

HB327

HOUSE COMMITTEE REPORT

(11)

Date Referred: May 2, 1992

FURTHER REFERRALS:

Date of Committee Action: 5/4/92

The FINANCE Committee considered:

HB 327

HOUSE BILL NO. 327

PRIMARY ELECTIONS

"An Act relating to primary elections."

RECOMMENDATIONS:

be replaced with _____

CS HB 327 (JUD)

the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) 4/29/92
HSTA Committee

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<u>EP McKeon</u>	<input checked="" type="checkbox"/>	Ed McKeon			
<u>Mark Boyer</u>	<input checked="" type="checkbox"/>	Mark Boyer	<input checked="" type="checkbox"/>		
<u>Lay Brown</u>	<input checked="" type="checkbox"/>	Lay Brown	<input checked="" type="checkbox"/>		
<u>Ronald J. Jam</u>	<input checked="" type="checkbox"/>	Ronald J. Jam	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
<u>Mike Spavan</u>	<input checked="" type="checkbox"/>	Mike Spavan	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
<u>Fillmer</u>	<input checked="" type="checkbox"/>				

Mike Spavan EP McKeon
 CHAIRMAN'S SIGNATURE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 327

Revision Date: _____ Department Affected: Office of Gov.-Div. of Election
 Title: Primary Elections BRU: _____
 Component: _____

Sponsor: House State Affairs Committee

Requestor: House State Affairs Committee COMPONENT SERIAL NO.

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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS: N/A

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact because the funding is included in the FY93 House budget.

Prepared By: House State Affairs Committee Phone: 465-4859

Division: _____ Date: 4/29/92

Approved by Commissioner: Representative Gene Kubina, Chairman

Agency: House State Affairs Committee Date: 4/29/92

CS FOR HOUSE BILL NO. 327 (JUDICIARY)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to primary elections."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. INTENT. It is the intent of the legislature in enacting this Act to continue the open
4 primary to the maximum extent legally and constitutionally permissible.

5 * Sec. 2. AS 15.25.060 is amended to read:

6 Sec. 15.25.060. PREPARATION AND DISTRIBUTION OF BALLOTS. The primary
7 election ballot shall be prepared and distributed by the director in the manner prescribed for
8 general election ballots except as specifically provided otherwise for the primary election.
9 Except when (b) of this section otherwise requires, the [THE] director shall place the names
10 of all candidates who have properly filed in groups according to offices filed for, without regard
11 to party affiliation. The names for each office shall be rotated as provided for the general
12 election ballot. No blank spaces shall be provided on the ballot for the writing or pasting in of
13 names. The ballot prepared under this subsection shall be designated, prominently labeled,
14 and referred to as the "open primary ballot." In this subsection, "open" means that the

1 ballot is available to all qualified and eligible voters of the state.

2 * Sec. 3. AS 15.25.060 is amended by adding new subsections to read:

3 (b) If (1) the central committee or other governing body of a political party adopts a rule
4 that, notwithstanding AS 15.25.010 - 15.25.130, nominees of the party may not be chosen by a
5 primary election open to all voters, but rather shall be chosen by a primary election limited to
6 voters whose political affiliation or nonaffiliation is designated by the party rules; and (2) the
7 central committee or other governing body of the party delivers a copy of the rule to the director,
8 no later than March 1 of the year in which a primary election is to take place, the director shall
9 prepare a separate ballot listing only the candidates of that party, and shall authorize the
10 distribution of that ballot only to the registered voters who are eligible to vote in that party's
11 primary under the party rule. Candidates who are listed on a separate ballot under this subsection
12 may not be listed on the ballot described in (a) of this section. The names of the candidates for
13 each office shall be rotated as provided for the general election ballot, and no blank spaces shall
14 be provided on the ballot for the writing or pasting in of names. A ballot prepared under this
15 subsection shall be designated, prominently labeled, and referred to as the "(insert name of the
16 party whose candidates appear on the ballot) closed primary ballot."

17 (c) If at a primary election under AS 15.25.010 there is more than one ballot available,
18 a registered voter may choose which ballot the voter wishes to use. A voter may not be given
19 more than one ballot, and may not be given a ballot of a political party if, under the rules of that
20 party as delivered to the director under (b) of this section, the voter would not be eligible to vote
21 in that party's primary election.

Alaska State Legislature

Chairman
State Affairs
Committee

Legislative Council

Transportation
Committee

During Session:
State Capitol
P.O. Box V
Juneau, Alaska 99811
(907) 465-4859

During Interim:
P.O. Box 2463
Valdez, Alaska 99686
(907) 835-2111

Representative Eugene Kubina

SPONSOR STATEMENT FOR CSHB 327

At the present time, the Alaska statutes regarding primary elections are not consistent with the federal constitutional requirements which govern a party's right to conduct primary elections. CSHB 327 has been introduced as a vehicle by which to correct these inconsistencies.

Under current state law, Alaska has an open primary in which a voter may vote for any candidate on the ballot, regardless of party affiliation. However, now that the Republican party has voted to close its primary, Alaska law must be amended to reflect a party's ability to restrict who votes in its primary. In a U.S. Supreme Court ruling, [Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986)], it was decided that a political party's First Amendment right of association overrides state law. Alaska law must be changed to reflect that ruling.

Section One of CSHB 327 describes the intent of the legislature to continue the open primary system when it is legally and constitutionally possible to do so.

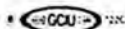
Section Two of CSHB 327 provides for the open primary to continue for those parties that do not close their primaries. It requires the Director of the Division of Elections to prepare an open primary ballot containing the names of all candidates whose parties choose to remain in the open primary system. This ballot may be distributed to any qualified voter in the state.

In the event that a party chooses to close its primary, Section Three would require the Director of Elections to prepare a separate ballot for the candidates of that party. This ballot would be named after the party whose candidates appear on it and would be available only to those voters allowed access by that party's rules.

CSHB 327 would also require that a party notify the Division of Elections of any change in their primary by March 1st of an election year in order to give the Division time to implement the changes. In order to support the one person-one vote standard, CSHB 327 states clearly that a voter may only be given one ballot.

— DISTRICT SIX —

• Chenega Bay • Chitina • Cooper Landing • Cordova • Hope • Moose Pass • Seward • Tatitlek • Valdez • Whittier •



DRAFT INSTRUCTIONS TO VOTERS

**BALLOT CHOICES AVAILABLE
IN AUGUST 25, 1992 PRIMARY ELECTION**

THE BALLOT EXAMPLES TO THE RIGHT DISPLAY THE BALLOTS AVAILABLE TO ALL ALASKA VOTERS, WHETHER REGISTERED TO SPECIFIC PARTIES, OR REGISTERED NON-PARTISAN, "OTHER," OR "UNDECLARED."

YOU MAY SELECT ONE BALLOT ONLY. YOU MAY VOTE FOR ONLY ONE CANDIDATE IN EACH CONTEST.

THE DEADLINE FOR VOTER REGISTRATION, INCLUDING AN ADDRESS CHANGE, IS 30 DAYS BEFORE ELECTION DAY, OR JULY 26, 1992, FOR THIS PRIMARY ELECTION.
AS 15.05.010

NOTICE:

ALASKA LAW PROHIBITS ELECTION BOARD WORKERS FROM DISCUSSING ANY POLITICAL PARTY, CANDIDATE OR ISSUE WHILE ON DUTY.
AS 15.15.160

FURTHER, DURING THE HOURS THE POLLS ARE OPEN, A PERSON WHO IS IN THE POLLING PLACE OR WITHIN 200 FEET OF ANY ENTRANCE TO THE POLLING PLACE MAY NOT ATTEMPT TO PERSUADE A PERSON TO VOTE FOR OR AGAINST A CANDIDATE, PROPOSITION OR QUESTION.

AS 15.15.170

ATTENTION VOTERS

**PRIMARY ELECTION
TUESDAY, AUGUST 25, 1992**

IF YOUR PARTY AFFILIATION ON YOUR VOTER REGISTRATION IS:

- ALASKAN INDEPENDENCE
- DEMOCRAT
- GREEN
- REPUBLICAN
- UNDECLARED
- NON-PARTISAN
- OTHER

YOU CAN VOTE A BALLOT WITH CANDIDATES FROM THE FOLLOWING PARTIES:

IF YOUR PARTY AFFILIATION ON YOUR VOTER REGISTRATION IS:

- REPUBLICAN
- UNDECLARED
- NON-PARTISAN

YOU CAN VOTE A BALLOT WITH CANDIDATES FROM THE FOLLOWING PARTIES:

↑
TOP C

**OFFICIAL PRIMARY
ELECTION BALLOT**

← ○ → □

THIS STUB TO BE REMOVED BY ELECTION BOARD

AKF01

STATE OF ALASKA Primary Election 8/25/92	
ALASKAN INDEPENDENCE	
DEMOCRAT	
GREEN	

↑
TOP C

**OFFICIAL PRIMARY
ELECTION BALLOT**

← ○ → □

THIS STUB TO BE REMOVED BY ELECTION BOARD

AKF01

STATE OF ALASKA Primary Election 8/25/92	
REPUBLICAN	



JOHN B. COGHILL
LIEUTENANT GOVERNOR

STATE OF ALASKA
P. O. BOX AA
JUNEAU 99811-0111
(907) 465-3920

April 22, 1992

Ms. Connie Zawacki, Chair
Republican Party of Alaska
P. O. Box 243732
Anchorage, Alaska 99524-3732

Dear Ms. Zawacki:

This letter is in response to your request to know what our current position is regarding the Primary Election. Secondly, you asked us to be specific about how the ballots would be printed.

The Alaska Statutes describe an open primary as being for the benefit of all the people of Alaska. If one party wishes to close their nomination process in the Primary Election, the logical position for us to take is to provide a separate ballot. If a second party wishes to close its nomination process, then we would provide them with their separate ballot. There would then be a third ballot for the parties who wish to remain with an open primary.

The ballots, then, would be as follows:

- A. One ballot with only Republican candidates listed
- B. One ballot with only Democratic candidates listed
- C. One ballot with Alaskan Independence candidates and Green candidates listed.

Our desire is to provide the people of Alaska with the clearest balloting process possible to prevent disenfranchising the electorate. The open primary has been in effect in Alaska for 25 years, and the clearest way to change that process through the "open classic" approach is to have separate ballots.

If you have any further questions, please let me know.

Sincerely,


John B. Coghill

cc: Joe Vogler, Alaskan Independence Party
Rhonda Roberts, Democratic Party of Alaska
Ronnie Roberts, Green Party of Alaska

DEMOCRATIC PARTY OF ALASKA

RESOLUTION 92-01

PRIMARY ELECTION PROCEDURE

WHEREAS the Alaska Democratic Party advocates maximum voter participation and wants to allow Alaskan voters the greatest choice; and

WHEREAS the Alaska Democratic Party does not want to encourage closed or restricted ballots; and

WHEREAS the Republican Party of Alaska in their State Convention of 1990, again in a special convention in 1991, and again at their State Convention in April 1992, has acted to close their electoral primary; and

WHEREAS the closed primary enacted by the Republican Party of Alaska severely limits voter choice and makes it possible for a voter to cast more than one ballot for the same office in the same election, violating the fair and reasonable election practice of one person, one vote; and

WHEREAS the Alaska Democratic Party strongly opposes any election process that allows voters to vote more than one time in any one election; and

WHEREAS the actions by the Republican Party of Alaska forces the Alaska Democratic Party to change our election rules

NOW THEREFORE BE IT RESOLVED THAT the Alaska Democratic Party Plan of Organization, Article X, General Rules and Procedures be amended by adding Section 17 as follows:

- 17.1 Alaska Democratic Party candidates may have their names appear on any ballot created by statute or regulation by the State of Alaska unless access to voting that ballot is restricted by party affiliation. Democratic candidates names cannot appear on any ballot which restricts access to voting that ballot by party affiliation.

.2 The various rules of the Alaska Democratic Party, including those relating to primary elections are severable. Any invalidity or un-enforceability of any rule or part thereof shall not affect the remainder of the rule or rules in any way.

BE IT FURTHER RESOLVED THAT the Alaska Democratic Party condemns the Republican Party of Alaska for limiting voter choice and creating confusion among the electorate and urges Alaskans to speak out on the Republican closed primary.

Unanimously adopted
in open meeting of the
EXECUTIVE COMMITTEE
DEMOCRATIC PARTY OF ALASKA
held in Juneau, Alaska
April 29, 1992

GREEN PARTY OF ALASKA 92-17

ELECTION OPTIONS RESOLUTION

WHEREAS Alaska's structure for elections is uncertain at this time, and

WHEREAS the Green Party needs to get preclearance from the Federal Government,

THEREFORE BE IT RESOLVED that the Green Party of Alaska will participate in the open blanket primary as it has been run for the last 20 years, allowing any voter to choose to vote for any candidate in the primary election, and

BE IT STILL FURTHER RESOLVED that if there is a non-partisan ballot that Green Party candidates shall be allowed to appear on such a ballot, and if there is a Republican-only ballot and a ballot of everyone but Republicans, the Green Party shall allow its candidates to be listed on the Non-Republican Ballot Only, and

BE IT STILL FURTHER RESOLVED that if parties are limited to listing their candidates on their own ballot that the Green Party of Alaska allow any Alaska voter access to the Green Party Ballot, so long as that voter does not vote the ballot of another political party, and

BE IT STILL FURTHER RESOLVED that the Green Party of Alaska Statewide council shall have the power to adjust proposals to meet the needs of the 1992 election according to the above-listed priorities.

Approved by Consensus
Green Party of Alaska Convention
Fairbanks, Alaska
~~April~~ 22, 1992
MAK

7.251

The duties of a State Party Standing Committee shall be fixed by the State Committee and all Standing Committee Chairs shall work at the direction of the State Chair.

7.22

A Chair may appoint pro tem, or the membership of any Alaskan Independence Party organization may elect, a moderator to chair a meeting.

Article VIII. SEVERABILITY

The various rules of the Alaskan Independence Party, including those relating to the primary elections, are severable. Any invalidity or unenforceability of any rule or part thereof shall not effect the remainder of these Bylaws in any way.

8.01

Between conventions of the Alaskan Independence Party, the State Committee may adopt temporary rules or clarifications that are necessary to insure that the bylaws and actions of the Alaskan Independence Party are consistent with state and federal law.

Article IX. PRIMARY ELECTIONS

The Alaskan Independence Party (AIP), believing in the principle of voting for the individual, do establish an open primary election which lists all parties' candidates for office, consistent with applicable law.

9.01

Any registered voter who has not voted another primary ballot may vote in the Alaskan Independence Party primary.

9.02

The fact that a voter has voted in the Alaskan Independence Party Primary Election shall not disqualify that voter from voting in the primary election of any other political party or parties, where that voter's participation in the primary election of the Alaskan Independence Party is authorized or permitted by the rules of the other party, or by the statutes of the United States or the State of Alaska.

Article X. MISCELLANEOUS

7.26

Terms implying or denoting gender in these bylaws or in any other official correspondence of the Alaskan Independence Party, such as Chair, Vice Chair, his, him, himself, and he, are used solely for brevity and ease of reference and are not to be construed as referring to any particular gender, masculine or feminine.

ARTICLE XIV - PRIMARY ELECTIONS

Section 1. Eligible Voters

Only registered Republicans, registered Independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

Section 2. Republican Designation

No person may use the word "Republican" on any ballot or in any campaign as part of a description of himself as a candidate unless that person is a candidate of the RPA, selected according to the Rules of the RPA.

Section 3. Maximize Voter Participation in Primary Elections

(a) Any voter qualified to vote in the Republican Party primary may vote in that election, regardless of whether or not that voter has voted in the primary election of any other party.

(b) The fact that a voter has voted in the Republican Party primary election shall not disqualify that voter from voting in the primary election of any other political party or parties, where that voter's participation in the primary election of other parties is authorized or permitted by the rules of the other party or parties, or the statutes of the United States or the State of Alaska.

Section 4. Implementation of Primary Election

The SCC, or the EC in the event that there is insufficient time to convene the SCC, may adopt any and all additional rules, regulations, interpretations, clarifications, and the like, which are necessary or desirable to implement the Republican primary election in accord with other rules adopted at this Special Convention (held March 2, 1991), and pursuant to Article XIV of the Rules of the RPA. Any action taken by the Central or Executive Committee under the provisions of this rule shall have the same force and effect as if adopted by this Convention.

Section 5. Prior Registration Requirement

In order to be a candidate in any Republican Party primary election, a person must have been a registered voter of the Republican Party of Alaska for a continuous period of six (6) months immediately prior to the filing deadline for the primary election.

MEMORANDUM

State of Alaska

Department of Law

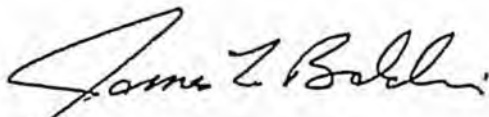
TO: Elizabeth A. Ziegler
Deputy Director
Division of Elections
Office of the Governor

DATE: December 3, 1991

FILE NO.: 663-92-0209

TEL. NO.: 465-3600

SUBJECT: Implementation of
closed primary
procedures



FROM:

James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

663-92-0209

OFFICE OF ELECTIONS

You requested our advice concerning a number of issues that are related to proposals by the major political parties in the state to close their primaries to members of competing political parties. Because you need this memorandum to help prepare for a meeting of the House State Affairs Committee to be held on November 13, 1991, we limit our opinion to your question concerning the power of the director of the division of elections to implement a closed primary by administrative regulation. It is your intent to administer a primary election that is consistent with the right of free association accorded to political parties even if provisions of state law applicable to the administration of primary elections permit a voter to cast a ballot that sets out candidates without regard to party affiliation.

You propose to establish new primary election procedures at the earliest possible date. You would like to implement new primary procedures early in the 1992 general election year. However, your timetable may be too aggressive to assure that the new procedures are properly supported by statute and regulation. The legislature would be unable to convene, consider, and enact amendments to the election code if there is not sufficient authority to accomplish your goals.

Your concern is whether the director may proceed in the absence of amendments to the election code to change primary election procedures and prescribe the form of the ballot so that the political parties control who may nominate candidates. We believe that it is prudent for the division to expeditiously pursue a resolution of the closed primary question both legislatively and by administrative means. Unlike the previous administration, you wish to acquiesce in the desire of a political party to nominate candidates using a primary ballot that may be voted only by persons admitted by the party. While we believe that there remains some question as to the proper interpretation of the rules of the Republican Party of Alaska, you can clarify this interpretation through the adoption of administrative regulations. However, before this can be done, it must be determined whether the division

has sufficient authority to adopt regulations that establish a closed primary election.

Existing law requires the division to prepare the primary ballot in a certain manner. The election code provides:

The primary election ballot shall be prepared and distributed by the director in the manner prescribed for general election ballots except as specifically provided otherwise for the primary election. The director shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation.

AS 15.25.060 (emphasis added). The foregoing provision appears to preclude the use of separate ballots that are limited solely to the candidates of a single political party. It must be remembered that this provision was added to the election code to end the practice of presenting a ballot that required voters to vote only for the candidates of one political party. Elsewhere, the election code grants the director of the division elections the power to

prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections.

AS 15.15.030. The code also grants the director the power to "determine the size of the ballot, the type of print, necessary additional instruction notes to voters, and other similar matters of form not provided by law." AS 15.15.030(1).

The provisions of the election code that are specific to the form of the primary election ballot are probably void when the members of a political party desire to restrict those who may associate with them for the purpose of nominating candidates for public office. The United States Supreme Court reaffirmed the First Amendment rights of political parties to be free from statutes that restrict their power to associate with whomever they wish when nominating candidates. Tashjian v. Republican Party of Connecticut, 479 U.S. 208. (1986).

There appears to be no overriding state interest that can be articulated to perpetuate an open primary system when recognized political parties adopt conflicting rules. However, it is unclear how the Tashjian decision will be applied to the type of open "blanket" primary required by existing state law. It is possible, though not probable, that a court would find that an open "blanket"

primary does not burden associational rights. Until there is a federal case on point, this eventuality cannot be ruled out. It is also possible that AS 15.25.060 can be construed to apply only when political parties have not exercised their constitutional rights to limit access to the nominating process. One thing remains certain; it would be advisable to amend AS 15.25.060 to allow for the implementation of associational rules of political parties that do not infringe upon legitimate state interests in the administration of elections.

Even though Tashjian places heavy emphasis on the associational rights of political parties, we believe there may be an overriding state interest in having the parties act promptly and with clarity in the way they define who may associate with them. The U.S. Supreme Court has acknowledged that "it is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); see also, American Party of Texas v. White, 415 U.S. 767, 779 (1973). State law may interfere with a political party's internal affairs when necessary to ensure that elections are fair and honest. Storer v. Brown, 415 U.S. 724, 730 (1973).

We reviewed a draft committee substitute currently under consideration by the House State Affairs Committee. This bill would require political parties to adopt and deliver any party rules that would materially affect the nominating process by March 1 of the primary election year. The purpose of imposing a deadline for action is to permit preclearance of the change in voting requirements by the U.S. Justice Department, allow for voter education, and give adequate time to the division of elections to implement the changes. While these interests appear to be compelling, it is possible that a minor, recognized political party could contest the validity of the March 1 date. There is precedent for the proposition that early deadlines for the declaration of candidacy improperly restrict free speech and associational rights of nonparty candidates. Sigler v. State, 3AN-88-8695 (Alaska Super. Mem. of Decision, Sept. 12, 1988). The harm encountered in Sigler was that the early declaration date improperly distanced nonparty candidates from the time of spirited public debate and the resultant attention of voters. Perhaps a minor recognized party could argue that it should be allowed to adopt rules which permit it to nominate candidates by convention held at or near the filing deadline for candidates for reasons similar to those advanced by Sigler. We believe that the concept of a deadline is supportable as a reasonable burden calculated to promote the electoral process. However, the division must fully document reasons for the cut-off date. The documentation will be essential in upholding the state's burden of proving that there is basis for the restriction.

Based on the foregoing, we conclude that existing provisions of the election code specifying the content of the primary election ballot are not operative when a political party opts to close its primary. In the absence of a specific statute, sufficient authority exists for the director to administratively implement new procedures for a closed primary. The basic standard applicable to the power of an administrative agency to adopt regulations is set out in the Administrative Procedure Act (APA). The APA provides:

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. The director is given broad legislative power to adopt administrative regulations. She may "adopt regulations under the Administrative Procedure Act (AS 44.62) necessary for the administration of elections." AS 15.15.010. Given our determination that Tashjian makes AS 15.25.060 inoperative under certain conditions, it appears that AS 15.15.010 grants sufficient authority to implement a closed primary by administrative regulation. See, e.g., Denardo v. State, 741 P.2d 1197 (Alaska 1987) (regulation requiring independent gubernatorial candidates to submit nominating petitions signed by one percent of qualified voters held to be valid when adopted after court found statutory requirement void).

We would be remiss in our duties if we did not point out that contrary legal arguments could be made. It could be argued that the existence of AS 15.25.060 makes it plain the legislature did not intend to commit the formulation of the primary ballot to agency discretion. Support for this argument can be found in AS 15.15.030(1), which allows the director to determine matters of ballot form "not provided by law." The intent to commit to agency discretion is a necessary element for determining whether a regulation is valid. Kelly v. Zamarello, 486 P.2d 906, 909 (Alaska 1971). We believe that a court would defer to the broad grant of legislative rule-making power conferred by AS 15.15.010, especially if the legislature fails to amend the election code after given a reasonable opportunity to do so. However, the fact that the regulations could be questioned justifies the effort to have the legislature take action to amend the election code.

Elizabeth A. Ziegler
Our File #: 663-92-0209

December 3, 1991
Page 5

We hope this memorandum will assist you in presenting your comments to the House State Affairs Committee.

JLB:ck

MEMORANDUM

State of Alaska

Department of Law

TO: Hon. John B. "Jack" Coghill
Lieutenant Governor

DATE: February 28, 1992

FILE NO.: 663-92-0407

TEL. NO.: 465-3600

SUBJECT: Whether the Tashjian case
requires implementation of
the Republican Party rules

441 C.L.L.
FROM: Charles E. Cole
Attorney General

You have asked whether the state must modify its primary election to implement rules adopted by the Alaska Republican Party. These rules conflict with state election law by limiting the voters who can participate in the selection of Republican nominees at the primary election. We believe that, in light of recent decisions of the United States Supreme Court, the First and Fourteenth Amendments to the United States Constitution require implementation of these rules.

I. State law and Republican Party rules

Alaska has a "blanket" primary, in which all voters select the nominees of all parties. ^{1/} Under AS 15.25.010 -- 15.25.130, all candidates of all political parties run on one ballot, and any registered voters, regardless of party affiliation, can vote for any candidate. The only restriction is that voters may cast only one vote for each office on the ballot. The party candidate receiving the most votes is placed on the general election ballot as the party's nominee for that office.

In 1990, the Republican Party of Alaska adopted a rule providing that

[o]nly registered Republicans, registered Independents [sic], and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S.

^{1/} In a blanket primary, all voters receive the same ballot, and may vote for one candidate for each office, regardless of party. In an open primary, a voter may vote for candidates of only one party, but may choose which party regardless of affiliation. In a closed party, only voters affiliated with one party may participate in that party's primary. See Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L.J. 116, 117 n.2 (1984).

Hon. John B. "Jack" Coghill
Lieutenant Governor
Our file #663-92-0407

February 28, 1992

Page 2

Representative, and members of the State
Legislature. 2/

After the 1990 general election, the party adopted several related rules, and submitted all of its rules to the United States Department of Justice for preclearance, as required by the federal Voting Rights Act, 42 U.S.C. § 1973c. The Department of Justice approved them, and the party submitted the rules to you in May 1991.

These rules are obviously incompatible with the state blanket primary law. That incompatibility has given rise to your opinion request.

II. Tashjian and Democratic Party v. Wisconsin

In Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), the Supreme Court recognized that the associational rights of political parties, as protected by the first amendment, can take priority over state election laws. In Tashjian, the Republican Party of Connecticut had adopted a party rule allowing nonaffiliated voters to vote in the party's primary. This rule conflicted with Connecticut statutes, which provided for a closed primary. Thus, those statutes limited the "group of voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates." 479 U.S. at 215-16 (citation omitted). The Court did not find the limitation justified by any compelling state interests. Accordingly, the Court held that the limitation constituted an unconstitutional burden on the Party's associational rights protected by the First and Fourteenth Amendments to the U.S. Constitution.

The Court rejected Connecticut's proffered justification that implementation of the rule would possibly result in greater administrative costs for purchase of voting machines, training of officials, and potentially for printing of additional ballot materials. Id. at 218. It further found that "[t]he State's legitimate interests in preventing voter confusion and providing

2/ Because of the shortness of time between the party's adoption of the rule and the 1990 primary election, the state declined to implement the rule for that election. The state successfully defended a federal court lawsuit initiated by the party. Doyle v. State, No. A90-248 Civil. The district court denied the party's motion for a preliminary injunction, requiring the state to give effect to the party's rules. The case was subsequently dismissed by the party.

for educated and responsible voter decisions in no respect 'make it necessary to burden the [Party's] rights.'" Id. at 221-22.

The Party rules in question here are different from those in Tashjian, in that the Alaska Republican Party seeks to narrow the field of voters who may participate in choosing Republican nominees. However, Democratic Party v. Wisconsin, 450 U.S. 107 (1981) (one of the major underpinnings of Tashjian), did address a situation involving a party rule that was more restrictive than the state statute. Wisconsin concerned that state's presidential primary election. While Wisconsin law let the parties choose the method of selecting delegates to the national conventions of the national parties, it required that those delegates vote according to the outcome of the state's open presidential primary. This law conflicted with the National Democratic Party's rule that, "restricted participation in the delegate selection process in primaries or caucuses to 'Democratic voters only who publicly declare their party preference and have that preference publicly recorded.'" 450 U.S. at 118. Because of this conflict, the national party announced its intent not to seat the Wisconsin delegates. The state therefore brought suit in state court, seeking a declaratory judgment that the state law was constitutional and that the national party had to seat those delegates. See Democratic Party v. Wisconsin, 287 N.W.2d 512 (Wis. 1980) (upholding the state law).

The United States Supreme Court invalidated the provision of the state law that infringed on the party's nominating procedure. It held that the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State," and that freedom of political association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 121-22 (citations omitted).

III. Discussion

We believe, in light of Tashjian and Wisconsin, a court would hold that the Republican Party's rule limiting participation in the selection of the party's candidates must be implemented, notwithstanding its conflict with Alaska's blanket primary statutes. 3/ Indeed, Alaska's law impacts the Alaska

3/ We have found no authority on point on this question. This lack of authority is not surprising, since only Alaska and Washington have blanket primaries. See generally Noe, North

Republican Party's associational interests to a far greater degree than did the Connecticut statutes at issue in Tashjian. 4/ Moreover, when Tashjian is read in conjunction with Wisconsin, where an open primary was at issue, the necessity to implement the Republican rule becomes even clearer. 5/

Moreover, in Tashjian the majority expressed concern that wide-open party rules might infringe on the rights of other parties: "Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes [upheld in other cases] were designed to prevent." 479 U.S. at 224 n.13. Alaska's blanket primary laws do precisely what the Court said that a party might not be able to do constitutionally.

As part of the debate surrounding this issue, it has been suggested that the modification of the blanket primary may infringe on a voter's constitutional right to vote. Voters not affiliated with a party, however, do not have constitutional rights to participate in that party's primary election if either state law or party rules provide for a closed primary. Nader v. Schaffer, 417

3/ (...continued)

Carolina General Assembly Amends Election Laws to Allow Unaffiliated Voters to Vote in Party Primaries, 66 N.C. L. Rev. 1208 (1988) ("there is a strong argument that both the open and blanket primary are unconstitutional").

4/ The dissent in Tashjian did not agree that Connecticut's law was unconstitutional. However, it observed that "[t]he ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom." 479 U.S. at 235-36 (Scalia, J., dissenting). This indicates to us that even the dissenters would not uphold Alaska's blanket primary law against a Republican Party challenge.

5/ We believe that both blanket primaries and open primaries impact a party's freedom of association claim. In both, members of one party may take part in the selection of another party's candidates.

Hon. John B. "Jack" Coghill
Lieutenant Governor
Our file #663-92-0407

February 28, 1992

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F. Supp. 837 (D. Conn), aff'd mem., 429 U.S. 989 (1976); Ferency v. Secretary of State, 476 N.W.2d 417 (Mich. App. 1991). 6/

It has also been suggested that Tashjian would not apply in Alaska because our law, unlike Connecticut's, does not require registration by party. We do not believe that a court would find this argument convincing. First, nothing in Tashjian suggests that Connecticut's statutory registration requirement was essential to the Court's decision. Second, although Alaska law does not require, or even specifically authorize, voter registration by party, there has been a long-standing practice of allowing such registration; indeed, since at least 1968, the registration forms have provided a place to indicate party registration. Third, Alaska law does implicitly authorize party registration: AS 15.25.030(a)(16), enacted in 1980, requires that a "member of a political party" seeking to become a candidate of that party in the primary attest "that the candidate is registered to vote as a member of the political party whose nomination is being sought."

Nor is Tashjian inapplicable because Alaska law, unlike Connecticut's, does not regulate political parties. Although Alaska law does not regulate the parties, it recognizes them as viable entities and confers rights on them. See, e.g., AS 15.25.056 (authorizing party central committee or party district committee to replace unopposed incumbent candidate for renomination if candidate dies or is disqualified or incapacitated); AS 15.25.110 (authorizing same committees to certify party nominee on general election ballot as incapacitated); AS 15.25.130 (authorizing party, through same committees or as otherwise provided in party bylaws, to replace party nominees on general election ballot who have died, withdrawn, resigned, or become disqualified or incapacitated).

We wish to comment on one other aspect of the Republican Party rules. In our opinion the state does not have to enforce Article XIV, section 3, of those rules, "A Rule to Maximize Voter

6/ Both Nader and Ferency involved primaries that were closed by state law, rather than by party rule. Tashjian makes it clear that this difference is without constitutional significance. The Court specifically states that "the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." 479 U.S. at 215 n.6. Significantly, the Court was distinguishing Nader and Rosario v. Rockefeller, 410 U.S. 752 (1973), where the restrictions on nonmembers were the product of state law, rather than party choices.

Hon. John B. "Jack" Coghill
Lieutenant Governor
Our file #663-92-0407

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Participation in Primary Elections" (allowing Republicans and independents to participate in the Republican primary even if they have also voted in the blanket primary and/or some other party's primary).

The party apparently believes that it can validly extend its association to voters who meet the requirements of the 1990 rule regardless of whether those voters also participated in the selection of other party candidates. However, several U.S. Supreme Court decisions hold that the Party's federal constitutional interest in associating with those voters is outweighed by the compelling interest of the state in "confining each voter to a single nominating act." Storer v. Brown, 415 U.S. 724, 743 (1974); see also American Party of Texas v. White, 415 U.S. 767, 785 (1974), ("Electors may vote in only one party primary"). Given the well-established nature of the "one nominating act only" principle, and the absence, to our knowledge, of any jurisdiction allowing a voter to participate in multiple primaries, we feel quite confident that the Alaska Supreme Court would reach the same conclusion as a matter of Alaska constitutional law.

If we may be of further assistance, please let us know.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 24, 1992

Senator Rick Halford
Chairman, Senate Judiciary Committee
State Capitol, Room 103
Juneau, Alaska 99811

Re: Composition of ballot under the
party rules

Dear Senator Halford:

You have asked how the primary election ballot should be prepared if a) the Democratic and Republican party primary participation rules currently in effect are both still in effect on May 1, or b) if the Republican rule is still in effect, but not the Democratic rule.¹ A clear answer to this question cannot be given because of the ambiguous wording of the party rules, the lack of implementing statutes or regulations, and the prospect for litigation. However, in our opinion, if both rules remain in effect, it would be reasonable to implement the primary with the following three ballots:

- a Republican ballot containing the candidates of all four parties; only Republicans and independents (whether registered as independents or providing no designation at all) may cast this ballot;
- a Democratic ballot containing the Democratic, Alaska Independence, and Green candidates; any registered voter may cast this ballot;
- a third ballot (the "statutory primary" ballot) containing Alaska Independence and Green candidates; any registered voter could cast this ballot.

If the Democrats withdraw their rule, there should be two ballots -- the Republican ballot described above, and the statutory primary ballot, which would now also contain Democratic candidates. Regardless of the number of ballots, no one may vote more than one ballot.

¹ Both parties' rules have been precleared by the U.S. Department of Justice, as required by Section 5 of the federal Voting Rights Act of 1965, as amended. 42 U.S.C. § 1973c.

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
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FAX: (907) 456-1317

P. O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
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Both the Republican and Democratic party rules are poorly drafted and ambiguous, and could be given a different interpretation.² However, our interpretation involves the least possible departure from the primary election statutes (AS 15.25.010 - 15.25.130).

Adherence to the Republican and Democratic party rules, even when inconsistent with the state blanket primary laws, is required by the decision of the United States Supreme Court in Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). See 1992 Inf. Op. Att'y Gen. (Feb 28.; 663-92-0407). However, Tashjian requires departure from state statutes only to the extent necessary to protect a party's associational rights under the First and Fourteenth Amendments to the United States constitution. Since all state officials are bound to uphold the laws of the state, it follows that ambiguities in party rules should be interpreted so as to be consistent with state statutes, rather than inconsistent.

The state's primary election laws, AS 15.25.010 -- 15.25.130, contemplate maximum participation by the electorate in a primary election: any qualified voter, regardless of party registration (or non-partisan status), can vote for any candidate of any party. Both parties' rules would require some modification of this principle. However, the modification should be minimized and harmonized with existing law. This means allowing voters the broadest choices possible consistent with party rules.

In the case of the Republican ballot, this reasoning requires that candidates of all parties appear on the Republican ballot. The Republican rule provides that voters registered as members of other parties may not vote for Republican candidates in the primary. The rule does not provide that persons wishing to vote in the Republican primary are restricted to voting only for Republican candidates. In Doyle v. State, A90-248 Civ. (D. Alaska), a lawsuit by the Republican Party of Alaska seeking to

² Lieutenant Governor Coghill, who by statute appoints and supervises the director of the Division of Elections, interprets the rules differently. In a recent letter to Republican Party chair Connie Zawacki, he stated that there would be three separate ballots, one with only Republican candidates, one with only Democratic candidates, and one (the statutory primary ballot) with Alaska Independence and Green candidates. As our letter to you indicates, we do not agree with the lieutenant governor's construction of the party rules. We believe his interpretation may depart from the election code to a greater degree than is necessary to satisfy the associational rights of the political parties without ceding to them control over state election procedures.

have its rule instituted for the 1990 primary election, we argued that the rule should be implemented in the manner just discussed. Because U.S. District Judge Russell Holland dismissed the suit on procedural grounds, he did not reach the issue of whether the state's proposed implementation was correct.

The Democratic rule is even more vague than the Republican rule; it states only that there will be a Democratic primary. Nothing in this rule can be remotely read as restricting the Democratic ballot to candidates seeking the nomination of the Democratic Party.

With respect to the Democratic rules, the party chair, Rhonda Roberts, stated that the rules were adopted only to protect the party against the Republican party's expressed desire, in its rules, that qualified voters be able to vote both the Republican ballot and the ballot of any other party allowing Republicans and independents to vote. According to Ms. Roberts, if the Division of Elections will not allow a voter to cast more than one ballot in the primary election,³ a separate Democratic ballot would be unnecessary; i.e., the Democrats would simply want to appear on the statutory primary ballot. However, the Democratic rule does state unequivocally, "There is established a Democratic Party primary in Alaska." In our opinion there must therefore be a separate Democratic ballot, even if it contains all candidates (except Republicans) and is open to all voters. If the Democratic Party wishes to have its candidates appear solely on the statutory primary ballot, it must rescind its rule.

In the absence of judicial intervention, the Division of Elections is the agency responsible by law for preparing the primary ballot. As discussed above, in note 2, the lieutenant governor has given notice of a different interpretation of the party rules than we have set out here. We will discuss the

³ Two Alaska statutes prohibit a voter from voting for more than one candidate when only one person can be elected. AS 15.15.360(a)(4) and 15.20.730(b)(5) (both made applicable to primary elections through AS 15.25.090). Two other statutes prohibit voters from voting more than once in an election. AS 15.15.210 (person whose right to vote is questioned must state in affidavit that person has not voted at same election); AS 15.15.410 (upon determining that person has voted more than once in same election, director of Division of Elections shall notify attorney general). Finally, the United States Supreme Court has stated that a state has a compelling interest in limiting a person to a single nominating act. Anderson v. Celebreeze, 460 U.S. 780, 802 n.29 (1983); American Party of Texas v. White, 415 U.S. 767, 785 (1973).

Senator Rick Halford
Chairman, Senate Judiciary Committee

April 24, 1992
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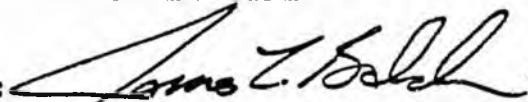
contents of the opinion with him and work toward a uniform application of the party rules to the procedures for primary elections set out in the election code.

Please feel free to contact us if we can be of further assistance.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By:



James L. Baldwin
Assistant Attorney General

cc: Lt. Gov. Coghill
Charlot Thickstun, Director, Division of Elections
Joe Vogler, Alaskan Independence Party
Rhonda Roberts, Democratic Party of Alaska
Ronnie Rosenberg, Green Party of Alaska
Connie Zawacki, Republican Party of Alaska

JLB:lmk



Official Business

Alaska State Legislature

From Gruenberg

Pouch V
State Capitol
Juneau, Alaska 99811

April 22, 1992

Hon. John B. "Jack" Coghill
Lt. Governor
State of Alaska
Juneau, Alaska 99811

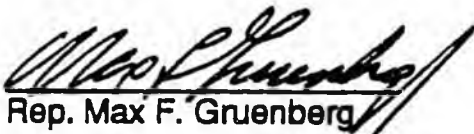
Dear. Lt. Governor Coghill:

Enclosed are two opinions from the Division of Legal Services discussing whether the lieutenant governor and the Division of Elections have the legal authority to adopt regulations implementing party rules closing the primary election. The opinions conclude that the lieutenant governor and the division lack the authority to do so under present law.

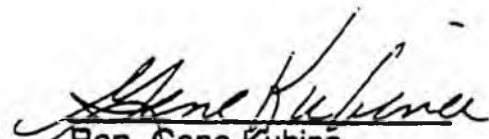
The legislature has before it two bills that would deal with the primary closure problem in very different ways. Both are constitutional under Tashiian. However we have not passed either of these proposals.

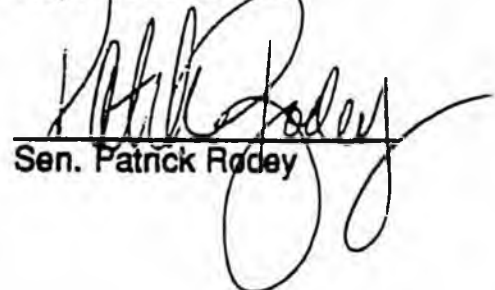
Unless and until the legislature passes legislation authorizing the implementation of restrictive party rules, we respectfully request you not to exceed your statutory authority.

Sincerely,


Rep. Max F. Gruenberg


Rep. Mike Miller


Rep. Gene Kubina


Sen. Patrick Rodey

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

March 13, 1992

SUBJECT: Present Ability of Lieutenant Governor to Promulgate Elections Rules That Complied With Tashjian Decision (Work Order No. 7-LS1188)

TO: Representative Max Gruenberg
Attention: Stan Robbins

FROM: Robert Glennon Casey *RGC* 3-13-92
Legislative Counsel

I. INTRODUCTION

You have asked for a discussion of the authority of the Lieutenant Governor of Alaska and the Division of Elections to adopt regulations to make Alaska's elections procedures comply with the U.S. Supreme Court's ruling in Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

II. SUMMARY

The Lieutenant Governor and the Division of Elections probably lack authority to adopt regulations to make Alaska's primary election law comply with the Tashjian decision. No statute or constitutional provision appears to give the Lieutenant Governor or the Division of Elections the power to adopt regulations that make new election law.

The details behind this conclusion are provided in section IV of this memorandum.

III. FACTS

Alaska law currently provides for a "blanket" primary. In a blanket primary, all voters receive the same ballot and each voter may vote for any candidate regardless of party affiliation.

The Republican Party of Alaska, however, has adopted a conflicting rule that closes the voting for Republican candidates in primary elections to all voters except

Republicans and independents. Furthermore, the United States Supreme Court ruled in the Tashjian case that such a party rule is a constitutionally-protected exercise of the right of association. When such a party rule conflicts with a state election statute, it is the statute which must yield.

There had been some question as to whether the Tashjian case applied in Alaska, but a February 28, 1992 memorandum of Attorney General Charles E. Cole concluded that Tashjian was applicable and that "a court would hold that the Republican Party's rule limiting participation in the selection of the party's candidates must be implemented, notwithstanding its conflict with Alaska's blanket primary statutes."

IV. DISCUSSION

The difficult practical question is how to implement the Republican Party's rule. Neither the Lieutenant Governor nor the Division of Elections would appear to have the power to adopt regulations that would meet the participation requirements of the Republican Party rule.

1. The Requirement that Rule-Making Be Authorized. Under Alaska law, administrative rule-making requires a statutory or constitutional grant of authority. For example, Alaska's Administrative Procedure Act (APA) provides that "[t]o be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law," AS 44.62.-020.

Court decisions have been consistent with that formulation. For example, in Rutter v. State, 668 P.2d 1343, 1349 (1983) the Alaska Supreme Court ruled that "[a]dministrative agencies are creatures of statute, deriving from the legislature the authority for the exercise of any power they claim." In a similar vein, the decision of State v. Alyeska Pipeline Service Co., 723 P.2d 76, 78 (Alaska 1986) ruled that "[r]egulations promulgated by an executive department must be authorized by statute."

In sum, it would seem that the Lieutenant Governor or the Division of Elections could only adopt regulations accommodating the Republican Party rule if some provision of law gave the Lieutenant Governor or the Division of Elections the power to do so.

2. The Lieutenant Governor and the Division of Elections Lack Authorization. There does not appear, however, to be any provision in either the Alaska Constitution or the Alaska Statutes which would authorize the Lieutenant Governor or the Division of Elections to adopt regulations that essentially made new primary election law.

For example, art. III, § 7 of the Alaska Constitution only states that the lieutenant governor "shall perform such duties as may be prescribed by law and as may be

delegated to him by the governor." That provision does not authorize adoption of regulations that would change the essential nature of Alaska's primary election system.

Statutory provisions also would not authorize the lieutenant governor to adopt such regulations. AS 44.19.020 states that "[t]he lieutenant governor shall administer state election laws," and AS 15.10.105(a) provides that "[t]he lieutenant governor shall control and supervise the division of elections," but these statutes only authorize administrative functions of a ministerial nature. They would not authorize adoption of regulations that were inconsistent with Alaska's primary election statutes.

In this connection, the Alaska Supreme Court ruled in State v. Anderson, 749 P.2d 1342, 1344 (1988) that the validity of a regulation partly depends on "whether it directly conflicts with any other statute." Regulations from the lieutenant governor implementing a closed Republican primary would conflict with existing statutes. As Attorney General Cole noted in his February 28, 1992 memorandum:

Alaska has a "blanket" primary, in which all voters select the nominees of all parties. Under AS 15.25.010 - 15.25.130, all candidates of all political parties run on one ballot, and any registered voters, regardless of party affiliation, can vote for any candidate. The only restriction is that voters may cast only one vote for each office on the ballot.

[footnote omitted]

A regulation that conflicted with AS 15.25's provision of an open primary would not be statutorily authorized.

The same principle would apply to regulations that the Division of Elections might adopt under AS 15.07.070, AS 15.10.020, 15.10.030, AS 15.15.010, 15.15.060, 15.15.350, 15.15.361, and 15.15.370. Regulations adopted pursuant to those enabling sections **must be** consistent with Alaska's existing statutory provision of a blanket primary. In **any** event, the subject matter of regulations authorized by those statutes does not include the qualification of a voter to vote for particular candidates in a primary election.

In sum, the lieutenant governor and Division of Elections lack constitutional or statutory authority to provide by regulation for a closed Republican primary election.

Representative Max Gruenberg
March 13, 1992
Page 4

V. CONCLUSION

The lieutenant governor and the Division of Elections probably lack the authority to conform Alaska's primary elections to the Tashjian decision's requirements by means of regulation.

RGC:pl
92-171.plm

DIVISION OF LEGAL SERVICES

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240 Main Street, Suite 500
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MEMORANDUM

March 30, 1992

SUBJECT: Supplemental Discussion of Regulations
Implementing Closed Primary Elections
(Work Order No. 7-LS1188)

TO: Representative Max Gruenberg
Attention: Stan Robbins

FROM: Robert Glennon Casey *RGC 3-30-92*
Legislative Counsel

I. INTRODUCTION

This memorandum reconsiders the opinion expressed in an earlier memorandum from the Division of Legal Services, dated March 13, 1992. That earlier memorandum concluded that neither the Lieutenant Governor of Alaska nor the Division of Elections possessed the authority to adopt regulations that conflicted with the open (or "blanket") primary system provided in AS 15.25.010 - 15.25.130.

II. SUMMARY

The original opinion stands. Regulations would be unauthorized for reasons given in the previous memorandum and also for reasons given below.

III. DISCUSSION

The impetus for this discussion is a December 3, 1991 memorandum of the Department of Law. Pages 4 and 5 of that memorandum indicated that under Denardo v. State, 741 P.2d 1197 (Alaska 1987) the Division of Elections might possess authority to adopt regulations authorizing a closed primary. (Copies of the Denardo decision and the memorandum of the Department of Law accompany this memorandum.)

Denardo, however, seems to stand for the opposite conclusion. The Denardo ruling probably means that such regulations are unauthorized if they conflict with either a currently effective statute or a currently effective statement of legislative intent.

In Denardo, a regulation was upheld, but it is important to examine the reasons why the court reached its result in that case. The Denardo court upheld the regulation because: (1) the regulation did not conflict with any statute in effect at the time the regulation was promulgated, (2) there were clear statements of legislative support for the substance of the regulation (thereby enabling the court to conclude that the regulation was within an express or implied delegation of rule-making authority under AS 15.15.010), and (3) the regulation was neither arbitrary nor unreasonable. The first two of these criteria would not attend an immediate adoption of regulations that facilitated closed primary elections.

First, the statute requiring an open (or "blanket") primary election, AS 15.25.060, continues to be in effect. Unlike the statute in Denardo, this statute has not been judicially invalidated. It is beside the point that a court would probably rule AS 15.25.060's mandate of open ("blanket") primary election balloting unconstitutional in certain factual settings. Statutes that are "probably unconstitutional" continue to be in effect until a court rules them unconstitutional. AS 15.25.060 is a currently effective statute, and "agency rules cannot amend a statute," Denardo, 741 P.2d at 1198.

Second, the Alaska Legislature has not stated any support for closed primary balloting. Absent such a statement of support, it is difficult to find in AS 15.15.010 an express or implied delegation of authority to adopt regulations that would conflict with AS 15.25.060.

There was legislative support for the regulation in Denardo, but the facts of that case differed from the current situation: (1) the legislature had passed a law that accorded with the regulation subsequently adopted by the Division of Elections, (2) the regulation merely filled the period prior to the statute's effective date, and (3) the regulation did not conflict with any currently-effective statute.

In the present case, by contrast, the Alaska Legislature has not enacted a law supportive of closed primaries. Instead, the legislature's only statement appears to be AS 15.25.060 - a statute opposed to closed primary balloting and certainly not a delegation of power to adopt a contrary regulation. So, the facts that enabled the Denardo regulation to be upheld are reversed in the present case, and regulations from the Division of Elections would be unauthorized.

· IV. CONCLUSION

In conclusion, a regulation facilitating closed primary election balloting would conflict with a currently effective statute and would also lack any expression of legislative support. Under both Denardo and the authorities cited in this office's previous memorandum, such a regulation is not authorized.

Daniel R. DENARDO, Appellant,

v.

STATE of Alaska, Appellee.

No. S-1679.

Supreme Court of Alaska.

Sept. 11, 1987.

Independent gubernatorial candidate brought action challenging Alaska Division of Elections' refusal to place his name on the ballot. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortall, J., sustained Division's actions, and appeal was taken. The Supreme Court, Compton, J., held that: (1) Division's action, in promulgating rule regarding number of names needed on nominating petitions for independent candidates, did not constitute improper attempt to amend an unconstitutional statute, and (2) regulation as to number of names required on petitions was valid.

Affirmed.

1. Elections §21

Statutes §133

After state statute requiring independent gubernatorial candidates to submit nominating petitions signed by qualified voters equal in number to at least three percent of number of votes cast in preceding general election was declared unconstitutional, State Division of Elections' promulgation of a one percent rule did not constitute an impermissible attempt to amend an unconstitutional statute; three percent provision became null and void upon its being declared unconstitutional, and Division's action was taken when legislature did not act to amend statute until after nomination petition deadline for gubernatorial election had passed. AS 15.25.160.

2. Elections §21

After state statute requiring independent gubernatorial candidates to submit nominating petitions signed by qualified voters equal in number to at least one percent of those voting in previous general

Alaska Rep. 737-741 P.2d-16

election was declared unconstitutional, State Division of Elections' promulgation of a one percent rule was consistent with delegating statute and reasonably necessary for administration of state elections; legislature did not immediately act to amend statute after three percent provision was declared unconstitutional, but had previously expressed its desire to place some limitation on access to the gubernatorial ballot. AS 15.25.160.

3. Action §6

Superior court properly determined that issue of write-in gubernatorial candidate access to a voter information pamphlet was not ripe for decision; despite allegation that State Division of Elections had informally indicated that such candidates would not have access to the pamphlet, there was no indication that any attempt to wage a write-in campaign had actually been made.

Daniel R. DeNardo, Anchorage, pro se.

Susan D. Cox, Asst. Atty. Gen., Grace Berg Schaible, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

Daniel R. DeNardo claims that the Alaska Division of Elections (Division) improperly refused to place his name on the ballot for the 1986 gubernatorial election. The division based its action on DeNardo's failure to comply with then § AAC 25.160 (Eff. 12/19/85), which required independent gubernatorial candidates to submit nominating petitions signed by qualified voters equal in number to at least one percent of those voting in the previous general election. DeNardo asserts that the regulation was invalid. The superior court sustained the actions of the division. We affirm.

L. VALIDITY OF 6 AAC 25.160.

Alaska Administrative Code Title 6, Section 25.160, was adopted pursuant to authority delegated to the director of elections by AS 15.15.010. That statute provides that the director "may issue regulations under the Administrative Procedure Act ... necessary for the administration of state elections." DeNardo does not claim that the director failed in any way to comply with the provisions of Alaska's Administrative Procedure Act (APA) in promulgating 6 AAC 25.160. Nor does DeNardo challenge the substance of the regulation or the legislature's power to enact such a rule.¹

Instead, DeNardo claims that the division had no power "to make election laws." DeNardo argues that 6 AAC 25.160 was a void attempt by the division to amend former AS 15.25.160, which this court held unconstitutional in *Vogler v. Miller*, 651 P.2d 1, 5-6 (Alaska 1982) (*Vogler I*). AS 15.25.160 provided that a gubernatorial candidate who did not represent a political party² had to be nominated by petition signed by qualified voters equal in number to at least three percent of the number of votes cast in the preceding general election. Ch. 88, § 5.58, SLA 1960; ch. 100, § 138, SLA 1980; see also *Vogler I*, 651 P.2d at 2.

In *Vogler I*, we recognized as legitimate the state's justifications for the statute, including the desire to eliminate voter confusion that would result from having a multitude of candidates on the ballot. 651 P.2d at 4. We nevertheless found that none of these explanations justified the increase from the equivalent of a one percent³ to a three percent signature requirement. Since the state failed to show that a one percent requirement would be any less effective in achieving the purported goals of the statute, we found that the state had not shown the compelling interest required

1. Indeed, the legislature has since enacted a statutory one percent signature requirement. AS 15.25.160.

2. "Political party" is defined as an organized group of voters that had polled a certain percentage of votes in the preceding gubernatorial election. Prior to 1983, the statutory percentage was 10%. This was found to be an uncon-

to save the three percent provision. *Id.* at 5-6.

The statute was not amended to comport with the one percent rule implicitly approved in *Vogler I* until June 6, 1986, five days after the filing deadline for nonparty candidates' nomination petitions for the 1986 gubernatorial election. Chapter 88, § 46, SLA 1986; AS 15.25.160. When it became clear that the legislature would not act in time, the division of elections promulgated 6 AAC 25.160 to govern the 1986 election.

[1] DeNardo relies on *State v. Marshall*, 633 P.2d 227, 233-34 n. 19 (Alaska 1981), in support of his argument that the division's adoption of 6 AAC 25.160 was in effect an attempt to amend an unconstitutional statute. This reliance is misplaced. It is clear, as DeNardo argues, that agency rules cannot amend a statute. See *id.* But, contrary to DeNardo's apparent position, the fact that the legislature has at some point enacted legislation dealing with a particular topic does not forever foreclose the legislature from delegating authority to an agency to make rules affecting the same topic.

This court has soundly rejected such an argument. In *Kelly v. Zamarella*, 486 P.2d 906 (Alaska 1971), we stated:

When administrative rule-making is based upon clear authority from the legislature to formulate policy in the adoption of regulations, the rule-making activity takes on a quasi-legislative aspect. We have held that, under proper standards, such delegations of legislative power to administrative agencies are constitutional. *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960).

Id. 489 P.2d at 909.

In *Boehl*, the following language appears:

tional restriction on access to the ballot. *Vogler v. Miller*, 660 P.2d 1192, 1195-96 (Alaska 1983) (*Vogler II*). In 1986, the percentage was lowered to 3%. Ch. 85, § 34, SLA 1986.

3. The statute had previously required 1000 signatures, slightly less than 1% of the votes cast in 1978. *Vogler I*, 651 P.2d at 5 n. 10.

[P]rovision is made [in the Alaska Constitution] for creation by the legislature of regulatory agencies that are not under the supervision of the executive. Alaska Constitution, Art. 111, §§ 22, 24, 26. Such agencies would obviously have the function of exercising authority and control in places where the legislature has decided not to exercise all the authority and control itself. This would be a delegation of legislative power and the constitution provides for it.

Id. 349 P.2d at 588 (footnote integrated into text).

The three percent provision of former AS 15.25.160 became null and void upon this court's decision in *Vogler I*, 651 P.2d at 5-6. The division's subsequent regulatory enactments could not "amend" a void statute. Rather, the division stepped in to address a question regarding which the legislature implicitly decided not to exercise all of its authority and control.

Thus DeNardo's argument that the division generally has no power to make election laws is without merit. The legislature is constitutionally empowered to delegate legislative authority to regulatory agencies under certain circumstances.

[2] The question remains whether the specific regulation actually adopted by the division is valid. Resolution of this question involves a two-part inquiry: first, is the regulation consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency,⁴ and second, is the regulation reasonable and not arbitrary. *Kelly*, 486 P.2d at 911.

The relevant delegating statute provides: The director [of elections] shall provide general administrative supervision over the conduct of state elections, and may issue regulations under the Administrative Procedure Act ... necessary for the administration of state elections.

AS 15.15.010. The delegation of authority is further limited by the APA:

4. This aspect of review insures that the agency has not exceeded the power delegated by the

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. Thus, 6 AAC 25.160 was valid if it was consistent with relevant statutes and reasonably necessary for the administration of state elections. After *Vogler I*, there was no effective statute governing the number of signatures required for a nominating petition. Moreover, the legislature had previously expressed its desire to place some limitation on access to the gubernatorial ballot by enacting former AS 15.25.160. We recognized this as a legitimate concern in noting "[t]hat 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate." *Vogler I*, 651 P.2d at 5, quoting *Lubin v. Pansik*, 415 U.S. 709, 715, 94 S.Ct. 1315, 1319, 39 L.Ed.2d 702, 708 (1974). In addition, the legislature has confirmed its continued approval of the policy of limiting access to the ballot by enacting the new AS 15.25.160, which is virtually identical to 6 AAC 25.160. Thus, 6 AAC 25.160 did not conflict with any statute in effect and was consistent with the expressed legislative intent.

Moreover, by implicitly approving a one percent voter signature requirement in *Vogler I*, we have already found the rule to be neither unreasonable nor arbitrary. *Vogler I*, 651 P.2d at 5-6.

6 AAC 25.160 was validly enacted. DeNardo failed to comply therewith and the division properly rejected his nominating petition.

II. ISSUES RELATING TO ACCESS OF WRITE-IN CANDIDATES TO VOTERS.

The superior court concluded that issues relating to the propriety of the division's legislation. *Kelly*, 486 P.2d at 911.

alleged refusal to include write-in candidates in voter information pamphlets were not ripe for decision. These issues were dismissed without prejudice. At the time of the hearing on DeNardo's "writ of mandamus," the pamphlet deadlines were still months away.

Apparently, the only pertinent information before the superior court was DeNardo's affidavit which stated: "Unofficially through the Division of Elections, Mr. DeNardo was informed that a write-in candidate would not have access to the election pamphlet." In its oral decision, the superior court deferred the issue of write-in candidate access to the voter information pamphlet, and invited each side to brief the question.

[3] DeNardo chose to appeal instead, arguing that the dismissal without prejudice was error because the access issue was "inextricably intertwined" with the nomination petition question. It cannot be determined from the record, however, whether DeNardo in fact attempted to wage a write-in campaign. It is thus impossible to discern the factual posture of this claim. The superior court wisely recognized this claim as unripe for judicial determination and declined to address it. We do likewise.

III. CONCLUSION.

The division of elections acted within the scope of the authority delegated to it by the legislature when it enacted 6 AAC 25-160. DeNardo failed to comply with its provisions and the division properly rejected his petition. The superior court correctly found that DeNardo's claims relating to his write-in candidacy were not ripe for review.⁵

The superior court's decision is **AFFIRMED**.



5. The division also argues that DeNardo's claim is moot. In view of our disposition regarding

Carlos RODRIQUEZ, Appellant,

v.

STATE of Alaska, Appellee.

No. A-323.

Court of Appeals of Alaska.

Aug. 7, 1987.

Defendant was convicted in the Superior Court, Third Judicial District, Ralph E. Moody, J., of lewd and lascivious acts toward children and contributing to delinquency of a minor. Defendant appealed. The Court of Appeals, Coats, J., held that: (1) testimony of expert on sexually exploited children was admissible; (2) testimony of police officers called by defendant was not admissible; (3) sentence for attempted rape was excessive; and (4) defense counsel was not ineffective.

Affirmed in part, and reversed and remanded in part.

1. Criminal Law ~~§~~460

Testimony by expert witness which provides useful background information to aid jury in evaluating testimony of another witness is admissible.

2. Criminal Law ~~§~~460

Testimony of social worker, to the effect that testimony of alleged sexual abuse victims was consistent with patterns exhibited by sexually exploited children he had observed while working with children who had been exploited through child pornography or prostitution and child sex rings, was admissible as background information.

3. Infants ~~§~~10

Testimony of police officers, who had been in defendant's home approximately five years before trial and who did not make thorough search of defendant's residence, to the effect that they had not seen drugs, pornography, or film-making equip-

the validity of the regulation, we do not address the mootness issue.

MEMORANDUM

State of Alaska

Department of Law

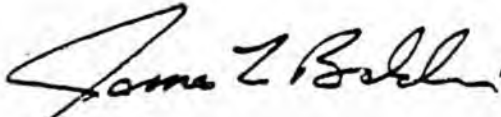
Elizabeth A. Ziegler
Deputy Director
Division of Elections
Office of the Governor

DATE December 3, 1991

FILE NO 663-92-0209

TEL. NO 465-3600

SUBJECT Implementation of
closed primary
procedures



FROM: James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

You requested our advice concerning a number of issues that are related to proposals by the major political parties in the state to close their primaries to members of competing political parties. Because you need this memorandum to help prepare for a meeting of the House State Affairs Committee to be held on November 13, 1991, we limit our opinion to your question concerning the power of the director of the division of elections to implement a closed primary by administrative regulation. It is your intent to administer a primary election that is consistent with the right of free association accorded to political parties even if provisions of state law applicable to the administration of primary elections permit a voter to cast a ballot that sets out candidates without regard to party affiliation.

You propose to establish new primary election procedures at the earliest possible date. You would like to implement new primary procedures early in the 1992 general election year. However, your timetable may be too aggressive to assure that the new procedures are properly supported by statute and regulation. The legislature would be unable to convene, consider, and enact amendments to the election code if there is not sufficient authority to accomplish your goals.

Your concern is whether the director may proceed in the absence of amendments to the election code to change primary election procedures and prescribe the form of the ballot so that the political parties control who may nominate candidates. We believe that it is prudent for the division to expeditiously pursue a resolution of the closed primary question both legislatively and by administrative means. Unlike the previous administration, you wish to acquiesce in the desire of a political party to nominate candidates using a primary ballot that may be voted only by persons admitted by the party. While we believe that there remains some question as to the proper interpretation of the rules of the Republican Party of Alaska, you can clarify this interpretation through the adoption of administrative regulations. However, before this can be done, it must be determined whether the division

has sufficient authority to adopt regulations that establish a closed primary election.

Existing law requires the division to prepare the primary ballot in a certain manner. The election code provides:

The primary election ballot shall be prepared and distributed by the director in the manner prescribed for general election ballots except as specifically provided otherwise for the primary election. The director shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation.

AS 15.25.060 (emphasis added). The foregoing provision appears to preclude the use of separate ballots that are limited solely to the candidates of a single political party. It must be remembered that this provision was added to the election code to end the practice of presenting a ballot that required voters to vote only for the candidates of one political party. Elsewhere, the election code grants the director of the division elections the power to

prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections.

AS 15.15.030. The code also grants the director the power to "determine the size of the ballot, the type of print, necessary additional instruction notes to voters, and other similar matters of form not provided by law." AS 15.15.030(1).

The provisions of the election code that are specific to the form of the primary election ballot are probably void when the members of a political party desire to restrict those who may associate with them for the purpose of nominating candidates for public office. The United States Supreme Court reaffirmed the First Amendment rights of political parties to be free from statutes that restrict their power to associate with whomever they wish when nominating candidates. Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

There appears to be no overriding state interest that can be articulated to perpetuate an open primary system when recognized political parties adopt conflicting rules. However, it is unclear how the Tashjian decision will be applied to the type of open "blanket" primary required by existing state law. It is possible, though not probable, that a court would find that an open "blanket"

primary does not burden associational rights. Until there is a federal case on point, this eventuality cannot be ruled out. It is also possible that AS 15.25.060 can be construed to apply only when political parties have not exercised their constitutional rights to limit access to the nominating process. One thing remains certain; it would be advisable to amend AS 15.25.060 to allow for the implementation of associational rules of political parties that do not infringe upon legitimate state interests in the administration of elections.

Even though Tashjian places heavy emphasis on the associational rights of political parties, we believe there may be an overriding state interest in having the parties act promptly and with clarity in the way they define who may associate with them. The U.S. Supreme Court has acknowledged that "it is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); see also, American Party of Texas v. White, 415 U.S. 767, 779 (1973). State law may interfere with a political party's internal affairs when necessary to ensure that elections are fair and honest. Storer v. Brown, 415 U.S. 724, 730 (1973).

We reviewed a draft committee substitute currently under consideration by the House State Affairs Committee. This bill would require political parties to adopt and deliver any party rules that would materially affect the nominating process by March 1 of the primary election year. The purpose of imposing a deadline for action is to permit preclearance of the change in voting requirements by the U.S. Justice Department, allow for voter education, and give adequate time to the division of elections to implement the changes. While these interests appear to be compelling, it is possible that a minor, recognized political party could contest the validity of the March 1 date. There is precedent for the proposition that early deadlines for the declaration of candidacy improperly restrict free speech and associational rights of nonparty candidates. Sigler v. State, 3AN-88-8695 (Alaska Super. Mem. of Decision, Sept. 12, 1988). The harm encountered in Sigler was that the early declaration date improperly distanced nonparty candidates from the time of spirited public debate and the resultant attention of voters. Perhaps a minor recognized party could argue that it should be allowed to adopt rules which permit it to nominate candidates by convention held at or near the filing deadline for candidates for reasons similar to those advanced by Sigler. We believe that the concept of a deadline is supportable as a reasonable burden calculated to promote the electoral process. However, the division must fully document reasons for the cut-off date. The documentation will be essential in upholding the state's burden of proving that there is basis for the restriction.

Based on the foregoing, we conclude that existing provisions of the election code specifying the content of the primary election ballot are not operative when a political party opts to close its primary. In the absence of a specific statute, sufficient authority exists for the director to administratively implement new procedures for a closed primary. The basic standard applicable to the power of an administrative agency to adopt regulations is set out in the Administrative Procedure Act (APA). The APA provides:

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. The director is given broad legislative power to adopt administrative regulations. She may "adopt regulations under the Administrative Procedure Act (AS 44.62) necessary for the administration of elections." AS 15.15.010. Given our determination that Tashjian makes AS 15.25.060 inoperative under certain conditions, it appears that AS 15.15.010 grants sufficient authority to implement a closed primary by administrative regulation. See, e.g., Denardo v. State, 741 P.2d 1197 (Alaska 1987) (regulation requiring independent gubernatorial candidates to submit nominating petitions signed by one percent of qualified voters held to be valid when adopted after court found statutory requirement void).

We would be remiss in our duties if we did not point out that contrary legal arguments could be made. It could be argued that the existence of AS 15.25.060 makes it plain the legislature did not intend to commit the formulation of the primary ballot to agency discretion. Support for this argument can be found in AS 15.15.030(1), which allows the director to determine matters of ballot form "not provided by law." The intent to commit to agency discretion is a necessary element for determining whether a regulation is valid. Kelly v. Zamarello, 486 P.2d 906, 909 (Alaska 1971). We believe that a court would defer to the broad grant of legislative rule-making power conferred by AS 15.15.010, especially if the legislature fails to amend the election code after given a reasonable opportunity to do so. However, the fact that the regulations could be questioned justifies the effort to have the legislature take action to amend the election code.

Elizabeth A. Ziegler
Our File #: 663-92-0209

December 3, 1991
Page 5

We hope this memorandum will assist you in presenting your comments to the House State Affairs Committee.

JLB:ck

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PLEASE MICROFILM TOP PAGE ONLY

DOCUMENTS WHICH HAVE NOT BEEN
FILMED BUT ARE AVAILABLE IN THE
ORIGINAL FILE INCLUDE:

- Handout of procedures for party
primaries in other states
- House Research Agency Request 91.080
AK's Blanket Primary & the Tashjian Decision
- Secretary of State of CA v. San Francisco
County Democratic Central Committee
- Allen Grant Doyle & the Republican Party
of AK v. State of AK
- Julia H. Tashjian, Secretary of State of Connecticut
v. Republican Party of Connecticut