on which a date can be entered, one could construe that two different dates are acceptable.

Enclosed for members of the Judiciary Committee of samples of the voter instructions and the oath and affidavit envelope we have used in the District 13 Special Election. The clearly state the responsibility of the voter and the witness(es) that the signature of the voter must take place in the presence of the witness(es). Additionally, we have added an oath which the witnesses take at the time they attest to the voter's signature. We believe these measures adequately address the issues raised in the litigation.

We respectfully request your consideration of the amendment we propose.

Sincerely,

Linda Edgwatt

for Sandra J. Stoyt
Director

01-A2LH

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-9974

FIRST CLASS

BUSINESS REPLY MAIL
FIRST CLASS PERMIT NO. 12 JUNEAU, ALASKA 99811-9974
POSTAGE WILL BE PAID BY ADDRESSEE

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

*POSTMASTER — **OFFICIAL BALLOT** — DO NOT DELAY*

GENERAL INSTRUCTIONS
FOR VOTING BY MAIL
APRIL 4, 1989

HOUSE DISTRICT 13
SPECIAL ELECTIONS

Your ballot for this election must be voted, witnessed and mailed not later than **April 4, 1989.** If you mail your ballot on the last day, remind your postal clerk that the envelope must be postmarked not later than April 4, 1989.

VOTING YOUR BALLOT

1. Choose your candidate, and with a pen, mark an "X" in the box to the right of the name.
2. After you have marked your ballot, put it in the SECRECY ENVELOPE before placing it in the return mailer.
3. **THE LAW REQUIRES THAT YOU FILL OUT THE INFORMATION ASKED FOR ON THE RETURN MAILER. IF IT IS NOT COMPLETE, YOUR BALLOT WILL NOT BE COUNTED.**

VOTER OATH

1. To vote in this election, you must be a registered voter **AND** an Alaska resident. You are asked to give your physical residence address **WITHIN THE STATE OF ALASKA.** This means:
   - give your street address, highway name, milepost, trailer park and space number, tract or plat number. **DO NOT use a P.O. Box, PSC Number, Star or Rural Route Number as a "residence" address.**

(Instructions continued on reverse side)

IN THE SUPREME COURT OF THE STATE OF ALASKA

DAVID FINKELSTEIN,

Appellant,

v.

SANDRA STOUT, Director of the Alaska Division of Elections, and STEPHEN A. McALPINE, Lieutenant Governor of Alaska,

Appellees,

and

W.E. "BRAD" BRADLEY,

Appellee/ Intervenor.

ORDER[1]

No. S-3107

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices. [Rabinowitz, Justice, and Moore, Justice, dissenting.]

I. INTRODUCTION

This is an election recount appeal brought pursuant to AS 15.20.510(2). This court referred the appeal to the Honorable Joan M. Katz of the Superior Court as a Special Master on December 8, 1988. Judge Katz filed her report on January 5, 1989. The report contains a detailed analysis of the challenges from all parties and of the evidence submitted in connection with the

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1. An opinion, and partial dissenting opinions, will follow.

challenges.[2] The following introduction contained in the report sets the context of this case:

> In the general election of November 8, 1988, David Finkelstein and W.E. "Brad" Bradley vied for Seat A in House District 13. After the election, Finkelstein was certified by appellee Stout, Director of the Division of Elections, to be the winner of that race. The count was 3,549 to 3,546.
>
> At Bradley's request, a recount was conducted on December 1 and 2, 1988. Based on the recount, Stout certified that Bradley had defeated Finkelstein 3,563 to 3,554, a nine vote margin.
>
> In the course of the recount, Stout determined that 26 votes had been improperly counted. Finkelstein Ex. 1. The ballots had been commingled, rendering it impossible to ascertain for whom they had been cast. Based on the formula set forth in Hammond v. Hickel, 588 P.2d 256 (Alaska 1978), cert. denied, 441 U.S. 907 (1979), Stout proportionately reduced Bradley's vote total by 15.02 votes and Finkelstein's total by 9.98 votes. These reductions resulted only in narrowing the gap between the candidates to 3.96 votes. Having determined that the outcome of the election would not have been different based on the rejected ballots, Stout certified the election results premised on the recount totals demonstrating Bradley to be the prevailing candidate by nine votes.

Judge Katz concluded that because of various errors relating to the counting of ballots, the election should be set aside and a new election held. As explained herein, we conclude that a new

---

2. We express our gratitude to Judge Katz for her thoughtful and expeditious report.

election may be necessary depending on the count of nine illegally cast absentee ballots which were not commingled[3] and on the precise proportionate reduction formula employed by the Director.[4] For ease of reference we will adopt the same numbering system and terminology employed in the Master's Report.

II. SPECIFIC BALLOT CHALLENGES

A. Appellant's Challenges

1. Absentee ballot envelope oaths suggesting no permanent Alaskan residence

Finkelstein challenged fourteen absentee ballots in this group. Judge Katz accepted the challenges in three cases and rejected the other eleven. A majority of the court is of the view that none of the challenges should have been accepted. There was sufficient evidence in each case so that the voter's intent to indicate a new legal residence outside of the district was unclear. In the absence of a clear expression of intent to change a legal residence the residence cannot be considered to have been changed. Fischer v. Stout, 741 P.2d 217, 222-23 (Alaska 1987).

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3. See part II.A.7., infra.

4. See part II.B.3., infra.

2. Post-election affidavits
demonstrating non-residency

After the election and the recount, twenty-one voters signed registration affidavits stating that they were not residents of the district at the time of the election. The Director of Elections had counted the votes of these individuals and they have been commingled. Judge Katz declined to apply the proportionate reduction formula set out in Hammond v. Hickel, 588 P.2d 256, 260 (Alaska 1978), cert. denied, 441 U.S. 907 (1979) to these votes. We agree with this conclusion. In our view, this objection was untimely as it was raised after the recount was concluded.

3. Military post office
box "residences"

Eleven challenges were considered under this category. All of the challenges were rejected by Judge Katz. We concur.

4. Absentee ballot
lacking witness signature

One challenge was made under this category which was accepted by Judge Katz. On the place for the signature of the witness, with respect to this absentee ballot, there is only a postmark, with no signature. We agree with Judge Katz that this ballot should not have been counted.

5. Undated witness signatures

Three individuals cast absentee ballots on which the attesting official did not date his or her signature. Judge Katz accepted these three challenges. We disagree. The attesting official witness is required to date his or her signature. AS 15.20.081(d). However, we have held that this requirement is directory rather than mandatory and does not require invalidation of the ballot so long as the ballot in question is cast on or before election day. Hammond v. Hickel, 588 P.2d 256, 269 (Alaska 1978), cert. denied, 441 U.S. 907 (1979). The burden of proving ballot illegality in general and particularly that the ballot in question was not cast on or before election day is on the challenger. This burden was not carried as all three ballots were received by the Division of Elections prior to the election.

Alaska Statute 15.20.081(d) also requires voting in the presence of the attesting witness. While a majority of the court agrees with Judge Katz that this requirement is mandatory rather than directory, it is our view that Finkelstein did not carry his burden of showing a violation of this requirement.

6. Incomplete voter signature

One voter made a hand written mark which appears to be the beginning of a "K" in the voter signature blank of the voter oath on the back of the absentee ballot. A qualified attesting official witness attested that the oath was subscribed and sworn

to before the witness. Judge Katz ruled that this was not a signature as required by AS 15.20.081(d). She thus accepted the challenge made by Finkelstein. We disagree. The mark could be legally sufficient to serve as the voter's signature if that was the voter's intent. Fischer v. Stout, 741 P.2d at 225. Since the voter oath was properly attested as subscribed and sworn to, it is the view of a majority of the court that it has not been shown that the mark was not intended by the voter to serve as his signature.

7. Different witness dates

Thirty-two voters submitted absentee ballots which had been witnessed by two non-official witnesses on different dates. All of these votes were counted. However, the Division segregated nine of the total so that if they were counted illegally the votes can be directly deducted. The remaining twenty-three votes have been commingled. Judge Katz ruled that all thirty-two of these votes were properly counted. We disagree for the reasons that follow.

a.

Alaska Statute 15.20.081(d) sets out the procedures for voting absentee by mail. In relevant part, that section provides:

> Upon receipt of an absentee ballot by mail, the voter, in the presence of [an official] . . . may proceed to mark the ballot in secret, to place the ballot in the small

> envelope, to place the small envelope in the larger envelope, and to sign the voter's certificate on the back of the larger envelope in the presence of an official listed in this subsection who shall sign as attesting official and shall date the signature. If none of the officials listed in this subsection is reasonably accessible, an absentee voter shall have the ballot witnessed by two persons over the age of 18 years . . . .

In Fischer v. Stout, we interpreted this section to mean that the two non-official witnesses must be present when the voter signs the voter's certificate. We stated:

> AS 15.20.081(d) and 6 AAC 25.110(a) specify the classes of persons authorized to serve as an attesting officer. If no appropriate officer is available, the voter may sign the voter's certificate in the presence of two persons over the age of 18 years and have those two witnesses sign the attestation form.

741 P.2d at 223 (emphasis added, footnote omitted). Thus, we interpreted the statute to mean that the role of the two non-official witnesses was the same as the function of the attesting official witness set forth in the statute.

One purpose of this statute is to insure that the ballot was marked by the voter, and not someone else, in circumstances free from coercion. The Mississippi Supreme Court has said concerning a similar requirement:

> The certificate . . . in addition to certifying that the voter executed the affidavit, certifies the voter first exhibited a blank ballot which was not marked or voted before it was exhibited to the witness, and that the voter then retired out of the witness' presence but within his sight so that he could see that he voted but not how

> he voted, that no one was present as he marked his ballot, that the voter was not solicited or advised in voting, and finally, that after making his ballot in secret, the voter placed it in the envelope, closed and sealed the envelope in the certifying officer's presence, and then signed and made affidavit to the first certificate.
>
> It is thus clear that the Legislature intended both signatures to be on the envelope because there were subsequent requirements to best ensure the integrity of an absentee ballot.

Fouche v. Ragland, 424 So.2d 559, 561 (Miss. 1982).

Since one objective is to insure that the voter mark his or her own ballot and that the vote be uncoerced, it would make no sense to require secret voting in the presence of an official, while waiving the presence requirement when two non-official witnesses are used.

The legislative history of the present statute, AS 15.20.081(d), confirms the view that the ballot is to be voted in the presence of either an attesting official or two non-official witnesses. Prior to 1980, the predecessor section to AS 15.20.081(d) required only one attesting witness who need not be an official. The statute was, however, clear that voting had to take place in the presence of the attesting witness.[5] Following

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5. The former statute, AS 15.20.150, read as follows:

> CASTING VOTE BY PERSONAL REPRESENTATIVE OR BY MAIL. Upon receipt of an absentee ballot

(Footnote Continued)

our decision in Hammond v. Hickel the legislature amended the statute, enacting AS 15.20.081(d) in its present form. The legislative committee memo accompanying the amendment said:

> Requires a person authorized to administer an oath to witness the signature on an absentee ballot. In the instance that a qualified official is not available, two persons may witness the signature.

Alaska State Senate, Special Committee on Electoral Reform, Document dated April 23, 1980 (section by section analysis). There are two conclusions to be drawn from this comment. The first is that there was no intent to change the requirement of voting in the presence of an attestor. Had there been such an intent it would have been mentioned. Second, the two non-official witnesses were regarded as a substitute for the attesting official witness, if one was not available. What was to occur before the

---

(Footnote Continued)

> through a personal representative or by mail, the voter, whether in or outside the state, inthe presence of an attesting witness who is at least 18 years of age, may proceed to mark the ballot in secret, to place the ballot in the small blank envelope, to place the small envelope in the larger envelope , and to sign the voter's certificate on the back of the larger envelope in the presence of the above-listed official or described persons who shall sign as attesting witnesses. The voter may then return the ballot properly enclosed in the envelopes, by personal representative to the election official who provided the ballot or by the most expeditious mail service, postmarked not later than the day of the election, to the election supervisor in his district.

attesting official witness or the two non-official witnesses was regarded as identical.

b.

Having established what the law requires, the next step is to determine whether it was complied with. In the case of the thirty-two ballots containing witness signatures subscribed on different dates, it can be said with a high degree of confidence that the voter did not mark the ballot, place it in the small envelope, place the small envelope in the larger envelope and sign the voter certificate on the back of the larger envelope in the presence of both non-official witnesses. If this had been done, the dates following the witnesses signatures would be consistent. Thus, the certificates themselves rebut the presumption of regularity and demonstrate non-compliance with the law.

c.

The next question is whether the director properly counted these absentee ballots even though they were not cast in the presence of the non-official witnesses.

Alaska Statute 15.20.203 requires the district absentee counting board to examine each absentee ballot envelope to determine whether the absentee ballot has been properly cast. Part (b) of the statute provides as follows:

(b) An absentee ballot may not be counted if

> (1) the voter has failed to properly execute the certificate;
> (2) an official or the witnesses authorized by law to attest the voter's certificate fail to execute the certificate;
> (3) the ballot is not attested on or before the date of the election;
> (4) the ballot, if postmarked, is not postmarked on or before the date of the election; or
> (5) after the day of election, the ballot was delivered by a means other than mail.

The conditions set out in this statute are not exclusive. In Willis v. Thomas, 600 P.2d 1079, 1083 n.9 (Alaska 1979) we quoted the following language from Carr v. Thomas, 586 P.2d 622, 626 (Alaska 1978), which in turn quoted Rich v. Walker, 374 S.W.2d 476, 478 (1964) as follows:

> All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to affect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void.

The requirement of voting in the presence of the non-official witness is, to use the terms of the language quoted above, "of a character to affect an obstruction to the free and intelligent casting of the vote . . . or to . . . affect an essential element of the election . . . ." As noted earlier, AS 15.20.081(d) is designed to insure that the vote cast is that of

the elector and that it was cast in circumstances free from coercion. Moreover, this requirement protects the integrity of the ballot process itself. Non-compliance with the requirements of AS 15.20.081(d) risks the frustration of these fundamental principles.

In Fischer v. Stout, 741 P.2d 217, 223, we noted that signing in the presence of the attestor was a condition of ballot validity: "AS 15.20.081(d) provides that an absentee ballot will be valid only if the ballot envelope is signed by the voter in the presence of an attesting officer." This statement is dictum. It is, however, correct. Because the requirements of AS 15.20.081(d) serve both to protect the essence of free and intelligent voting and to safeguard the integrity of the ballot process, the requirements should be regarded as mandatory.

Desjourdy v. Board of Registrars, 266 N.E.2d 672 (Ma. 1971) is instructive. There twenty-two absentee ballots were not marked in the presence of a notary as required by Massachusetts law and the ballot envelopes were signed by notaries outside the presence of the voters. Id. at 676, 677. The Supreme Judicial Court of Massachusetts held that these ballots should not have been counted:

> The procedure followed violated [the applicable statute] which sets up significant safeguards to ensure that the ballot represents the will of the voter. Its violation results in more than simply a technical irregularity. As these ballots stand, we have no way of knowing whether they were in fact marked by

> those in whose names they were received and cast.

266 N.E.2d at 677 (citations omitted).

Kiehne v. Atwood, 604 P.2d 123, 133 (N.M. 1979) is another case where a court invalidated ballots because of attestation illegality. There the oaths on seven absentee ballots were notarized by the county clerk. The voters were not in the clerk's presence when they signed the documents. All of the voters testified that they wanted the county clerk to notarize their signatures. In invalidating the ballots, the court stated:

> [A]s to the affidavits in question, swearing to and subscribing by the voter and attesting to by a notary or other official are not mere technicalities. The statutes prescribing these duties are not simply directory. The acts called for are significant safeguards against fraud and mistake, are necessary to preserve the purity of our elections, and are mandatory duties.

Id. at 133.

In Fugate v. Mayor and City Council of Town of City of Buffalo, 348 P.2d 76 (Wyo. 1959), twelve absentee ballot affidavit forms were attested to by an election official not in the presence of the affiants. Id. at 79. These votes were held to be illegal. Id. at 85. See also McCavitt v. Registars of Voters of Brockton, 434 N.E.2d 620, 6289 (Mass. 1982) (ballots marked outside presence of notary held invalid).

The fact that the ballots in the present case were not cast in the presence of two non-official witnesses is due in part to the failure of the voter instructions on the voter oath form to state explicitly the requirement that the vote be cast in the presence of the witnesses. We have noted that errors "solely on the part of election officials" will not invalidate ballots. Willis v. Thomas, 600 P.2d 1079, 1087 (Alaska 1979) (registered voters' names not on voters' lists on election day). See also Fischer v. Stout, 741 P.2d at 223, 224. That observation, however, was not made where the official omission caused or contributed to a violation of a mandatory requirement, and we decline to extend it to such cases. A voter who has voted illegally has an interest in having his or her vote counted, and that interest stands on a high level where the source of the illegality lies with election officials. On the other hand, where the vote violates provisions designed to insure the integrity of the electoral process, the public has a supervening interest - that of fundamentally sound elections - which is protected by not counting illegal votes, regardless of the source of their illegality.

8. Ballots without postmarks received after the election

Four challenges were made under this category, all of which were rejected by Judge Katz. We concur.

9. Unregistered voter

The state has conceded that the absentee ballot of the unregistered voter in question should not have been counted. Judge Katz concurred and accepted the challenge. We concur as well.

10. Punchmark ballots

Involved here are challenges to fourteen votes for Bradley where the punchmarks were placed in the boxes for both Bradley and Finkelstein. Judge Katz accepted three of these challenges, namely to ballots 29, 20, and 30. Judge Katz was evidently under the impression that ballot 29 had been counted. We are advised by all counsel that in fact it was not counted and thus it should not be subtracted from Bradley's total. Ballots 20 and 30 were called by the Director for Bradley. Judge Katz, however, was of the view that the voters' intent could not be determined from the ballots. We disagree. In our view it is evident that the voting machine was voting low and that the voters in these cases intended to vote for Bradley.

A different situation exists with respect to ballot 27. Judge Katz recommended that this vote be attributed to Bradley. We disagree and accept Finkelstein's challenge. There is no consistent pattern on this ballot of the punchmarks being either high or low. The intent of the voter cannot be determined.

On all other ballots within this category we concur with the recommendations of Judge Katz which upheld the Director.

B. Intervenor's Challenges

1. Absentee ballots lacking voter signatures

Bradley contends that fifteen absentee ballots which were not counted because they were not signed should have been included. Judge Katz held that the Division was correct in refusing to include these ballots. We concur.

2. Special overseas absentee ballots

Three voters submitted special absentee ballots and later mailed regular absentee ballots which for various reasons were held invalid. Bradley argues that under these circumstances the original special ballots of these voters should have been counted. The Division disagreed and Judge Katz recommended that the decision of the Division be upheld. We concur.

3. Proportionate Formula

In order to determine whether the errors in counting commingled ballots might have affected the election, a proportionate formula was employed. See Hammond v. Hickel, 588 P.2d 256, 260, cert. denied, 441 U.S. 907 (1979). Bradley contends that the formula was not strictly proportional because it failed to include ballots which were cast for write-in candidates or which were blank with respect to the

Finkelstein-Bradley race. We agree that the principle espoused by Bradley is correct. We are, however, uncertain as to what the precise ratio is which results from application of this principle. That should be determined by the Director on remand.

III. CONCLUSION

The Director certified that Bradley had defeated Finkelstein by nine votes, 3,563 to 3,554. We have accepted one challenge which reduces Bradley's total to 3,562 votes (part II.A.10. of this order, ballot 27). There were fifty-one illegal ballots which were counted and commingled. (Twenty-six found by the Director, twenty-three in accord with part II.A.7. of this order, and one each for parts II.A.4. and II.A.9.) In addition, there were nine illegal ballots which were counted but not commingled. (Part II.A.7.)

This case is REMANDED to the Director with the following instructions:

1. The nine segregated ballots should be deducted from the vote totals of the candidate for whom they were cast. A provisional prevailing candidate will then be apparent.

2. The appropriate proportional reduction formula should be applied to the fifty-one illegally counted commingled ballots.

3. If application of the proportional reduction formula does not change the provisional result noted in step 1, the Director should certify the prevailing candidate forthwith.

4. If application of the proportional reduction formula would change the provisional result achieved in step 1, a new election should be held promptly.

Entered at the direction of the court this 11th day of January, 1989.

David A. Lampen

DAVID A. LAMPEN
Clerk of the Supreme Court

RABINOWITZ, Justice, joined by MOORE, Justice, dissenting.

I dissent from the court's holding that the director improperly counted 32 absentee ballots which had been witnessed by lay persons on different dates. Thus, I would affirm the certification of the Director of the Division of Elections that W.E. "Brad" Bradley is the winner of the election for Seat A in House District 13.

This court's special master rejected the state's contention that the dating of lay witnesses signatures is only directory. Instead the special master ruled that it is a mandatory aspect of absentee voting that lay witnesses be present when the ballot is cast and the voter certificate is executed. AS 15.20.081(d). The special master further reasoned that normally the failure to comply with a mandatory provision which has as its purpose establishing "presence" should prove fatal to these ballots. Nevertheless the special master concluded that the director properly counted these disputed absentee ballots. In so doing the special master reasoned as follows:

> However, once again, the Division has utilized procedures, in this case forms, that are seriously deficient. Option 2 under the witnessing affidavit provides in full:
>
> > If no authorized official is reasonably available, you may have the certificate witnessed by two persons over the age of 18.
> >
> > Witness Signature_____ Date_____

Witness Signature_____ Date_____

at (City/State or Country)_____

Finkelstein Ex. 147, p. 1. Unlike the official executing an affidavit under Option 1, the lay witnesses are not told what it is that they are to "witness." They may reasonably believe that it is sufficient if a person they know to be the individual whose name appears on the oath brings the certificates to them to sign, after the fact. Such an interpretation would be consistent with the type of certification required on permanent fund dividend application forms.

While the witness' certificate is simply unclear, the instructions to the voter on the secrecy envelope are actually misleading. The voter is directed to take the certain steps. The first four are summarized below. The fifth step is quoted as it appears in the instructions.

[1. & 2. Mark the ballot.]

[3. Turn the ballot over and vote the other side.]

[4. After all choices have been marked, put the ballots in the secrecy envelope.]

5. Complete and sign the VOTER OATH on the back of the return mailing envelope. Also have your oath WITNESSED, using OPTION 1 or OPTION 2 described on the back of the return mailing envelope.

Two additional steps regarding mailing follow.

These instruction suggest that the voting process itself need not be witnesses. There is, furthermore, nothing said to inform the voter that his or her oath should be executed in the presence of the lay witnesses. To negate the votes of 35 individuals on the grounds that they did not meet requirements never made known to them or their witnesses would constitute disenfranchisement of a most

> egregious sort. Under these circumstances, the ballots of these individuals were properly counted.

In my view the special master's analysis is in accord with this court's voting decisions. In Fischer v. Stout, 741 P.2d 217, 223, 224 (Alaska 1987) we said:

> In Willis we upheld the decision of a master to count the votes of two voters whose names did not appear on the voters list because the registrars failed to send their registration applications to the Division of Elections. 600 P.2d at 1087. As in Willis, the error with regard to Ms. Munoz's application was 'solely on the part of the election officials.' Id. Her vote should have been counted.

An additional point in Fischer concerned whether the ballot of Daryl Wallace should have been counted. In attempting to correct an error in the address given on his voter registration card, the voter checked the box cancelling his registration. In regard to the issue we said:

> Fischer argues that the voter registration card is confusing and that Mr. Wallace's ballot should have been counted. We agree . . . his vote should have been counted.1/

Of additional significance is that portion of our decision in Fischer v. Stout where in connection with a name change issue it was observed that:

> Accordingly, we will seek a const ıction of the phrase which avoids the wholesale disfranchisement of qualified electors. See

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1. Fischer v. Stout, 741 P.2d 217, 224 (Alaska 1987).

Carr v. Thomas, 586 P.2d 622, 626 (Alaska 1978) (footnote omitted).2/

The authorities alluded to above are reflective of this court's recognition that the right to vote is a fundamentally important right.[3] Our own precedents are also in accord with the view that "Absentee voting regulation should not be construed in a manner that unduly interferes with the exercise of this right by those otherwise qualified to vote."[4] In this regard the Supreme Court of Colorado further concluded that:

> Nor should the exercise of the voting right be conditioned upon compliance with a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters. A rule of strict compliance, especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing results in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit.5/

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2. Id. 741 P.2d at 225. In Carr this court noted:

> Courts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own and '[where] any reasonable construction of the statute can be found which would avoid such a result, the courts should and will favor it.'

Carr v. Thomas, 586 P.2d 622, 626 (Alaska 1978).

3. Erickson v. Blair, 670 P.2d 749, 754 (Col. 1983).

4. Id. 670 P.2d at 754.

5. Id. 670 P.2d at 755.

(footnote continued)

Given the importance of the right to vote, and our decisions which have refused to disenfranchise voters due to mistakes of election officials, I conclude that the special master correctly upheld the director's decision to count these 32 disputed absentee ballots.[6] As the special master noted the lay witnesses were given unclear instructions concerning the witness certificate. Additionally, the instructions to the absent voter were "actually misleading." In short, these inadequate directions failed to articulate the precise roles the voter and his or her witnesses were to play in the absentee voting process. Further, there is no indication in this record of fraud, voter coercion, intentional wrongdoing, or a pattern of similarity among the names of the witnesses who signed the witness certifications on these absentee ballots. In such circumstances I would not penalize the absentee voters for the failure of Alaska's election officials to furnish unambiguous instructions concerning the manner in which the absentee voter, and his or her

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(footnote continued)

The Erickson court went on to reject the rule of strict compliance and in turn adopted a standard of substantial compliance concluding that such standard "is adequate to the task of both preventing fraud in the elections and perserving the absent voter's right of suffrage against unnecessary and technical restrictions."

6. Application of Moore, 154 A.2d 631, 637-38 (N.J. 1959).

two lay witnesses, were required to carryout their respective roles in the absentee voting process.[7]

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7. Implicit in the resolution I would reach is my agreement with the state's contention that the requirements of AS 15.20.081(d) should be construed as directory, under AS 15.20.203(b)(2), for purposes of determining the consequences of any noncompliance on the part of lay witnesses in executing absentee voter certificates.

AS 15.20.510 THE SUPREME COURT REVIEWS CHALLENGES TO THE BALLOTS CAST AT A STATE SENATE ELECTION.

The Supreme Court of Alaska held that there was required to be a partial recount of the ballots counted. It also held that

(1) the director of elections was without any statutory or administrative authority to set deadlines for the submission by candidates of specific ballot challenges; while it agreed that the deadlines were probably "wise and expeditious, streamlining the recount and providing faster certification,", the court would not imply an authority to "arbitrarily limit the scope of a recount";

(2) a punch-card ballot that was signed by the voter could be counted; it was not, the court said, a "spoiled ballot" under AS 15.15.280 - 15.15.300 because it was "exhibited";

(3) a punchcard ballot that was marked with a pen could be counted, neither AS 15.15.360 (hand-marked ballot counting rules) nor AS 15.20.730 (rules for counting punch-card ballots) require a voter to use a punch-card machine if one is available;

(4) a residence described only as "Elmendorf Air Force Base" was sufficient to fix a voter's residence

since all of the base is within a single election district;

(5) a residence described as a post office box or private mail service is inadequate to fix a voter's residence within an election district unless additional information has also been provided;

(6) while a voter registered under AS 15.05.011 may vote only in a "federal" election, a person residing outside the United States is not required to register under that section and may instead register under AS 15.05.010 and vote in all state elections;

(7) absentee ballots that indicate a new permanent Alaskan residence outside the district may not be counted as to the candidates seeking election only within the district;

(8) that the failure of otherwise qualified attesting officers to identify the officer's authority does not invalidate the ballot; the presumption of validity may be rebutted only by an affirmative showing of a lack of authority; and

(9) the failure of state election registration officers to complete the registration does not disqualify the voter and the vote under a questioned ballot should be counted. Fischer v. Stout, 741 P.2d 217.

The Supreme Court of Alaska construed the law according to the apparent legislative intent. Legislative action is not recommended.