

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6610 SENATE STATE AFFAIRS

1014

The Honorable Pat Pourchot
January 5, 1989
Page 4

If the oath is to be taken literally, it would mean that no candidate would ever be able withdraw his or her declaration to resubmit a new one, or to make any change his or her candidacy declaration. This may not be practical.

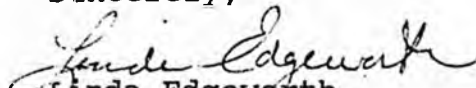
Your attorney can probably assist in clarifying the intent of the legislature in addressing the two issues about which you are concerned. One suggestion might be:

AS 15.25.030. New Section

(c) The information provided in compliance with the requirements of AS 15.25.030 on a declaration of candidacy which as been filed with the director may not be amended, altered or otherwise withdrawn and refiled by the candidate within the 15 days immediately preceding the filing deadline established in AS 15.25.040.

The Division of Elections has always been very grateful for your generous support and commitment. Please let me know if I can be of any further assistance.

Sincerely,


Linda Edgeworth
Information Officer

STATE OF ALASKA

OFFICE OF THE GOVERNOR

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

January 18, 1989

The Honorable Pat Pourchot
Alaska State Senator
P. O. Box V
Juneau, AK 99811

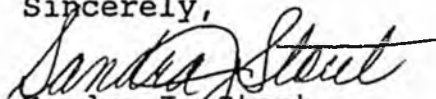
Dear Senator Pourchot:

I appreciate your interest in following up on the implementation of that portion of House Bill 284 covering the special advance ballot often called the "submarine ballot." I am happy to report that in its first implementation during the 1988 elections, it seems to have been a success. In our analysis of voter activity in connection with the use of the special advance ballot we found the following:

Number of Special Advance Ballots Sent to Overseas and APO/FPO Voters	493
Total Returned	<u>349</u>
Never Opened Because Official Ballot Was Also Received	171
Opened and Counted Because Official Ballot Was Not Received	150
Rejected Because of Deficiencies or Determination of Ineligibility, and Official Ballot Was Not Received	24
Returned Undeliverable by Post Office	4
Total Special Advance Ballots Not Received	<u>114</u>
Official Ballots Received	105
No Ballot Received From Voter	39

I hope this information is helpful. Please let me know if I can provide any additional assistance.

Sincerely,


Sandra J. Stout
Director

SUMMARY OF RECOUNTS
1978 - 1986

* Indicates OVERTURNED RACE

Year	District		Original Vote Spread	Recount Vote Spread	Charge
1978 Gen	S-F	*Kelly (R) Willis (D)	+4	+1	Free
1978 Prim	Governor	Hammond (R) Hickel (R)	+98	+98	Free
1980 Gen	H-6	Charney (D) Elliott (R)	+120	+116	Deposit
1980 Gen	H-7	Bierne (R) dal Piaz (D)	+76	+59	Deposit
1980 Gen	H-9	Kubitz (D) Buchholdt (D)	+53	+54	Deposit
1980 Gen	H-16	Chuckwuk (D) O'Hara (R)	+5	+27	Deposit
1980 Gen	H-13	Fritz (R) Malone (D)	+8	+13	Free
1980 Gen	H-20	Koponen (D) Smith (D)	+50	+57	Deposit
1982 Prim	S-J	Goddard (R) McCracken (R)	+3	+2	Free
1982 Prim	H-23	Fondell (R) Hemmes (R)	+19	+19	
1982 Prim	H-24	Juettner (R) Wallis (R)	+6	+8	Free
1982 Gen	S-D	Fischer (R) Smith (D)	+52	+53	Free
1982 Gen	H-12	Uehling (R) dal Piaz (D)	+35	+33	Free
1984 Prim	H-12	Childers (D) *Ratcliff (D)	+1	+1	Free

Year	District		Vote Spread	Vote Spread	Charge
1984 Prim	H-14	Barnes (R) Pignalberi (R)	+997	+998	Deposit
1984 Gen	H-5A	Navarre (D) Sikorski (R)	+79	+72	Deposit
1984 Gen	H-5B	Fritz (R) Marrou (L)	+53	+56	Deposit
1984 Gen	H-10A	Boucher (D) Cowdery (R)	+47	+38	Free
1984 Gen	H-11	Jenkins (R) McKinnon (D)	+33	+32	Free
1984 Gen	H-25	Binkley (R) Vaska (D)	+74	+82	Deposit
1986 Prim	S-F	Faiks (R) Vonhippel (R)	+2296	+2296	Deposit
1986 Gen	S-H	Fischer (D) Uehling (R)	+15	+12	Free

NO REFUNDS WARRANTED

ONLY 2 RACES OVERTURNED - BOTH IN SITUATION IN WHICH THE VOTE SEPARATION WAS 4 OR FEWER VOTES.

Courts have no right to deprive citizens of representation

It was with a sense of alarm that I heard the courts had vacated the election in the Bradley-Finkelstein affair.

I am less disturbed by the thought that the court would look at an election or even that the court would go so far as to tell the Division of Elections that this or that ballot should not be counted than I am that the legislature met without all the areas of the state being represented. This is wrong.

The court in its zeal left several thousand people unrepresented. The judges should be tried for such an action.

When John F. Kennedy became president of the United States by carrying the state of Illinois by 8,000 votes when 13,000 illegal ballots had been counted in Chicago, the thought of leaving our nation without a president was not even considered.

When the court ruled that the election should stand because no



one could prove how many votes had been stolen by which party, a few of us choked. I feel this day that Kennedy did not truly win a majority, but it was better that he be my president than the office be left vacant.

It should be possible to arrest a legislator for major crimes such as murder, but only the body to which he or she was elected should have the right to remove that person from his elected office.

The people should never be left without their legal voice as a result of the action of another

branch of government.

The special privileges given elected officials under both the federal law and in Alaska's Constitution are not given because our elected officials are in themselves so great, it's that the voice of the people shall not be muzzled however inane their voice shall sound. The reason a legislator may not be stopped on his way to and from the chambers or that he or she may not be removed by any but a body of their fellow legislators for acts committed is to ensure that the representatives of the people are not silenced by police, the executive body or the judiciary.

It was not always this protected. In the freewheeling days of Boss Tweed in New York, his police would stop opposition members on their way to the council chambers, and the Boss' tame judges would hold them long enough to avoid a vote or even to avoid embarrassing de-

bate. If, when freed, they spoke out in protest of the arrest and treatment, the courts served as a deterrent to future members who might act so rationally.

Now while the excesses of men like Boss Tweed are today at least partly controlled, the purpose behind the safeguards in our laws and in the state constitution are still valid.

The peoples' voice shall not be silenced, and in a representative form of government, what more complete a silence can there be than that of leaving the seat empty.

For any court to rule that neither candidate has won is a dangerous precedent to allow any judge or any body of judges to set.

Hallbut Cove charter boat skipper Clem Tillion is a former president of the Alaska Senate.

Times 1/15/89

The court rules: a failed election

As the Alaska Legislature moves into its second week, Anchorage's House District 13A remains without representation. The more than 7,000 voters who cast ballots in the November election between Republican Brad Bradley and Democrat David Finkelstein have been told, "Sorry, your votes don't count. We'll have to do it again."

Daily News 1/14/89

Meanwhile, Gov. Steve Cowper is expected to appoint an interim representative. With the district facing a minimum of two months without elected representation, circumstances demand a quick method of filling the void, and perhaps the best solution is to let the governor choose someone.

No, the quarrel isn't with the governor's authority, nor with the Supreme Court's ruling that required a new election, given the situation the justices had to deal with. The quarrel is with an elections system that let things get this far.

Close elections are a fact of life in Alaska. A handful of votes have determined more than one election in the past. Thus, it behooves the people who run state elections — the Division of Elections and Lt. Gov. Steve McAlpine, who supervises the division — to have the resources, regulations and equipment to deal with tight races.

In the counts and recounts of the Bradley-Finkelstein race, a number of problems were discovered.

One was ballots that had been mismarked or marked for both candidates. Some of the mismarkings stemmed from troubles with the machines that punch the ballots.

Another was deficient voter instructions included with absentee ballots. The Supreme Court concluded that the instructions failed to explicitly state that the vote must be cast in the presence of two witnesses.

Voters deserve machinery and election guidelines that prevent such miscounts. When problems arise, elections staff must have the training to handle them properly. Voters deserve a system that produces accurate, conclusive and timely vote counts.

The system failed this time. The voters who went to the polls in November have been, in effect, disenfranchised. A fundamental tenant of democracy went unfulfilled. The Division of Elections, the lieutenant governor, and, if necessary, state legislators should begin work now to assure it doesn't happen again.

McAlpine orders vote for District 13A

By SHEILA TOOMEY
Daily News reporter

Lt. Gov. Steve McAlpine on Thursday ordered a new election for House seat 13A, after a recount of 60 disputed votes failed to establish a clear winner in the contest between Republican Brad Bradley and Democrat David Finkelstein.

The final recount, ordered by the Alaska Supreme Court, put Finkelstein eight votes ahead; but because his lead was based on a mathematical formula, and not on counting actual ballots, he could not legally be declared the winner.

Since Bradley also could not be declared the winner, a ruling by the Supreme Court Wednesday required that a new election be held.

Finkelstein won election-night tabulations, but Bradley asked for a recount, setting off a mathematical marathon leading to the court decision that leaves the district without a representative.

Gov. Steve Cowper plans to appoint an interim representative from the district within a week, said press aide David Ramsour. Cowper met with legislators Thursday and his office was already "compiling a list of poten-

tial appointees," Ramsour said.

The seat is legally vacant and does not belong to any party, he said, so Cowper is free to appoint anyone who is a resident of the district.

McAlpine warned that the earliest a new election can be held is in "a minimum — and I think that's the important word — a minimum of 60 to 75 days." If the race is close enough for a recount or court challenge, it could take considerably longer to seat an elected District 13A representative.

McAlpine said he may decide to postpone the election until after the current 120-day legislative session is over, to ensure the people of the district get effective representation during the crucial last few weeks.

"Somewhere around the fifth of May, some poor guy is going to end up sitting down in the legislature when the bills are flying by. . . . If someone would get sworn in in the last 10 days of the session, that would not serve the district well."

In 1977, when a western Alaska House race between Nels Anderson Jr. and Joe McGill had to be done over, an interim representative, appointed by then-Gov. Jay Ham-



The Associated Press

Lt. Gov. Steve McAlpine explains the results of the ballot recount.

mond, served until March 11.

Finkelstein, who got the news of his sort-of victory in Anchorage, urged that the election be held as soon as possible. He estimated that only about 50 percent of the voters who cast ballots in November would be likely to turn out, mak-

ing any prediction about a winner impossible.

Bradley was in Juneau Thursday, where he predicted to The Associated Press that he would win the re-match.

In November, Finkelstein won all the District 13A precincts ex-

cept Elmendorf Air Force Base, which cast enough votes for Bradley to all but wipe out Finkelstein's lead.

In the history of counts and recounts, Finkelstein won the first. Bradley then asked for a recount and won that. Finkelstein went to Superior Court and won that, by .17 votes. But no one won the count that counted, the last one.

Following the Supreme Court's directive, the Division of Elections started with a final vote count, which gave Bradley an eight-vote lead over Finkelstein, 3,582 to 3,554. Then they subtracted two sets of illegal votes from those totals.

Subtracting nine ballots that made up the first set resulted in seven votes being subtracted from Bradley and two from Finkelstein. That left Bradley with a three-vote lead, making him the provisional winner.

Next, 51 votes were subtracted from the two totals. These votes — all absentee or challenged ballots — were disqualified on the basis of the envelopes they came in. Because the actual ballots had long

See Page C-3, RECOUNT

RECOUNT: Election ordered

Continued from Page C-1

since been mixed in with the more than 6,000 ballots cast in the original election, they were subtracted using a proportional formula.

In the next step, Bradley lost 28 votes and Finkelstein 18, putting Finkelstein ahead by eight.

So why wasn't Finkelstein declared the winner? Because declaring a winner on the basis of a formula as opposed to known, counted votes is not acceptable, according to the Supreme Court. That left District 13A with a winnerless race and a need for a new election.

After announcing the re-match, McAlpine listed some of the things his office has to do before the reballoting can take place.

First, he has to get permission from the Alaska courts "to not have to comply with every single state law" governing general elections, such as issuing a voter pamphlet and opening ab-

sentee voting booths around the state.

Then, because Alaska is on a federal list of states that once practiced voter discrimination, the procedural details of the special election must be approved by the U.S. Department of Justice, which has 60 days to issue a decision.

The race will be strictly between Finkelstein and Bradley, McAlpine said. Only the voting has been reopened, not the filing period. And normal registration rules will apply, which means anyone who hopes to vote in the special election must be registered in the district 30 days ahead of time.

McAlpine was reluctant to estimate how much the special election will cost. Probably somewhere between \$100,000 and \$200,000, he said when pushed for a number. "It will be done by the cheapest, most effective method," he said.

Appointment will be made within week

TIMES STAFF and ASSOCIATED PRESS

Gov. Steve Cowper will appoint someone to represent District 13-A "as soon as possible" until a spring election is held, but it could take as long as a week before the appointment is made, said a spokesman from the governors office.

In the election, to be held in mid-March at the earliest, Anchorage voters will get another chance to decide whether Republican Brad Bradley or Democrat David Finkelstein will represent them in the House of Representatives.

Cowper spokesman David Ramseur said the governor is asking legislators for names of possible appointees and that Cowper had one or two ideas of his own on people to appoint.

McAlpine, the state's top elections official, said a new election in the disputed District 13-A race was necessary because of a state Supreme Court order issued Wednesday.

The court ordered a recalculation of the Nov. 8 general election results after Finkelstein challenged the Elections Division's recount of the close contest. Because the recalculation indicated a change in the outcome, with Finkelstein holding an eight-vote edge, a new election was ordered.

Finkelstein had not yet recommended to Cowper, also a Democrat, who should fill the seat temporarily.

"It's an amusing situation," Finkelstein said. "I'd like to have my wife appointed and Bradley would like to have his wife appointed, but I don't think either one is appropriate because of their ties to the campaign. The best person is someone not tied to the campaign," he said.

McAlpine said the election cannot be held for at least 60 days because the Law Department is required to review the election procedure during that period.

The initial election results showed Finkelstein with a three-vote victory, but a recount gave Bradley the election by nine votes. After Finkelstein filed his challenge, the Supreme Court last week stayed Bradley's swearing-in pending resolution of the case.

The court ordered Wednesday that about 60 See Cowper, page B-5

Cowper: Taking suggestions

Continued from page B-1

challenged votes be reconsidered, most under a complex formula used to determine whether errors might have affected the outcome of an election. The court said if the formula showed a different outcome, that a new election be held.

Justices Jay Rabinowitz and Daniel Moore were the dissenters in the 3-2 decision. They argued that

Bradley should be certified as the winner of the Nov. 8 election.

Bradley said after the news conference that the court's order was "rather nit-picking and after the fact." He said he was confident he would win in another election, however.

Finkelstein said he was pleased that a new election would be held.

House Democrats met immediately following McAlpine's announcement.

Court requires recount

Disputed ballots to be reconsidered

By SHEILA TOOMEY
Daily News reporter

The Alaska Supreme Court Wednesday handed the disputed Bradley-Finkelstein House race back to the Division of Elections with instructions to count 60 votes slightly differently and figure out if there's a winner or if a new election is necessary.

Lt. Gov. Steve McAlpine said Wednesday that his office expects to have the latest, and perhaps last, recount of the District 13A vote finished today.

The ballots and absentee voter envelopes in dispute were locked in the Supreme Court chambers and not accessible Wednesday night, McAlpine said. An elections official, accompanied by security personnel, will retrieve them today and the recalculations ordered by the high court should be done fairly quickly, he said.

David Finkelstein, the Democratic contender in a race that has turned into a marathon, said he knows where the disputed votes will go and predicted a new election will be ordered.

Republican Brad Bradley could not be reached for comment. His attorney, David Devine, said he does not remember how nine of the disputed ballots were voted so could not predict an outcome.

So far, each candidate has been a winner at least once. Finkelstein won the first count, right after the Nov. 8 election, by



Finkelstein



Bradley

DISPUTE: Court orders another count in House election

Continued from Page E-1

three votes. Bradley won the first recount, by nine votes. Finkelstein won a decision from Superior Court Judge Joa Kaiz, sitting as a special master for the Supreme Court. She put him 17 votes ahead and ordered a new election, saying the original one was too flawed to figure out who won.

Meanwhile, the 13A seat in the state House of Representatives remains vacant as the legislative session moves toward the end of its first week.

Should a new election be ordered, Gov. Steve Cowper is expected to name an interim representative, with House approval. Finkelstein said he has asked Cowper not to appoint him.

"It's not my seat. It's not Mr. Bradley's seat," he said. "It should be someone not connected to either of us."

Following the instructions issued by the Supreme Court Wednesday, three outcomes are now possible: either Finkelstein or Bradley could be declared the winner, or a new election could be ordered. Finkelstein said it is very unlikely he will pick up enough votes to win outright.

When the Supreme Court finished its count Wednesday, the candidates were eight votes apart, with Bradley leading 3,562 to 3,554. But the court declared 60 of these votes invalid and ordered them subtracted from the totals in a two-step process.

Step 1 involves counting nine ballots that have been declared illegal and simply subtracting them. At this point a provisional winner will be named, the court said.

Step 2 involves 51 envelopes that once contained absentee ballots. For a variety of reasons, the votes submitted in these envelopes have been declared invalid and they must also be subtracted.

Unfortunately, these ballots were long ago mixed with all the other ballots, so it is impossible to know for certain how many should be subtracted from each candidate.

As in past disputed elections, the court ordered these ballots assigned to the candidates in proportion to the number of known absentee ballots they received. Because Bradley received

many more absentee votes than Finkelstein, it is expected that Bradley will lose more of these disputed votes, as he did in the recounts completed to date.

If the provisional winner is still ahead after Step 2, then that candidate should be declared the winner, the court ruled.

If the proportional subtraction changes the provisional outcome, a new election should be held, the court said. In the past, the court has held that declaring a winner on the basis of unknown votes would be inappropriate.

Because applying a proportion is likely to result in numbers that include fractions, it is possible that Bradley or Finkelstein could come out ahead by less than a vote.

Anchorage Daily News Thursday, January 12, 1965 E3

Intrusion by the courts

THE ALASKA Supreme Court treads on mushy constitutional tundra when it tells the legislature, as it did last week, to deny a seat in the House of Representatives to either of two candidates claiming election from an Anchorage district, pending the high court's determination of who actually won the race.

At the risk of meddling in affairs of the judiciary, let's express an opinion that this is a matter which is no business of the courts or the judges.

The courts might be called upon to settle a legal dispute — there's no argument about that.

But neither prior to nor after such a decision has the court the constitutional right to order the legislature not to seat whoever it wants to admit as a member.

THE AUTHORITY is clearly spelled out in the Alaska Constitution.

Says Section 12 of Article II of that guiding document:

"The houses of each legislature shall adopt uniform rules of procedure. Each house may choose its officers and employees. Each is the judge of the election and qualifications of its members."

The House and Senate, in other words, are the judge and jury of those who will be legislators. The constitutional language couldn't be more specific. In an election dispute of this nature, the legislative body involved has the final say.

Not a judge of the Superior Court.

Not the justices of the Supreme Court.

They have no authority, as we read this constitutional provision, to even suggest — much less issue a formal stay, as they did last Saturday — to the Alaska House that it should not swear in Republican Brad Bradley as the new representative of an

East Anchorage district.

Mr. Bradley, a former state senator and most recently a member of the Anchorage Assembly, was certified after a recount as the victor in his race last November with Democrat David Finkelstein. Mr. Finkelstein filed suit, and Superior Court Judge Joan Katz did her own thing with the ballots and declared the Democratic contender as the winner, using some kind of a percentage formula to allocate a share of certain votes that she found questionable.

WE DON'T question Judge Katz' sincere attempt to sort through a bunch of challenged ballots to come up with a decision.

But that's a process that already had been handled by the state election judges.

And the ultimate decision — despite whatever the results might be, in the eyes of whoever last looked at the ballots — belonged to the members of the House, not to the justices of the Supreme Court.

The legislature — not the court — is the judge of its members.

The House, had it been so inclined, could have told Mr. Bradley, yesterday to step aside on its own determination that he had not won the election. And it could have called Mr. Finkelstein forward to be sworn in as the new representative from Anchorage.

What it might more properly have done is declare the seat still vacant and directed the state elections office to conduct a new election in the district.

But that is the legislature's business, not the courts.

Our constitution, we suggest, says as much in language so plain that it's surprising the high court would even bother to get involved.

Court may call re-vote

By PATTI HARPER: 1/6/89
Times Writer

The Alaska Supreme Court was meeting at press time today to decide whether it should order a new election in the District 13 State House race between Republican Brad Bradley and Democrat David Finkelstein.

The state's attorney in the case, John Rubini, wants the court to uphold the election results. But he asked the five justices to order that the declared winner, Brad Bradley, not be sworn in next week if they cannot reach a decision today.

Bradley's attorney, David Devine, said he opposes that idea. It would leave voters in the East Anchorage district without representation, he said. "I don't think Mr. Bradley should be kept from taking office," unless there is a decision ordering a new election, he said.

Anchorage Superior Court Judge Joan Katz recommended to the court late Thursday that the election be re-run. She was acting as a special master to clarify the vote counting issues in Finkelstein's legal challenge to Bradley's apparent nine-vote win.

Katz agreed with Finkelstein that a number of ballots were improperly counted. She calculated that vote totals should be adjusted in a way that reverses the outcome and puts Finkelstein ahead by 1.17 votes.

All attorneys agreed today that she made an error and the actual difference between the two candidates using her decisions is 41, less than one vote.

Since there is no way to identify which of the thousands of ballots counted were the ones improperly cast, the calculations cannot reflect actual votes.

All parties had agreed that if the challenge had this result a new election should be called, Katz noted.

"We haven't even thought of that," Division of Elections spokesperson Linya Edgeworth said about the logistics of holding a new election.

The state wants the Supreme Court to decide elections officials properly declared Bradley the winner.

See Re-election, page A-8

Re-election: Court considers election to settle disputed race

Continued from page A-1

Any new election would take at least 60 days to satisfy election law requirements, said John Rubini, an attorney representing the state. That's half of the 120-day legislative session.

Edgeworth said this morning that it might be possible to trim that timeline to 40 days.

Gov. Steve Cowper would have the responsibility to appoint someone to represent the district until the ultimate winner is de-

clared, Rubini said.

Speaker-elect of the House, Sam Cotten, D-Eagle River, said this morning that he's already been contacted by the governor's office for suggested appointees. Cotten said he didn't have any names for Cowper.

"We certainly won't seat Bradley or Finkelstein (when the legislature convenes Monday) if the court has called for a new election," Cotten said. "We're going to follow what the court directs."

Cotten said the court decision

won't affect the organizational structure of the House even though Bradley would be minority member if seated while Finkelstein would join the majority coalition.

Finkelstein was the first apparent winner in the hard-fought race to represent the East Anchorage district, which includes Mountain View and Elmendorf Air Force Base. He was initially certified the victor after the Nov. 8 polling.

But a recount in early December left Bradley ahead 3,583 to

3,546.

Finkelstein appealed to the high court, challenging more than 70 votes for a variety of reasons.

Katz agreed with Finkelstein that three of the votes credited to Bradley should be thrown out because the ballots were not clearly punched, the marks falling between the two candidates' names.

Today, attorneys in the case agreed that one of those votes was not counted and so should not have been deducted from

Bradley's total.

Katz also agreed with Finkelstein that nine other ballots were improperly counted.

The division had already decided another 28 absentee ballots were improperly cast. Since none of these votes could be determined, the candidates were each docked a portion of a vote for each vote thrown out. The proportions were based on the percentage of the total absentee vote each candidate had received.

Since Bradley got more of that

vote, he was docked more. That is what left Finkelstein ahead in Katz's calculations.

Bradley was docked about .62 votes for for every vote thrown out, while Finkelstein was docked about .38.

Devine argued to the high court this morning that Katz was wrong to accept Finkelstein's arguments.

Devine said he believes the court will declare Bradley the legitimate winner.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

DAVID FINKELSTEIN,)
)
 Appellant,)
)
 vs.)
)
 SANDRA STOUT, Director of the)
 Alaska Division of Elections,)
 and STEPHEN A. McALPINE,)
 Lieutenant Governor of Alaska,)
)
 Appellees,)
)
 and)
)
 W.E. "BRAD" BRADLEY,)
)
 Intervenor.)

Supreme Court No. S-3107

Filed and Entered
AFFILIATE COURTS of the
STATE OF ALASKA

JAN 5 1989

CLEAK
By _____ Deputy

SPECIAL MASTER'S REPORT

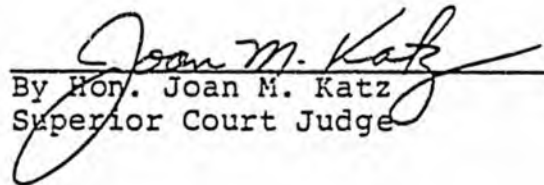

By Hon. Joan M. Katz
Superior Court Judge

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I. INTRODUCTION

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, 599 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.

This recount appeal was timely filed with the Alaska Supreme Court pursuant to AS 14.20.510(2). On December 8, 1988, the court appointed the undersigned as special master charged

with making findings and recommendations regarding each ballot issue raised, as well as summary findings and recommendations pertaining to the ultimate fate of this election contest. Bradley was subsequently granted permission to intervene.

A discovery and briefing schedule was established immediately upon the appointment of the master, with supplemental briefing requested by the master as such proved necessary. Oral argument was conducted on January 3, 1989. Limited testimony was taken. The findings and recommendations of the master are based on the complete record and pertinent legal authority. The findings address each of the parties' challenges to specific ballots, or groups of ballots, in the order in which the issues have been presented in the briefings.

II. SPECIFIC BALLOT CHALLENGES

A. Appellant's Challenges

1. Absentee ballot envelope oaths suggesting no permanent Alaskan residence

Finkelstein challenges the state's failure to reject 14 absentee ballots in light of indications on the voter oaths on the ballot envelopes suggesting that these voters did not have a permanent Alaskan residence in District 13 at the time of the election. The statutory framework for this issue is as follows:

Under AS 15.05.010(4), a person may vote in an election if, inter alia, he or she "has been a resident of . . . the election district in which the person seeks to vote for at least 30 days just before the election." Residence is defined in AS

15.05.020(2) as being "that place in which the person's habitation is fixed, and to which, whenever absent the person has the intention to return." Subparagraph (3) of the statute provides that "There can only be one residence." Finally, subparagraph (10) states:

The address of a voter as it appears on an official voter registration card is presumptive evidence of the person's voting residence. If the person has changed voting residence, this presumption is negated only by the voter executing an affidavit on a form prepared by the director setting out the new voting residence.

In Fischer v. Stout, 741 P.2d 217, 222-23 (Alaska 1987), the court held that the absentee voter oath is a "form prepared by the director" sufficient to rebut the presumption of residency arising from the voter registration card. The court struck the ballots of eleven voters who were determined, based on absentee voter oaths, to have resided outside of the district in question. Finkelstein seeks the same result in the case of these 14 challenged ballots.

The state opposes this relief on two grounds. First, appellees contend that Fischer v. Stout should be overturned. Second, the state argues that a statutory provision safeguarding residency as it pertains to students, as well as members of the military and their families, removes most of these 14 cases from application of the Fischer rule.

The state's basis for urging reversal of Fischer is the presumptive validity afforded the residency information provided on a voter's registration form. Appellees insist that the code contemplates that a voter may "have a voting residence at one location, yet 'reside' at still another." Appellees' Brief at 10. Appellees contend that "the registration rolls offer a 'snapshot' of a highly mobile electorate, and the components of the picture consist of the voter's habitation as of the time of registration." Id. (Emph. added.) Appellees cite to AS 15.07.090 as authorizing amendment of registration only by execution of "new" registrations. The presumption raised by registration is said to be "conclusive."

This line of argument is not persuasive. The state overlooks the explicit mandate of AS 15.05.010(4) limiting the class of people entitled to vote to those who have in fact been residents of the district for the 30 days preceding the election. This mandate derives from Article V, Section 1 of the Alaska Constitution, which reads:

Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state election. A voter shall have been, immediately preceding the election, a thirty-day resident of the election district in which he seeks to vote, except that for purposes of voting for President and Vice President of the United States other residency requirements may be prescribed by law. Additional voting qualifications may be

prescribed by law for bond issue elections of political subdivision.

Thus, not only is the 30-day residency requirement a sine qua non of voter qualification, it is clearly differentiated from "registration residency requirements" (emph. added) which must also be observed.

It is obvious, then, that registration supplies only an evidentiary tool for establishing voter residency. Registration cannot provide a "conclusive" presumption. To allow this effect would be to authorize the voting by non-residents in contravention of the Alaska Constitution. This result was prohibited in Turkington v. City of Kachemak, 380 P.2d 593 (Alaska 1963). There, the court invalidated a territorial act which contemplated the voting of non-resident property owners in certain local elections. The court held that the legislation directly contravened Article V, Section 1 of the subsequently adopted constitution.

In a related argument, the state observes that the voter oath is not intended to constitute a new registration. While this may be true, as suggested above, it is irrelevant. The critical fact is that the oath provides updated information which must be taken into account.]

Finally, appellees suggest that the Fischer rule should be overturned, because the absentee voter oath does not make a clear distinction between mailing and residence addresses, as does the registration form. In both Fischer v. Stout, supra, at 223-224 and Willis v. Thomas, 600 P.2d 1079, 1087 (Alaska 1979),

the court suggested that errors attributable to the state should not result in disenfranchisement of the electorate.

It is possible that the form could have been clearer in this regard. However, the relevant portion asks specifically for "My permanent Alaskan Residence Address." It advises voters, moreover: "(DO NOT use P.O. Box, Rural Route #. You must use street address, #, legal description, or other physical location description.)" The master does not deem these instructions so misleading as to explain the rationale of voters in putting down out-of-state addresses or writing "no permanent Alaskan residence." The only reasonable explanation for such entries is that the voters did not, in fact, have a permanent Alaskan residence.

Appellees' second argument is more persuasive. AS 15.05.020 provides, in pertinent part:

Rules for determining residence of voter.
For the purpose of determining residence for voting, the place of residence is governed by the following rules:

(1) A person may not be considered to have gained a residence solely by reason of presence or may a person lose it solely by reason of absence while in the military service . . . of the United States or . . . because of marriage to a person engaged in the . . . military service . . . of the United States, while a student at an institution of learning

Subparagraph (2), cited previously, defines "residence" as "that place in which the person's habitation is fixed and to which, whenever absent, the person has the intention to return."

Read together, these two sections require that if a citizen establishes residency as a registered voter in Alaska

prior to leaving the state as a member of the military, a military dependent, or for educational purposes, such person is not deprived of his or her registered voting residency, notwithstanding an absence of intent to return to the precise voting residence location.

This is the only logical interpretation of these sections for two reasons. First, the reality is that many people in the military, as well as those attending institutions of higher education, have lived either in military housing or rental units prior to leaving the state. This is a young and mobile segment of the population which, from a factual standpoint, generally cannot be expected to own a home such as would qualify as a "permanent residence" in the sense intended by subparagraph (2). People who leave the state do not retain an interest in rental units or specific military housing that would support an intent to return to such specific locations.

Additionally, if subparagraph (i) were intended to be limited to those students and members of the military who have purchased a home or otherwise secured a true fixed habitation in Alaska, the provision would be superfluous. Subparagraph (2) already instructs that if anyone is absent from a residence to which he or she intends to return, legal residency is established. It is hornbook law that legislation must be construed to give meaning to all its parts. Alaska Transp. Comm'n. v. AIRPAC, Inc., 685 P.2d 1248, 1253 (Alaska 1984). The only reasonable conclusion here is that voting residents who

leave the state in the military or to go to school are entitled to rely on their last registered address for purposes of voting in Alaska.

Review of the 14 oaths challenged here discloses that ten of the voters explicitly referenced the military or educational pursuits to explain why they had no permanent Alaska address. These voters include Jennifer Dahlmann (Appellees Ex. 8), James W. Dahlmann (Appellees Ex. 9), Ginger Rusnock (Appellees Ex. 10), Jodie Callahan (Appellees Ex. 11), Patrick A. Tuller (Appellees Ex. 12), Candice J. Tuller (Appellees Ex. 13), Anna M. Steward (Appellees Ex. 14), Tony R. Steward (Appellees Ex. 15), Donna S. Kuehn (Appellees Ex. 16), and Judith Hanf (Appellees Ex. 17). Their ballots were properly counted.

Cheryl A. Henry (Appellees Ex. 6) did not mention being a current member of the military. But she wrote her old Elmendorf address on the oath and had her oath notarized by Air Force Captain Richard Henry. Captain Henry can fairly be assumed to be Cheryl Henry's husband. There is enough information provided from which it can reasonably be inferred that Ms. Henry is either military or a military dependent. Her vote was properly counted.

There are three individuals, however, who gave no clear indication that they fall within any of the exceptions authorized by AS 15.05.202(1). Melanie McDermott (Appellees Ex. 5) was in the military in Alaska at the time of her registration. But she did not state in her oath that she continues to serve in this

capacity. McDermott provided a Texas address and gave no information to suggest that it is on a military installation. Homer C. Rice, Jr. (Appellees Ex. 7) similarly made no reference to present military status. The address he provided on the oath is different from that given on his registration. Finally, Adam P. Behnen (Appellees Ex. 18) did not indicate that he was in the military even on his registration. Moreover, he provided an address of "C/o Michael Rethlake" on his oath, with a street location that is outside of District 13.

The state argues generally against rejection of any of these ballots due to the alleged hardship of disenfranchising these voters. However, the last-mentioned three voters would be "disenfranchised" only in respect to a contest in a district in which they have demonstrated that they do not have actual residency. They have not established their entitlement to any exception. Exclusion of these ballots is necessary and reasonable to insure that the "political community" is maintained intact without suffering dilution of the vote of legitimate district residents. See Dunn v. Blumstein, 405 U.S. 330, 31 L.Ed.2d 274 (1972); Reynolds v. Sims, 337 U.S. 533, 555 (1963). The ballots of voters McDermott, Rice, and Behnen should not have been counted.

2. Post-Election affidavits demonstrating non-residency

Subsequent to both the election and the recount, 21 voters executed official voter registration affidavits attesting to the fact that they were not residents of the district on the

day of the election. In each case, the individuals in question filled in the blank asking for "My current residence at this [non-District 13] address (or in this district [other than 13], whichever is longer) began" with a date prior to the November 8, 1988 election. Appellant claims that the votes of these affiants should not have been counted.

In their briefs, appellees argued that the new affidavits take effect only on the date that they are postmarked or executed (if accomplished in person). Reiterating their position vis-a-vis the absentee voter oath, appellees urged that absent a new registration in effect 30 days prior to the election, the presumptive validity of the old registration governs. It was asserted that:

ominously, Finkelstein's proffered interpretation would create a limbo period in which a voter would be a legal resident of neither district, thus depriving that voter of an opportunity to vote on even statewide matters.

Appellees' Brief at 21.

At oral argument, new evidence surfaced in support of the state's position. It became apparent through representations of counsel and the testimony of Mr. Finkelstein that most, if not all, of the 21 affidavits had been solicited by the Finkelstein campaign. Oral argument transcript at 53, l. 24-58, l. 15. The affidavits do not represent spontaneous decisions by the voters to update their registrations. Rather, the affidavits are the product of one party's attempt to alter the outcome of the election.

Based only on the arguments presented in the briefs, the master would adopt appellant's position. It is true that the amended registrations modify the voter's registration record only as of the date the new forms are executed or postmarked. But if the information contained on the new form explicitly demonstrates lack of residency in the election just passed, such information rebuts the presumption afforded the "valid," older registration. AS 15.05.020(10). The Alaska Constitution would, ordinarily, require that the votes of the non-residents be set aside.

The new registration form is not confusing. Appellees argue that the form does not distinguish between residency for purposes of "living" versus voting. Yet, none of the Division of Elections forms sets forth this distinction. Under the state's analysis, no registration would be valid, because no form alerts the voter to this possible distinction.

Additionally, there is no "limbo," as fearfully portended by the state. The Legislature has anticipated this dilemma. AS 15.07.090(c) allows individuals to change their registration up to 30 days prior to the election. The statute requires the director to transfer the registration of a voter from one district to another when requested by the voter. Again, the voter must reside in the new district for at least 30 days in order to vote. AS 15.20.015 provides as follows:

Moving from election district just before election. A person who meets all voter qualifications except that listed in AS 14.05.010(4) [30 day residency] is qualified to vote by absentee ballot in the election district in which the person formerly resided

if the person lived in that election district for at least 30 days immediately before changing residence.

Thus, to insure against disenfranchisement, the Legislature has authorized people to vote in their old district, at least for state-wide elections, if they cannot meet the 30-day residency requirement at their new address.

Based on the above reasoning, if the affidavits had been submitted spontaneously, constitutional considerations would override claims of administrative convenience. These 21 ballots would be rejected. To apply the Hammond v. Hickel formula to these commingled ballots, however, would work an injustice. The affidavits were solicited by Finkelstein. Presumably, the campaign workers identified themselves as such to these 21 voters; (if not, the failure to do so would in itself have been improper). It is reasonable to assume that the 21 individuals supported Finkelstein, or they would not have been willing to cooperate with his campaign in updating their registrations. There is a high probability that most, if not all, of these 21 votes were cast for Finkelstein. At a minimum, the unusual circumstances under which these new registrations were secured renders it unlikely that these 21 votes were cast in the same proportions reflected in the election at large.

If the proportionate impact formula were to be applied, most of the votes would be deducted from the Bradley column. Finkelstein might, thereby, effectively receive two votes from many of these 21 individuals. He would retain the vote they cast originally, and he would benefit from the vote subsequently

deducted from the Bradley total. To apply the Hammond v. Hickel formula in this case would, thus, subvert its very purpose in attempting to approximate realistic and fair election results. There should be no alteration in the proportionate reduction computations based on these 21 affidavits.

3. Military post office
box "residences"

Eleven people, some of whom voted absentee and some of whom voted in person, utilized an Elmendorf Postal Service Center ("PSC") box number on their registrations. Finkelstein contends that under the supreme court's ruling in Fischer v. Stout, such post office box addresses do not meet residency requirements. Appellees argue, to the contrary, that the court in Fischer also indicated that an address of "Elmendorf Air Force Base" would suffice for residency purposes. The state claims that the addition of a post office box number should not defeat residency based on the designation of Elmendorf.

Fischer v. Stout does provide the starting point for this analysis. The pertinent discussion from that opinion is as follows:

Fischer contests the ballots of five voters who listed as their residence address only "Elmendorf Air Force Base." Elmendorf Air Force Base is a bounded area wholly within Senate District H. Thus, merely listing "Elmendorf Air Force Base" is sufficient to fix a voter's residence to a specific locale within District H. These votes were properly counted.

Fischer also challenges those absentee voters who registered to vote using a post office box or private mail service as the

voter's residence. A post office box or private mail service address is clearly not a voter's fixed place of habitation and is therefore insufficient to fix a voter's residence within a voting district. Thus, any voter providing such an address as his or her residence would be ineligible to vote unless he or she provided additional information regarding that voter's residence.

741 P.2d at 221. It is undisputed that had these 11 voters simply utilized "Elmendorf AFB" as their residence, their votes could not be challenged. The issue is whether the reliance on a military post office box effectively converts their addresses from residences to mere mail receptacles. Resolution of this issue, in turn, depends on identification of the classes of people who are entitled to use these boxes.

Finkelstein supplied the court with copies of a booklet apparently utilized at Elmendorf which describes the function of postal service centers. Finkelstein Ex. 52. At page 3 of the exhibit, the brochure reads:

A civilian contractor operates three postal service centers on base. PSC-1 in building 2-900 and PSC-2 in building 31-160 serve people living in areas where USPS does not provide free resident delivery service. Also, temporary general delivery service is available for people who will not be living in the dormitories.

Finkelstein also furnished an excerpt from the Department of Defense Postal Manual. Finkelstein Ex. A to Ex. 53. This excerpt states, first, that "In CONUS, receptacles are assigned only to service members not afforded free mail delivery by the USPS at their quarters address." The manual then goes on to indicate that postal service center boxes may be used by certain

professionals within the military, regardless of where they reside, for the purpose of receiving professional papers, journals, and other job-related materials. In the case of such assignments, the manual admonishes: "Under no circumstances shall receptacles be used to conduct private business."

The state submitted an unsworn memorandum from one Captain Raymond B. Rounds, Elmendorf's Installation Voting Officer, to Linda Edgeworth, the information officer for the Division of Elections. (Appellees Ex. 21). The memorandum is undated, but appears to have been written in response to a December 13, 1988 telephone call between Edgeworth and Rounds described in Edgeworth's affidavit (Appellees Ex. 1).

Captain Rounds advises that the procedures set forth in the postal manual referenced, supra, are implemented at Elmendorf. He continues:

Receptacles are assigned only to service members who do not receive mail delivered by the US Postal Service. According to the directive no one living off-base will be assigned a receptacle or PSC box number. There may be a PSC box number assigned to a military member who has just arrived or is leaving within a short period of time who does not have an address, but the box number will be withdrawn as soon as the member finds a place to live permanently or has left the area. Further, a person will have his/her receptacle or PSC box privileges taken away if he/she moves from the barracks into off-base quarters or into family housing on Elmendorf AFB. Family base housing is serviced by the US Postal Service. Only those military members who live in the barracks on Elmendorf AFB, or who are in transition, will be assigned a PSC box number. The exceptions noted in the remainder of section 502.2 are designed only for receipt of job-related

materials, are not to be used for private mail delivery, and are therefore not used to receive voting materials.

Id.

In appellant's reply brief and supplemental affidavit of Joseph McKinnon, Finkelstein produces excerpts from the state voter registration lists which demonstrate that of the 343 registered voters who have supplied an Elmendorf PSC box as their mailing address, 26, or 7.6%, have provided an off-base voting residence address. Finkelstein's point is that recitation of a PSC address does not provide complete assurance that the individual actually resides on base.

The master concludes that the evidence¹ generally supports appellees' view that PSC boxes are distinct from private post office boxes. The overwhelming majority of these boxes are used by dormitory residents of Elmendorf who are not entitled to regular mail delivery. Since professionals assigned PSC boxes are not authorized to receive personal mail there, the only individuals likely to use the boxes for voter registration purposes other than base residents would be recent military arrivals or those whose departure is imminent.

None of the 11 voters challenged here has been demonstrated to have another address off-base. This is a critical distinction from the 26 individuals identified by appellant. Each citizen's vote is entitled to a presumption of

¹Due to the time constraints imposed in this case, the "evidence" submitted on this issue included hearsay and uncertified public documents. The master deemed this material sufficiently trustworthy to be relied upon in this analysis.

validity. See Carr v. Thomas, 586 P.2d 622, 626 (Alaska 1978). The presumption is amply supported here by the greater than 90 percent correlation between PSC boxes and residence on Elmendorf.

Additionally, as noted previously, the supreme court has indicated that errors by the Division of Elections resulting in deficient registration of individual voters should not lead to disenfranchisement of these voters. Fischer v. Stout, supra, at 223-224; Willis v. Thomas, supra, at 1087 (Alaska 1979). In this case, Linda Edgeworth of the Division of Elections stated by affidavit:

Military voters and their dependents oftentimes use a Postal Service Center (PSC) Box Number as their residence address in the registration process. The division's longstanding policy is to accept such addresses as a residence address because they indicate an on-base residence. Because military installations are included within a single precinct, use of a PSC address nonetheless allows the division to know in which district and precinct the voter resides.

Appellees Ex. 1, par. 3. It is apparent that the Division never alerted potential voters to any problem with their use of PSC box addresses for residency purposes. To the contrary, reliance on such addresses was officially sanctioned. Under these circumstances, rejection of votes by individuals listing PSC boxes as their residences would be manifestly unjust. These 11 votes were properly counted.

Two of these ballots, moreover, provide independent verification of a physical residence on Elmendorf. Mark A. Bramer is registered at a PSC box. He voted absentee and

identified his permanent residence address as "Arcadia Drive BLD 31-270 RM 355.2." Finkelstein Ex. 39. Intervenor Bradley advises that there is an "Acacia Drive" on Elmendorf. Bradley argues that the building and room number used by Mr. Bramer confirms that the address listed is a barracks location on base. Bradley notes further that the zip code on the oath is 99506, the Elmendorf zip code. In contrast, the zip code for Arcadia Drive is 99503. The master concurs in Bradley's analysis.

Keith E. Boulware registered using a PSC box; his voter's oath contained a building number address on Elmendorf, clearly bringing Mr. Boulware within the physical location requirement of Fischer. Finkelstein Ex. 41.

4. Absentee ballot lacking
witness signature

Finkelstein objects to the vote of Karen J. Leander. Ms. Leander voted absentee. On the place for witness signature, there is only a postmark, with no signature. The state urges acceptance of the postmark as constituting the signature of the postal clerk. The state relies on Fischer v. Stout, quoting from the opinion:

The Director refused to count the ballot of Mr. Baker on the ground that the attesting officer had initialed the attestation section rather than signed. It is black letter law that any mark intended as a signature will function as such.

741 P.2d at 224. Later in the opinion, the court said:

The signature may be affixed in any manner and may consist of any character, symbol,

figure, or name so long as such mark is intended by the signator as a substitute for the individual's given name.

Id. at 225.

The state's citation is its own undoing. It is clear from Fischer that the signature must provide some means of identifying the individual who signed the document. The postmark does not meet this test. Failure to execute the witness certificate requires invalidation of the ballot. AS 15.20.203(b)(2). Leander's ballot was improperly counted.

Ballot
invalid
map

5. Undated witness signatures

Three individuals cast absentee ballots on which the attesting official did not date his or her signature. These voters were Steven E. Walls (Finkelstein Ex. 55); Lisa Crowley Walls (Finkelstein Ex. 56); and DiAnn Schoeff (Finkelstein Ex. 57).

AS 15.20.081(d) requires attesting officials to date their signatures. All parties acknowledge, as did the court in Fischer, that it is the intent of AS 15.20.081(d) that the voter cast the ballot and execute the oath in the presence of the official or other witnesses. The oath to be signed by the official witness attests to the fact that the voter appeared before the official on the date specified.

In considering defects relating to absentee voting, the Alaska Supreme Court has made a distinction between obligations which are mandatory and those which are merely directory. In the case of mandatory obligations, failure to comply requires

rejection of the vote. Violation of directives, on the other hand, does not impair the viability of the ballot. An election requirement is mandatory only if enforcement was sought before the election, or if the requirement is

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.

Carr v. Thomas, supra, at 627 (Alaska 1976).

The supreme court has held that the purpose of postmarks and date-received stamps is to insure that the vote was cast on or before the date of the election. Hammond v. Hickel, supra. Thus, the absence of either or both of those required items does not invalidate a ballot, as long as the witness has dated his or her affidavit in a timely fashion. Id. In Willis v. Thomas, supra, the court somewhat gratuitously included witness dating in its summary of the Hammond v. Hickel ruling: "We held that the postmark, witness date and date stamping provisions of AS 15.20.150 were directory and not mandatory" 600 P.2d at 1083 (emph. added). The facts in Willis, once again, involved ballots which had late postmarks. They were properly dated by a witness on or before the election day.

In this case, the inverse appears to be true. While not properly dated, there is no evidence that the ballots were

not postmarked so as to indicate timely voting. If the only issue is timeliness, the absence of a witness date should be recognized as violative of a directory requirement, and not fatal to the vote.

There is, however, a second issue. Witness presence is required not only to insure timeliness, but to protect against other forms of fraud in the electoral process. Witness presence warrants that the person claiming to have voted is the individual who actually cast the ballot and executed the oath. And most critically, witness presence helps to assure the absence of improper influence and pressure at the time that the ballot is marked.

A voter's identity can be verified by his or her signature, as well as through information supplied regarding birthdate and social security number. Witness presence is not required for this function. There is no substitute for witness presence, however, in assuring that voter fraud in the form of improper influence is prevented. Other courts have signaled the importance of safeguarding the integrity of the electoral process through the witnessing requirement. E.g., Fouche' v. Ragland, 424 S.2d 559, 561 (Miss. 1982); Wrinn v. Dunleavy, 440 A.2d 261, 272 (Conn. 1982); Kiehne v. Atwood, 604 P.2d 123, 133 (N.M. 1979); and Desjourdy v. Board of Registrars of Voters of Uxbridge, 266 N.E.2d 672, 677 (Mass. 1971).

While the cases cited are distinguishable on the grounds of specific facts or statutory provisions, the emphasis

on the importance of witness presence to prevent fraud is applicable to this election contest. AS 15.20.203(b)(2) compels rejection of a ballot when an official fails to execute the certificate. At a minimum, substantial compliance with the execution requirements must be achieved in order to include such ballots in the absentee vote tallies. Wrinn v. Dunleavy, supra.

The three officials whose attestations are questioned here did no more than inscribe their names, titles, and limited addresses. Out of five lines on their respective certificates, they each filled out only two. They did not in any way affirm that the voter's oath was "subscribed and sworn" to before them nor did they indicate the date that such act might have taken place. In light of the fact that the spaces for them to so indicate were immediately above the lines on which they signed their names, there is no basis for alleging reasonable confusion. The emptiness of these simple blanks almost gives rise to an inference that the voters did not subscribe their oaths in the witnesses' presence. The failure of these officials to execute their certificates properly affects an essential element of the election and contravenes the statutory requirement set forth in AS 15.20.203(b)(2). These three votes should have been rejected.

6. Incomplete voter signature

Kevin Dowell apparently began to sign his name on his absentee ballot oath; the first part of the "K" is written on the signature line. For some reason, however, he failed to complete even one letter of his name. Finkelstein Ex. 58. Appellant has

challenged Dowell's absentee ballot on the grounds of lack of signature. The state has defended on the basis of the language in Fischer v. Stout, cited in Section 4, supra.

Finkelstein's challenge is well taken. Mr. Dowell did not complete any mark which can fairly be said to represent a signature. In Willis v. Thomas, supra, at 1086 the court held that "The voter's signature is a basic part of the certificate and failure to properly attach it invalidates the ballot." The court based its decision on the language now found in AS 15.20.203(b), cited above, which requires that a ballot be rejected if the voter has "failed to properly execute the certificate." See also Erickson v. Blair, 670 P.2d 749, 757 (Colo. 1983), where the court stated: "A 'signature . . . is not only a mark' of identity but also a sworn affirmation or adoption of the contents of the affidavit itself. Without the signature, there is in reality no affidavit." Mr. Dowell's vote must be rejected.

7. Different witness dates

Thirty-two voters submitted absentee ballots which had been witnessed by lay persons on different dates. Three additional voters submitted ballots in which only the first witness supplied a date with his or her signature. The Division has segregated 10 of the total of 35 ballots raising lay witness dating issues. (Finkelstein Exs. 60-69). The actual votes in these cases can still be ascertained. The remaining ballots in this category have been commingled (Finkelstein Exs. 70-94). Finkelstein challenges all these votes on the grounds that the

varying dates indicate that at least one of the witnesses was not present when the ballots were cast.

As discussed in Section 5, supra, all parties agree that the Legislature intended for witnesses to be present at the time the vote is cast and the oath executed. The state argues, however, that neither AS 15.20.081(d) nor AS 15.20.203(b) explicitly apply this requirement to the lay witnesses, as opposed to the official witness. The state stresses that while ballots are to be rejected if voters fail to "properly" execute their oaths under AS 15.20.203(b)(1), witnesses are only required to "execute" their certificates, not necessarily to do so "properly." AS 15.20.203(b)(2). The state concludes that dating of lay witness signatures is only directory. It is contended that any lack of dates or discrepancies therein are of no legal significance.

The master determined previously that presence of the official witness when the ballot is cast and the voter's certificate executed is a mandatory aspect of absentee voting. The lay witnesses are to be relied upon only in the event no official witness is available. AS 15.20.081(d). When the court decided, in Hammond v. Hickel, that only one lay witness was required, the Legislature clarified its intent by overturning that decision through an amendment to the election law explicitly requiring two lay witnesses. See Committee Analysis of the Changes Proposed to the Election Code (Finkelstein Ex. 96). As stated in Finkelstein's brief,

It defies logic to conclude that the Legislature would require strict adherence to procedural safeguards when an absentee ballot is voted before a public official, but relax those standard when an absentee ballot is voted in a less preferred manner.

Appellant's Brief at 32.

Based on the above analysis, it would appear that the lack of dates, or inconsistent dating, in connection with lay witness signatures should prove fatal to these 35 ballots. If it is mandatory that one official execute the witness certificate to establish "presence," then, similarly, it must be mandatory that both lay witnesses execute their certificates for the same purpose.

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 instructions suggest that the voting process itself need not be witnessed. 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.

8. Ballots without postmarks
received after the election

Finkelstein seeks rejection of four absentee ballots which were received after the election and which did not contain

a postmark. Appellant relies on a portion of AS 15.20.081(e) which provides that "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." Finkelstein observes that delivery of a ballot after the day of election by means other than mail constitutes grounds for rejecting the ballot. AS 15.20.203(b)(5).

In this case, however, there is no evidence that these four ballots were delivered other than by mail. The state does not support its contention that postmarks are frequently lacking on "franked" mailings. But the state is correct in asserting that Finkelstein bears the burden of demonstrating that a means other than mail was used. That burden has not been met. These ballots were valid.

9. Unregistered voter

Appellant demonstrated that voter Eileen M. Snyder was not registered at the time she submitted her absentee ballot. Finkelstein Ex. 101. The state has conceded error and agreed that Snyder's ballot should not have been counted. The court concurs.

10. Punchmark ballots

Finkelstein objects to the counting of 14 votes for Bradley when the punchmarks were placed in the boxes for both Bradley and Finkelstein. Appellant relies on AS 15.20.730(b)(1), which provides that the computer shall be programmed to count votes "only if the punch is clearly spaced in the square designed

by a plus sign following the name of the candidate the voter desires to select. . . ." Appellant also cites administrative rules for evaluating ballots, particularly a paragraph 5 which states: "The marks . . . SHALL BE COUNTED ONLY if they are substantially inside the square provided, or touching the square so as to indicate clearly that the voter intended the particular square to be designated." Finkelstein Ex. 118. Finally, Finkelstein notes that instructions posted in the voting booths advise voters who spoil their ballots to obtain new ballots. Finkelstein Ex. 117.

The state's position regarding these challenges is that a voting machine in Precinct 153 malfunctioned, causing punch marks to register low. No verified evidence was presented to support this theory, other than the ballots themselves, which cannot be tied to a particular voting machine. (But see Affidavit of Diane Holmstrom, submitted by the state in its "Filing of Supplemental Affidavit.")

The supreme court has stated that the "crucial question in determining the validity of ballot markings is one of voter intent." Willis v. Thomas, supra, at 1085. The Willis court examined the entire ballot in at least one instance to ascertain the voter's intent in regard to a specific race. In McCavitt v. Registrars of Voters of Brockton, 434 N.E.2d 620, 625 (Mass. 1982), the court held that "the judge correctly inspected each ballot for patterns that reveal the voters' intent." In the same opinion, it was recognized that the judge must make a de novo

determination of voter intent, and not rely on the administrative determination below.

The master has inspected each ballot to determine whether, standing alone, a pattern of consistently low punchmarks on a particular ballot gives rise to a clear inference of voter intent vis-a-vis that ballot. The statutory and administrative guidelines for assessing ballot marks are intended to accomplish the objective stated by the supreme court: to determine voter intent. There is no deviation from administrative rule 5 in any of the cases in which the master recommends that challenged ballots be counted. The punchmarks attributed to Bradley are all "clearly spaced" when considered in the context of the physical placement of all marks on the respective ballots.

The master's findings are as follows:

Ballot 20 (Finkelstein Ex. 102). The punchmark is evenly divided between the Finkelstein and Bradley boxes. The same is true of the other state legislative races. The races for U.S. Congress and President are the only ones which do not give rise to any question of voter intent. The votes for Young and Bush do not cross over into any other candidate's box. While there is certainly a possibility in this case that all the punchmarks were registering low, the fact that three out of the four marks on the first side of the ballot are squarely divided between two candidates leaves the master with no basis for finding that a vote for Bradley has been demonstrated. The

presidential boxes are large enough that a voter can readily position the lever in varying parts of the box without a clear inference being reasonably drawn from such act. This vote should not have been counted.

Ballot 21 (Finkelstein Ex. 103). In this case, all the punchmarks on the first side of the ballot bisected the line of a box approximately evenly. However, in each race other than the Finkelstein-Bradley contest, the line bisected was the bottom line of the box for the last candidate for that particular race. Thus, there was no question about the voter's intent in regard to three out of the four races on that side of the ballot; it is logical to assume that low registration accounts for the placement of all the punchmarks, including that in the Bradley-Finkelstein race. The vote was properly counted.

Ballot 22 (Finkelstein Ex. 104). This situation is identical to that obtaining on Ballot 21. This vote was also properly counted.

Ballot 30 (Finkelstein Ex. 105). This voter registered in the middle between the Bradley and Finkelstein boxes, low in the Young box, and low in the write-in box for the Martin-Whittle race (with no write-in candidate specified). No vote was cast in the Phillips-Pourchot race. The mark was low in the Bush box. Since the Bradley-Finkelstein race was the only one in which the vote was "split," and because of the irrelevant vote in the Martin-Whittle race, the master does not believe a fair inference

of voter intent can be drawn in this case. The vote should not have been counted.

Ballot 1 (Finkelstein Ex. 106). In three of the four races on the first side of this ballot, the mark was substantially in the upper candidate's box, but touched to some extent the box of the candidate below. In the Phillips-Pourchot contest, the mark was low in the second candidate's box so that it would have crossed into the next candidate's space had there been a name below. Here there is substantial evidence of an intent to vote for the person in whose box the greater part of the mark was located. The vote was correctly included for Bradley.

Ballot 4 (Finkelstein Ex. 107). Well over half of the mark here fell inside the Bradley box. Similarly, the other marks on this side of the ballot were predominantly located in the lower portion of one candidate's box. Bradley was entitled to this vote.

Ballot 6 (Finkelstein Ex. 108). All prevailing candidates received marks substantially within their boxes, crossing over slightly into the box below. The intent of the voter to support Bradley was correctly honored.

Ballot 25 (Finkelstein Ex. 109). Again all votes were substantially in one candidate's box but crossed over the bottom line to some degree. The vote for Bradley was correctly counted.

Ballot 26 (Finkelstein Ex. 110). All votes were on the line between two candidates; all were close to two-thirds into the upper candidate's box. On the reverse side of the ballot,

every presidential candidate except one received a punchmark -- all low in the respective boxes. The intent to vote for Bradley was correctly ascertained.

Ballot 27 (Finkelstein Ex. 111). This is a close call. The ballot is marked slightly more in the Bradley box than in the Finkelstein space, and the punchmark is similarly divided in the Phillips-Pourchot contest. The Young mark is similarly proportioned, but with no candidate below, gives rise to the inference that the mark was registering low. The uncertainty is created by the vote for Martin, which similarly divides the top line of Martin's box. It appears most likely to the undersigned that the voter recognized belatedly that his marks were registering low and sought to correct the problem by going high to eliminate any possibility of confusion. Comparing the high and low marks, it does not appear that a mark squarely within the center of any of these boxes would have been feasible. The vote was properly attributed to Bradley.

Ballot 28 (Finkelstein Ex. 112). Three-fifths of the punchmark was in the Bradley box. Since the same proportion was in the boxes for Pourchot and Whittle, who had no candidates below them on the ballot, it can be assumed that the mark was registering low. Bradley was entitled to this vote.

Ballot 29 (Finkelstein Ex. 113). The mark in the Bradley box here is slightly greater than that in the Finkelstein space. However, this is the only mark between two candidates on this ballot. In voting for Martin and Phillips, the voter

bisected the top line of these candidates' boxes leaving no room for doubt as to the intention. Only the vote for Young -- with no candidate beneath him -- similarly bisected the bottom line of the box. The presidential vote was low. The undersigned does not find that voter intent has been demonstrated. This ballot should not have been counted.

Ballot 31 (Finkelstein Ex. 114). All votes on this ballot were three- to four-fifths in the box of a given candidate, including Bradley. All registered low in that candidate's box. The vote was properly attributed to Bradley.

Ballot 32 (Finkelstein Ex. 115). Again, all punchmarks were predominantly within specific candidates' boxes. This represents a vote for Bradley.

Scrutiny of each of the above-referenced ballots results in a subtraction of three votes from Bradley's total.

B. Intervenor's Challenges

1. Absentee ballots lacking voter signatures

Intervenor contends that 15 absentee ballots which were not counted for lack of voter signatures should have been included. Bradley's position is much the same as was argued by the state in connection with the incomplete signature provided by Mr. Dowell (Section A. 6, supra). Bradley also argues that the placement of the signature line in the general area under the instruction to "Provide at least one of the following for identification purposes," which space includes blanks for voter number, birthdate and social security number, is confusing. The voter,

according to Bradley, might believe that the signature blank is optional, if other identifying information is provided.

As a factual matter, the undersigned does not agree that there is a substantial opportunity for confusion. The request for voter signature is stated in red ink, differentiating it from the black ink utilized to ask for voter number, etc. Moreover, the requests for voter number, social security number, and birthdate precede the line left blank for insertion of the information; the voter signature line is preceded only by an "X." The words "Voter Signature" appear below the line. The instructions on the secrecy envelope into which the ballot itself is placed state in red "Complete and sign," and then in black, "the VOTER OATH on the back of the return mailing envelope." Any voter confusion is due to the individuals' own lack of diligence in following instructions. See, original Exs. 146 and 147 to Appellant's Reply Brief.

In addition to disagreeing with Bradley on the factual basis for his claim, as a matter of law, the master considers the voter signature requirement to be a mandatory one. The reasoning for this position was set forth in Section 6, above.

Bradley does add a new factor, however, in the case of voters Deborah C. Thomas and Michael S. Lynch. These voters executed -- and signed -- new affidavits containing all the information set forth on their original oaths and attesting that the information was true at the time of mailing their absentee ballots and at the time the new affidavits were sworn. The same

witnesses who attested to the original ballots averred that the voter's statements were originally made to them on the date stated on the original envelope. Intervenor Exs. 16 and 17.

As discussed earlier (Section A.2), to insure the accuracy of decisions regarding voter qualifications and ballot validity, some after-the-fact presentations of relevant information on Division of Election forms should be permitted. In this case, however, Intervenor acknowledged at oral argument that these new affidavits were solicited by his campaign. They are akin, in that respect, to the affidavits acquired by Finkelstein to demonstrate non-residency. These Bradley affidavits, moreover, were not presented on Division forms. Without the safeguards of regularity, these affidavits must be disregarded. The Division was correct in refusing to include these 15 ballots in the vote tallies.

2. Special overseas absentee ballots

AS 15.20.082(d) authorizes a procedure whereby voters overseas may receive special absentee ballots prior to the time candidates are certified for all the races. On these special ballots, the voters are given the option of casting their ballots based solely on party preference. Voters submitting such special absentee ballots are subsequently sent regular absentee ballots identifying all the candidates by name. According to statute, "The director shall, if the regular absentee ballot is received within the time required by law, count the regular absentee ballot in preference to the special absentee ballot."

Bradley presents the names of three voters, Cherie D. Riney, Roger A. Sturdy, and Kathleen E. Lund, who submitted valid special absentee ballots (Intervenor Exs. 18, 19 and 29, respectively). These individuals subsequently mailed in regular absentee ballots which, although timely, were rejected by the Division for either lack of signature or witnessing. Bradley argues that since no valid regular absentee ballots were received, the original special ballots should have been counted.

Finkelstein and the state both disagree. While the presumption in favor of enfranchisement of the electorate supports Bradley's position, to allow overseas voters who improperly execute a regular absentee ballot to rely on earlier special ballots would afford one limited class of voters multiple opportunities for casting a valid ballot. According to the statute, once the regular absentee ballot is received, valid or otherwise, it supersedes the special absentee ballot. The only purpose of the overseas ballot is to enhance the opportunity for this group of voters to cast an absentee ballot. Bradley's construction would favor individuals casting ballots overseas in preference to other absentee voters. As such it cannot be adopted.

Moreover, without inspection of the special, regular absentee ballots, there is no way to ascertain whether any of these individuals changed his or her vote from the special to regular ballots. Such inspection would violate these voters' right to ballot secrecy. See Alaska Constitution, Art. V, §3. These votes were properly rejected.

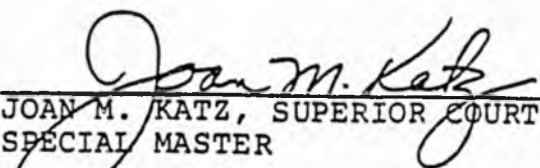
III. CONCLUSION

Based on the findings and recommendations contained hereinabove, it is the master's conclusion that the election should be set aside. The findings made in Section II.A.10 of this report require that three full-count votes be deducted from Bradley's post-recount total. This computation leaves Bradley with 3,560 votes to Finkelstein's 3,554, a six-vote margin. Findings in Section II.A.1, 4, 5, 6, and 9, pertaining to commingled votes, necessitate subtraction of nine votes in addition to those previously deducted by the Director to ascertain proportionate impact pursuant to the Hammond v. Hickel formula. This calculation indicates a potential impact on the outcome of the election to the extent of 1.17 votes in Finkelstein's favor. All parties agree that such a finding, if upheld, requires that a new election be held.

Regardless of how the supreme court rules on this contest, the master recommends that the Legislature and Division of Elections be alerted to the need to modify statutes, forms and procedures, as may be appropriate, to insure that some of the problems which gave rise to challenges in this case do not recur. It is particularly important that the Division specifically prohibit the use of Postal Service Center box numbers, at a minimum for persons who do not reside on base. Additionally, the Legislature or Division should prescribe an oath which advises the official and lay witnesses that they are attesting to

their observation of the casting of the ballot and the execution of the voter's oath; the secrecy envelope instructions should be revised accordingly.

These findings and recommendations are submitted to the Alaska Supreme Court this 5th day of January, 1989.


JOAN M. KATZ, SUPERIOR COURT JUDGE
SPECIAL MASTER

APPENDIX A

FINDINGS ON FINKELSTEIN'S CHALLENGES TO DIRECTOR'S DECISIONS
TO COUNT SEGREGATED VOTES

Vote Improperly Counted?

I. ATTESTATIONS OF TWO WITNESSES ON DIFFERENT DATES

A. Voter Ballots (Finkelstein Ex. Nos. 60-69) NO

B. Results

1. Votes Improperly Counted: 0
2. Subtraction from Finkelstein Total: 0
3. Subtraction from Bradley Total: 0

II. THE PUNCH CARD BALLOTS

A. Finkelstein Ex. Nos.

1. 102	YES
2. 103	NO
3. 104	NO
4. 105	YES
5. 106	NO
6. 107	NO
7. 108	NO
8. 109	NO
9. 110	NO
10. 111	NO
11. 112	NO
12. 113	YES
13. 114	NO
14. 115	NO

B. Results

1. Votes Improperly Counted: 3
2. Subtraction from Finkelstein Total: 0
3. Subtraction from Bradley Total: 3

III. Results of Election After Special Master's Findings on Segregated Votes

A. Vote Totals After Recount

Bradley.....3563
Finkelstein.....3554

B. Vote Totals After Special Master's Findings

Bradley.....3560
Finkelstein.....3554

APPENDIX B
FINDINGS ON FINKELSTEIN'S CHALLENGES TO DIRECTOR'S DECISIONS
TO COUNT COMMINGLED VOTES*

<u>Ballot Category</u>	<u>Votes Challenged</u>	<u>Challenges Accepted</u>	<u>Change Per Ballot</u>	<u>Total Vote Change</u>
Absentee Voter Oath Defects	14	3	B: -.6183 F: -.3817	B: -1.855 F: -1.145
Post-Election Affidavits Demonstrating Non-residency	20 in-person 1 absentee	0	B: -.6302 F: -.3698	B: 0 F: 0
Postal Boxes	4 absentee	0	B: -.6183 F: -.3817	B: 0 F: 0
	7 in-person	0	B: -.6302 F: -.3698	B: 0 F: 0
No Witness	1	1	B: -.6183 F: -.3817	B: -.6183 F: -.3817
Undated Witness	3	3	B: -.6183 F: -.3817	B: -1.855 F: -1.145
Two Witness Dates	25	0	B: -.6183 F: -.3817	B: 0 F: 0
Post-Election Day Ballots	4	0	B: -.6183 F: -.3817	B: 0 F: 0
Unregistered Voter	1	1	B: -.6183 F: -.3817	B: -.6183 F: -.3817
No Voter Signature	1	1	B: -.6183 F: -.3817	B: -.6183 F: -.3817
TOTAL		9	Bradley: Finkelstein:	-5.565 -3.435

* applying the formula prescribed in Hammond v. Hickel, 588 P.2d 256, 260 (Alaska 1978).

APPENDIX C
FINDINGS ON BRADLEY'S CHALLENGES TO DIRECTOR'S DECISIONS
NOT TO COUNT VOTES

Votes Improperly Stricken?

- | | |
|---|----|
| I. ABSENTEE BALLOTS NOT SIGNED (15) | NO |
| II. SPECIAL ADVANCED OVERSEAS BALLOTS (3) | NO |
| III. Results of Election After Special Master's Findings on Intervenor Bradley's Challenges: Unaffected | |

APPENDIX D

SUMMARY OF EFFECT ON VOTE TOTALS AFTER
SPECIAL MASTER'S FINDINGS

I. Results of Election After Special Master's Findings on Segregated Votes (See Appendix A)

Bradley.....3560
Finkelstein.....3554

II. Proportionate Impact Using Hammond v. Hickel Formula After Special Master's Findings on Commingled Votes

A. Results of Proportionate Reduction by Director of Elections (See Finkelstein Ex. 1)

Bradley.....3547.98
Finkelstein.....3544.02
Margin.....3.96

B. Adjustment to Total Vote Count due to Findings on Segregated Vote Totals

Bradley.....3544.98
Finkelstein.....3544.02

C. Results of Additional Proportionate Reduction by Special Master (See Appendices B and C)

Bradley.....3544.98
 -5.565 Special Master's Findings
 3539.415 Net

Finkelstein....3544.02
 -3.435 Special Master's Findings
 3540.585 Net

NEW MARGIN BETWEEN CANDIDATES.....1.17
(in Finkelstein's favor)

Filed and Entered
APPELLATE COURTS of
STATE of ALASKA

IN THE SUPREME COURT OF THE STATE OF ALASKA

JAN 11 1989

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.)
)

CLERK
By _____

ORDER¹

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

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 commingled³ 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).

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

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 attester. 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, in the 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 attester 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. Registrars 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

Official Business

Four challenges were made under this category, all of
 Speaker of the House of Representatives

which were rejected by Judge Katz. We concur.



Alaska State Legislature

Pouch V
 State Capitol
 Juneau, Alaska 99811
 (907) 465-3720

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
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 instructions suggest that the voting process itself need not be witnessed. 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 construction of the phrase which avoids the wholesale disfranchisement of qualified electors. See

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/}

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

(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 preserving 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

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.



Alaska State Legislature

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: Senate State Affairs Committee Members

FROM: Senator Pat Pourchot, Chairman *Pat*

RE: January 20 Committee Hearing

DATE: January 19, 1989

On Friday, January 20 at 1:30 p.m. in the Beltz Room, the Senate State Affairs Committee will be presented an overview of the state's election laws by the State Division of Elections. In addition, several individuals who have first hand experience with problems in existing law have been invited to participate.

In addition, testimony will be taken on SB 43, Relating to conduct and administration of elections by the director of elections. SB 43, which makes several clarifications to current election law, has passed the House twice before and is largely a technical "clean-up" bill. However, it is my intent to use SB 43 as the vehicle for additional amendments to election law that the committee may deem necessary following Friday's hearing.

As currently written, SB 43 addresses the following issues: a voter's name change, notification of changes in precinct boundaries or polling places, placement of judicial retention candidates on the ballot, receipt of absentee ballots, and the time period for withdrawal of a candidate's name from the ballot. Backup materials on SB 43 are attached.

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5-DAY NOTICE 1-20-89
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER JUD

**FISCAL NOTE(S) MUST BE ATTACHED
IN ACCORDANCE WITH AS 24.08.035

DATE TURNED INTO OFFICE 2-6-89

1/9/89

Mr. President:

STATE AFFAIRS

Committee considered

SB 43

conduct and administration of elections by the director of elections;
efd

and recommended:

replace with CS SB 43 (St Aff) same title
 new title

attached amendment(s) and

_____ letter of intent adopted

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

FISCAL NOTE(S) attached zero
 appropriation no FN attached

fiscal impact
 Gov. FN introduced w/ bill

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Janis Smith
Tim Kelly

Paul Hej (no Rec)

Ed Townsend do pass
Chairman signature and recommendation

Committee backup attached

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 3, 1989

SUBJECT: Election issues
TO: Senator Pat Pourchot
FROM: Richard A. Bradley
Legislative Counsel

Jeannie has asked that I comment briefly on two issues.

The first is the use of party names: May the legislature prohibit a candidate or party from using a word in a nominating petition that is also used in the name of an existing political party in the state?

I am aware of the use of the phrase "Moderate Republican" by Ray Metcalfe and, I believe, of the phrase "Bull Moose Republican" by Tuckerman Babcock. Each was a candidate for the legislature.

I believe that the legislature may enact a law that would prohibit a candidate from using unmodified names when the individual is not a candidate of the party. Thus only those who go through the primary could be prohibited from using the phrase "Republican" or "Democratic."

But there may be more difficulty with predicting that the court will prevent candidates from calling themselves "Moderate Republicans" or "Social Democrats." There is an American political party known as, I believe, the Democratic Socialists of America, lead by Michael Harrington; they are too well established to be prevented from the use of the word "Democratic".

Everything that is affected with First Amendment rights is closely scrutinized by the courts and I believe that the answer might well be that the voters can tell real Democrats from hyphenated Democrats.

Senator Pat Pourchot
Page 2
February 3, 1989

But it is a close question and you should note that it has been the law of the state for a number of years that a "limited political party" [AS 15.30.025(b)] may not "assume a name which is so similar to an existing political party as to confuse or mislead the voters at an election." While restrictions on First Amendment freedoms are closely scrutinized, the legislature acts in the public interest when it requires parties to identify themselves fairly and without confusing or misleading the voters.

The second question that you asked that I comment on would be the choice of August 1 for the deadline for "no-party" candidates to file their nominating petitions.

The question arises under the Sigler opinion of the Superior Court, at Anchorage, Case No. JAN-88-8695-CI. The case arose out of the efforts of Libertarians to qualify for the ballot later than other candidates.

The Superior Court decision ordered the Division of Elections to admit the candidates to the ballot; the decision was issued in early September. While I understand that Tuckerman Babcock did not intervene in this litigation, he benefited from it and used the order of the court for his entry on the ballot.

I understand that the decision has been appealed and thus, the comments may need review on the decision by the Supreme Court.

But the Superior Court stated that the basis for third parties was the failure of the main-line parties to represent all interests. The court noted that this perceived disenchantment arises after the nomination of the main-line candidates. Its authority for this decision is Anderson v. Celebrezze, 460 U.S. 780 (1983), a case involving third party candidates for president. While the court thought the case was on point, it seems to me that the analogies between state legislative races and the presidential races offers little value. And it noted that the Anderson case required third party candidates to qualify earlier than main-line candidates.

Alaska does not require its third-party candidates to qualify earlier but at the same time as main-line candidates.

Senator Pat Pouchot
Page 3
February 3, 1989

The court also cited an Eighth Circuit case, McLain v. Meier, 637 F.2d 1159 (8th Cir., 1980). That case stated that since the third party candidates arise as a reaction to main-line candidates, it was unreasonable to require them to qualify before the primary results were available.

The trial court noted that a more recent case, Rainbow Coalition v. Oklahoma State Election Board, 844 F.2d 740 (10th Cir., 1988) was contra, but it declined to follow the more recent case.

I note that if the trial court decision is followed, an August 1 deadline for third party candidates is too early since it does occur before the primary election.

But I suggest that it is undesirable to rely too heavily on the trial court decision in preparing legislation. I would await the decision by the Supreme Court.

If I may be of further assistance, please advise.

RAE:lmb
L6/161

STEVE COWPER, GOVERNOR

REPLY TO:

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PHONE: (907) 465-3600

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

January 30, 1989

Hon. Pat Pourchot
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Re: SB 43 -- conduct and administration of elections

Dear Senator Pourchot:

At your request, I have reviewed SB 43, relating to the conduct and administration of elections by the director of elections. Generally, the amendments proposed by this bill are beneficial and would greatly assist the division of elections (division) in the performance of its duties. However, the amendment to AS 15.25.056(a) set out in sec. 12 of the bill may need further clarification.

Under existing law, if an incumbent fails to remain in the race, a political party may petition to add another candidate. This right to replace a candidate applies only if the termination of candidacy occurs during a specific period of time. The period ends five days before the withdrawal deadline. This bill would lengthen the period to a date "which is more than 54 days" before the primary election. I interpret this to mean midnight of the 55th day before the primary election day. If that is not your intent, let me know and I will draft a conforming amendment.

Section 11 of the bill would change the withdrawal deadline to the 54th day before the primary election day. The amendments set out in secs. 11 and 12 would shorten the gap to 24 hours. I presume the time gap is intended to allow a political party enough time to convince a qualified candidate who has filed for another incompatible office to withdraw and replace the fallen incumbent by petition. I am unable to offer advice whether allowing more time for such a withdrawal is beneficial or harmful to the electoral process. I have observed that it is common for political decisions concerning candidacy to be left until the final minutes before a deadline expires. It seems to me that the wisdom of allowing a longer period is a policy call that is best left to the legislature.

I also suggest that you consider amending AS 15.20.203