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votes in down-ballot races should be cast for first position.[12] In reality, 47.9% of all votes were cast for first position. Given the expectation of 45.4% and 3,836 individual precincts, the probability of observing 47.9% or more is less than .001.[13]

Position Effect and Candidate Advantage

We have discussed name-order bias in the abstract, referring to positions instead of candidates, for the sake of quantitative analysis but this should not obscure the fact that the beneficiaries of first-position effect are individual candidates. All 12 statewide candidates received "extra" votes when listed first. The political implications of position effect may be more vividly demonstrated by shifting our attention briefly to results by candidate.

Among the 180 candidates in contested primaries, 161 received a larger percentage of the vote when listed first. Table 3 lists the vote tally for the statewide candidates in our dataset, by the order in which their names appeared on the ballot.[14] For example, Catherine Abate, a Democratic candidate for Attorney General, received 27.1% of the total vote, but when listed first she captured 29.3%. The boost for individual candidates ranged from –11.6% to 14.5%, with an average of 3.4%, as depicted in Figure 1.

[Table 3 ABOUT HERE]

[Figure 1 ABOUT HERE]

Inspecting the by-candidate results revealed one of the most important aspects of our findings: in seven of the 79 contests, the first-position advantage exceeded the margin of victory. That is to say, the first-position effect was large enough to change the outcome of the election. One of those elections was the hotly contested primary to succeed Chuck Schumer in the U.S. House of Representatives.[15] The estimated position effect was 2.1%, and the winner's margin of victory was

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[12] More details about how we calculated the observed and expected votes are available at http://www2.bc.edu/~steenje/ballot.htm, or from the authors upon request.

[13] N=3,836 instead of 5,616 (the total number of precincts in New York City) because there were no contested Democratic primaries below the statewide offices in 1,780 precincts.

[14] Vote tallies for local candidates are available at http://www2.bc.edu/~steenje/ballot.htm, or from the authors upon request.

[15] The others were both district-level civil court judge nominations and four elections to Democratic party offices (Male District Leader for the 36th Assembly district, Male District Leader for the 37th Assembly district, State Committeeman from the 74th Assembly district, and State Committeewoman from the 31st Assembly district).

just 1.1%. On ballots on which Melinda Katz was listed first, Katz prevailed with 3,575 votes and her nearest opponent, Anthony Weiner, received 3,282. When Weiner was listed first, he received 3,729 votes to Katz' 3,110. Weiner won the primary (with a margin of less than 500 votes out of 45,113 cast), but if the ballots had not been rotated and Katz had drawn the top slot, it is probable that she, not Weiner, would now be a Member of Congress.

Variations in Name Order Effect

The effect of ballot position on election outcomes is not uniform across contests. According to Miller and Krosnick's theory, these variations may be explained in part by variations in voters' information about the candidates, *ergo* their substantive bases for choosing among options. With more information regarding the candidates, voters are less likely to be influenced by the position of the names because they are more likely to enter the booth with pre-formed intent to vote for one candidate or another. To test the hypothesis that voter information decreases the ballot position effect, we considered two kinds of indicators of voter information, those related to the offices sought and those related to the electorate's characteristics.

Level of Office

Voters are more likely to have some information upon which to base a decision in the more prominent contests either because they seek out information or the contests feature more vigorously waged campaigns that include television commercials, direct mail, street campaigning and significant news coverage. Candidates for Governor and U.S. Senator naturally receive much more media attention and advertise themselves more than do candidates for state central committee. Voters may also seek out information about the top-of-the-ticket races because they perceive these contests as more important.

As an indirect indicator of salience we use the relative ballot placement of blocks of candidates for the same office.[16] Figure 2 presents the average position effect by office, depicting a clear trend of increasing position effect with decreasing prominence of the office sought. In the

[16] Furthermore, offices are listed in the ballot in roughly the order of salience to the electorate, so if cognitive fatigue is a factor in position effect, the down-ballot races would be more susceptible.

four statewide primaries position bias is roughly two percent, while in the local party offices it is almost four percent.

[Figure 2 ABOUT HERE]

Conclusion

In this paper, we have clearly demonstrated the existence of position effect on a wide-range of contests in the 1998 Democratic primary in New York City. The evidence leaves little doubt regarding this phenomenon. Moreover, we conclude the effect – while it may appear small – can be determinative in close contests. This offends democratic notions that all candidates should compete on a level playing field.

Those who accept lotteries or alphabetic ordering for ballot position as an unavoidable part of our election system should reconsider this acceptance of the *status quo*. If a jurisdiction with as many simultaneously contested elections as New York City – and 14 states – can successfully carry out rotation, there is no reason other election officials could not do the same across the country.

Of course, the problem of position effect does not exist in a vacuum. While rotation of candidate names would certainly solve the position effect problem, it could frustrate some other practices intended to make voting easier. Most obvious, printing accurate sample ballots for each voter would be almost impossible. Congress is encouraging states to provide sample ballots to reduce the likelihood of problems such as those experienced by Florida voters in 2000 (Seelye 2001). Indeed, some jurisdictions legally require production of a ballot facsimile that exactly reproduces the actual ballot (e.g., Fla. Stat. §101.20 (2001)). This could prove challenging were rotation also implemented.

Some of the proposed changes that have emerged in the wake of the 2000 election would, however, be entirely consistent with rotation. Electronic voting technologies – especially those that employ a screen-based display of candidate names – would, in fact, make rotation much easier. Such a device could rotate candidate names *by voter*. That could eliminate position effect *and* provide terrific data to political scientists who study this phenomenon in the future.

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Table 1. Percentage of vote for candidates in each position, statewide primaries

	Ballot Position				Total votes cast for this office	Number of precincts with votes for this office	Advantage to first position
	1	2	3	4			
Governor	27.3%	24.0%	23.5%	25.3%	427,871	5,460	2.3% ***
U.S. Senator	26.8%	25.1%	24.0%	24.0%	444,410	5,460	1.8% **
Lt. Governor	34.9%	33.3%	31.8%		305,331	5,442	1.6% **
Atty. General	27.2%	25.2%	23.9%	23.7%	395,820	5,456	2.2% ***

** $p<.01$
*** $p<.001$

Table 2. Percentage of vote for candidates in each position, local offices

(Note: Table 2 continues on one additional pages)

Office	District	Ballot Position				Total votes cast for this office	Number of precincts	Advantage to first position
		1	2	3	4			
U.S. Representative	9	27.1%	24.5%	24.5%	23.8%	45,113	498	2.1%
	10	37.1%	31.6%	31.4%		33,477	514	3.7% *
	17	50.0%	50.0%			23,267	348	0.0%
State Senator	17	56.6%	43.4%			9,209	251	6.6% *
	14	36.8%	31.4%	31.8%		17,657	208	3.5%
	19	54.1%	45.9%			14,647	213	4.1%
	30	51.6%	48.4%			28,071	240	1.6%
	32	50.3%	49.7%			17,119	216	0.3%
State Assemblymember	29	55.5%	44.5%			5,833	85	5.5%
	31	53.3%	46.7%			4,368	75	3.3%
	34	51.5%	48.5%			3,761	77	1.5%
	36	53.3%	46.7%			8,627	75	3.3%
	42	35.5%	34.3%	30.1%		5,774	54	2.2%
	43	53.7%	46.3%			6,531	62	3.7%
	45	24.5%	24.3%	26.8%	24.5%	9,816	103	-0.5%
	46	38.3%	30.[illegible]	31.7%		6,802	84	4.9%
	51	54.5%	45.[illegible]			4,549	93	4.5%
	52	51.3%	[illegible]			7,787	108	1.3%
	54	39.5%	[illegible]%	29.6%		4,303	102	6.2% +
	55	50.8%	[illegible].2%			5,632	104	0.8%
	56	52.3%	47.7%			6,465	89	2.3%
	58	53.3%	46.7%			6,157	64	3.3%
	68	53.6%	46.4%			6,571	99	3.6%
	69	51.7%	48.3%			10,606	95	1.7%
	72	40.5%	59.5%			6,977	55	-9.5%
	75	55.2%	44.8%			7,311	71	5.2%
	76	41.6%	58.4%			4,692	85	-8.4%
	78	54.2%	45.8%			4,234	68	4.2%
	79	40.6%	30.7%	28.7%		6,416	95	7.3% +
Civil Court Judge	Bronx	48.6%	51.4%			42,332	877	-1.4%
(Countywide)	Brooklyn	51.5%	48.5%			100,006	1,875	1.5%
Civil Court Judge	1	39.0%	30.2%	30.8%		16,386	269	5.6% *
(District)	2	52.9%	47.1%			19,685	420	2.9%

Office	District	Ballot Position				Total votes cast for this office	Number of precincts	Advantage to first position
		1	2	3	4			
Male District Leader	29	53.0%	47.0%			4,575	85	3.0%
	31	55.2%	44.8%			2,360	75	5.2%
	36	53.6%	46.4%			5,229	75	3.6%
	37	56.8%	43.2%			2,815	81	6.8%
	41	52.4%	47.6%			7,810	110	2.4%
	42	38.1%	32.2%	29.7%		4,293	54	4.7%
	46	53.3%	46.7%			5,200	82	3.3%
	51	53.2%	46.8%			3,848	93	3.2%
	54	41.2%	30.1%	28.7%		3,750	101	7.8% *
	55	52.0%	48.0%			5,399	101	2.0%
	56	52.5%	47.5%			6,181	89	2.5%
	68	57.8%	42.2%			5,267	99	7.8% +
	76	56.7%	43.3%			3,269	85	6.7%
	78	52.7%	47.3%			3,634	68	2.7%
	79	57.8%	42.2%			3,271	93	7.8% +
	82	55.1%	44.9%			4,115	116	5.1%
Female District Leader	29	55.4%	44.6%			4,789	85	5.4%
	31	53.2%	46.8%			2,584	75	3.2%
	36	56.5%	43.5%			4,209	75	6.5%
	41	53.2%	46.8%			7,809	110	3.2%
	46	50.9%	49.1%			5,696	83	0.9%
	54	44.7%	27.2%	28.1%		3,812	102	11.4% **
	68	56.5%	43.5%			4,975	99	6.5% +
	72	39.4%	60.6%			3,521	55	-10.6%
	76	59.3%	40.7%			3,135	85	9.3% *
	78	53.4%	46.6%			2,187	67	3.4%
	79	57.6%	42.4%			3,999	95	7.6% +
	82	54.4%	45.6%			4,469	116	4.4%
State Committeeman	29	53.1%	46.9%			2,976	41	3.1%
	31	38.5%	32.6%	28.9%		1,771	38	5.2%
	36	55.1%	44.9%			4,348	39	5.1%
	74	61.3%	38.7%			5,317	76	11.3% *
	75	43.4%	56.6%			5,695	71	-6.6%
	76	60.0%	40.0%			3,421	85	10.0% *
	78	44.1%	55.9%			3,132	68	-5.9%
	79	58.7%	41.3%			3,699	94	8.7% *
State Committeewoman	29	54.6%	45.4%			3,506	41	4.6%
	31	54.5%	45.5%			1,530	38	4.5%
	75	60.0%	40.0%			5,168	71	10.0% *
	76	54.6%	45.4%			3,591	85	4.6%
	78	44.0%	56.0%			2,668	68	-6.0%
	79	58.6%	41.4%			3,686	94	8.6% *

+p<.10 * p<.05 ** p<.01 *** p<.001

Table 3. Position advantage for individual candidates in statewide contests

OFFICE	DIST	NAME	POSITION 1	2	3	4	Total	1st - Total
Governor		Betsy McCaughey Ross	18.3%	15.4%	14.8%	15.9%	16.1%	2.2%
		Charles J Hynes	19.1%	15.7%	15.9%	18.0%	17.1%	2.0%
		James L Larocca	7.3%	5.0%	4.8%	6.0%	5.8%	1.5%
		Peter F Vallone	63.7%	59.8%	59.3%	61.1%	61.0%	2.7%
Lieutenant Governor		Charles King	38.5%	36.3%	35.0%		36.6%	1.9%
		Clyde Rabideau	17.4%	16.3%	15.2%		16.3%	1.1%
		Sandra Frankel	48.6%	47.6%	45.3%		47.1%	1.5%
Attorney General		Catherine Abate	29.3%	27.2%	25.8%	25.9%	27.1%	2.2%
		Eliot Spitzer	41.9%	39.3%	38.6%	38.0%	39.4%	2.5%
		Evan A Davis	10.9%	9.8%	8.5%	8.5%	9.4%	1.5%
		G Oliver Koppell	26.3%	24.6%	23.0%	22.4%	24.1%	2.2%
U.S. Senator		Charles E Schumer	55.6%	53.9%	51.9%	51.8%	53.3%	2.3%
		Eric Ruano Melendez	6.6%	5.9%	4.4%	3.9%	5.2%	1.4%
		Geraldine A Ferraro	20.5%	17.5%	17.1%	18.1%	18.3%	2.2%
		Mark Green	24.1%	23.2%	23.0%	22.4%	23.2%	0.9%

Table 4. Bivariate correlations, position effect and indicators of political knowledge

	Pearson Correlation
Percent of residents holding bachelors degree	-.614**
Number of households with income of $150,000 or more	-.510*
Number of households in which a language other than English is spoken	.491*
Median value of owner-occupied housing units	-.454*
Median household income	-.406*

N=14 (congressional districts)
* p<.05 ** p<.01

Figure 1. Histogram of individual candidates' position advantage

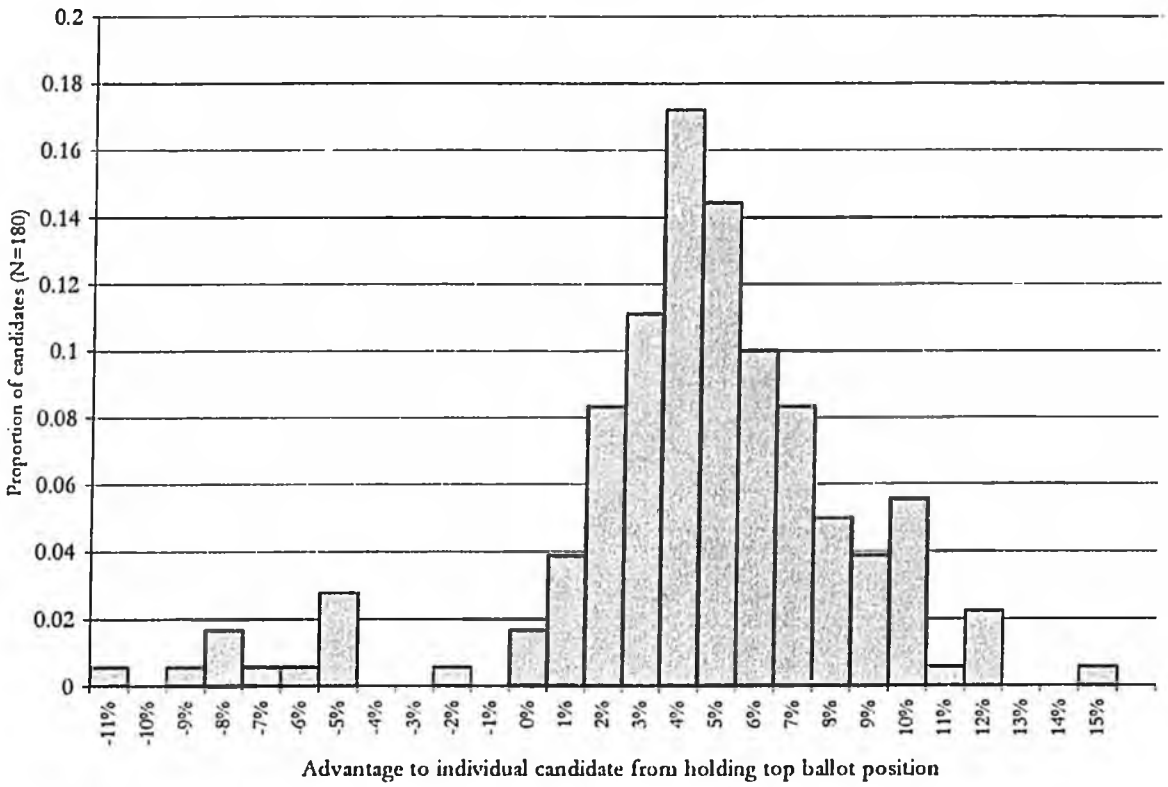
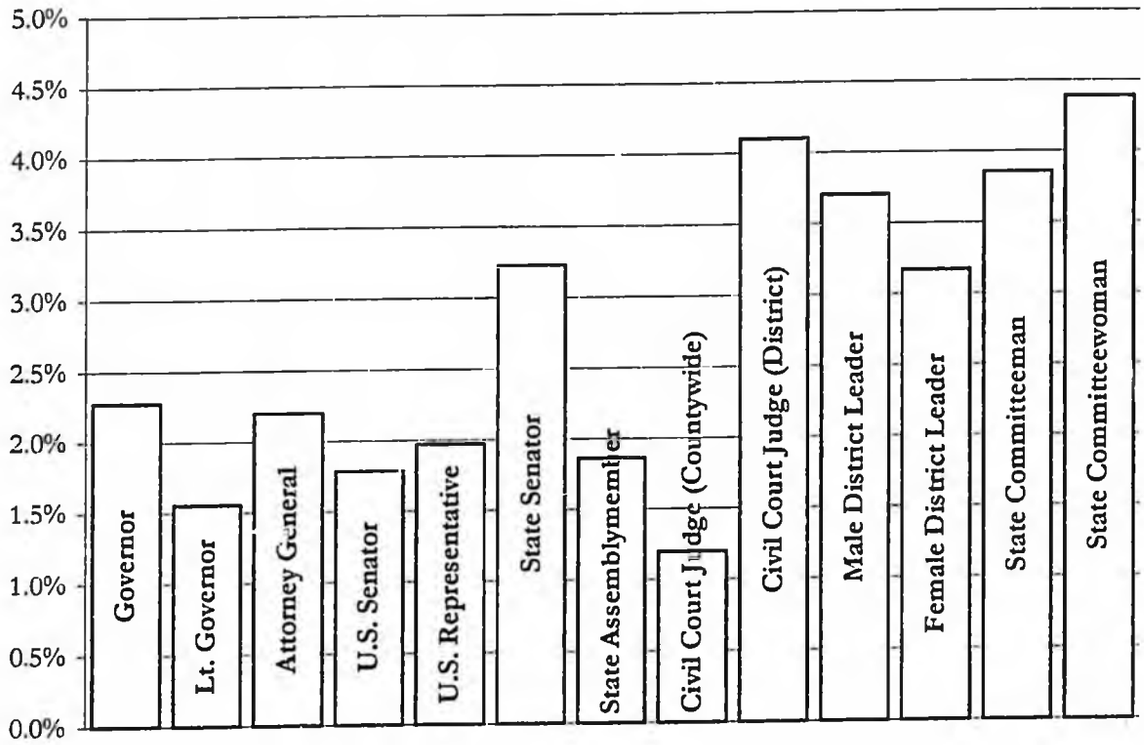


Figure 2. Average bonus to first position, by office



Determination of Order on Ballots

Importance in "Mark Choice" Voting

In systems where voters have to mark their choice of preferred candidate or party on a ballot, determining the order in which accepted candidates, parties or groups appear on the ballot (either for ballot papers or machine or electronic systems) is the link between the nominations process and final election materials design and the voting and vote counting systems set up.

As candidate or party position on the ballot may affect voting behaviour (there are perceptions that some voters merely follow the order on the ballot in marking their vote), it is critical that legislation and regulations determining the method by which candidate/party order on the ballot is determined is equitable and that procedures are applied transparently by election administrators. Basic methods for creating the order on the ballot include:

- some form of alphabetical listing
- random draw
- rotating ballot positions

Alphabetical Order

Alphabetically-based ballot orders raise equity questions, as they may be susceptible to manipulation, through name-based choice of candidates or taking alphabetical considerations into account when naming parties or groups. Safeguards are required both internally within the election processes of nomination and party registration and, perhaps, externally in relation to persons changing their names.

However, such methods do provide a simple, easily verifiable method for determining order on the ballot, with transparency being simply achieved through publication by the electoral administration of the list of accepted candidates, parties, or groups in the required alphabetical order.

Random Allocation of Order

A truly random draw for positions on the ballot will prevent any name bias in ballot order. For equity benefits of a random draw to be realised, it is critical that election administrations conduct the draw in the presence of candidates or parties participating in the election, and it is accessible to the public. This may delay the determination of ballot order. In devising the procedures for random draws, the process must be kept obviously transparent. Basic requirements to be implemented by the electoral administration would include:

- draw to be made by persons, preferably electoral administration staff, independent of any political participants in the election;
- equipment used to be available for public inspection prior to and after the draw and constantly visible during the draw;
- equipment used to be of a durable nature (e.g., paper candidate name slips are not advisable; equal size and weight balls or tiles should be used);
- formal recording of draw results to be witnessed by candidate or party representatives present;
- additional integrity measures should be considered, such as a double randomisation process (a draw for each party or candidate's number and a second draw of these numbers for ballot position for each party or candidate).

For examples of control sheets for double randomisation draws, see Draw for Ballot Paper Order (candidates), Australia (individual candidate constituency) and Draw for Ballot Paper Order (party lists) - Australia (list election)

The use of existing apparatus of known integrity maintained by lottery or similar organisations may minimise equipment costs.

Rotating Positions on Ballot

Using rotating ballot positions negates any positioning advantage, and its implementation would depend on whether the measured impact on election equity outweighs administrative disadvantages. For inexperienced voters it may be confusing. For administration of voting operations it makes ballot counts more complex and has significant cost disadvantages in ballot materials printing and collation, ballot

systems design, and, to some extent, voter education and election staffing. Appropriate transparency mechanisms are also more difficult and costly to implement; verifiable processes to ensure that equal numbers of each rotation's ballot papers, or machine or computer-generated ballot forms are available in each voting station must be maintained and available for public inspection.

Public Information and Data Transfer

Following the determination, the order on the ballot should immediately be made publicly available. The determination and publicising of the order should be made with the shortest possible delay after the closing time for nominations, both to counter any perceptions of manipulation of the order, or acceptance of late nominations, and to allow early finalisation of voting materia and systems information at a time-critical stage in the election process.

It is vital that accuracy be maintained in transferring the candidate and party order on the ballot to voting materials (see Production of Ballots). Similar accuracy must be maintained in transferring the same candidate/party sequence to forms and materials used to assist in and record vote counts, to reduce the possibility of error in transferring data. This obviously will not be possible where the order on the ballot is rotated; particular care needs to be taken in devising vote tallying procedures and in training vote counting staff under such systems.

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Ballot Design Options

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Prepared for *Human Factors Research on Voting Machines and Ballot Designs: An Exploratory Study*

1. Introduction

Does ballot design "matter"? Does the design of ballots influence how voters cast their ballots, and thereby affect the outcome of an election?

Anecdotal evidence indicates that ballot design may be a very important factor in American elections. Probably the most well-known ballot design question is the now infamous "butterfly" ballot design, from the 2000 Florida election.[2] The "butterfly" ballot design was argued to have confused many voters, especially the elderly (who might have had trouble with the visual layout of the "butterfly" ballot) and low-information voters (who might have been mislead by poor instructions and cognitive confusion). Unfortunately, while there was a great deal of rhetoric about the potential impact of the "butterfly" ballot design, there has not been anywhere near as much scientific research in to the exact impact such a ballot design might have had nor whom it might have affected most.

But other examples abound where ballot design issues may have played a role in some recent election. An excellent case is the 2001 June mayoral runoff election in the City of Compton, California.[3] The Compton City Clerk, in an apparent misunderstanding of California state elections law regarding ballot design, failed to correctly randomize the name of candidates on the runoff election ballot. Following state elections law, the Compton City Clerk requested and used the appropriate randomized list of candidate names in the March 2001 primary election, but he again used the same randomized list for the June 2001 runoff election (according to the court ruling in this case, the Clerk should have requested and used a second randomized list for the runoff election).

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[2] A full discussion of the "butterfly" ballot is in Richard A. Posner, *Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts.* Princeton, NJ: Princeton University Press.
[3] In the interests of full disclosure, the author was an expert witness in the City of Compton's defense of this case, and provided testimony regarding this ballot design question. The judge's decision was issued on February 8, 2002 in Los Angeles County Superior Court, and is currently under appeal.

The sitting incumbent mayor, Omar Bradley, was listed second on the runoff election ballot; his challenger, Eric Perrodin, was listed first and won the election by a slim 261 vote margin. The expert witness for Bradley, Jon Krosnick, testified that this incorrect ordering of candidate names on the runoff ballot could have accounted for at least the 261 vote margin, and perhaps many more ballots for Perrodin. The court was convinced by Krosnick's testimony, and on this basis alone, ruled in Bradley's favor, threw out the results of the June 2001 runoff election, and reinstated Bradley as mayor of the City of Compton.

These are just two examples of ways in which ballot design has been argued to affect two recent elections. But they point to two areas of election administration that have been largely neglected by social science. Much more research on these two areas, and other areas, of ballot design are necessary. At a time in which many election jurisdictions are investing considerable sums of money in the purchase of new voting systems, clearly more insight into how ballots are designed is necessary. In the remainder of this essay, I take up a series of what I consider to the important general topics regarding ballot design. I conclude the essay by outlining some general principles for scientific study of these ballot design topics.

2. Candidate Name Order

The recent City of Compton court case cited above is an important example about the limitations of current scientific knowledge of ballot design impacts on election outcomes. Importantly, there are an enormous variety of procedures for ordering the names of candidates on ballot across the United States. For example, in the State of California, the election code provides strict rules for randomization and rotation of candidate names on statewide ballots, randomization and limited rotation for state legislative races, and only randomization for local races.

For each election cycle, the Secretary of State's office issues a randomized alphabet. In statewide races (for example, gubernatorial races), the randomized alphabet is used in Assembly District 1 (of 80) for the candidate ordering on the ballot; rotation occurs across Assembly Districts, so that in Assembly District 2, the first letter on the original list is moved to last, effectively rotating the candidate list across Assembly Districts. But for a state legislative race (for example a State Senate election), the Secretary of State's random list is utilized for the entire Senate district, unless that district cuts across county lines; if the district does cut county lines, the list is rotated for each successive county the Senate district lies in. But for local races, no rotation is mandated, and rarely occurs in most local races.[4]

[4] Exceptions to this rule sometimes occur for countywide races in California. In Los Angeles County, the practice is to rotate the list across the various Assembly Districts that constitute Los Angeles County.

Other states, though, have dramatically different election laws regarding candidate name order. One well-studied state is Ohio, where candidate name order is a matter of county election law.[5] Many Ohio counties randomize and rotate candidate names by precincts.

Rotation and randomization procedures have been instituted in many election jurisdictions to alleviate a phenomenon that political psychologists call a "primacy effect". This phenomenon has been well-documented in survey methodology, where there is often a noticeable bias for respondents to provide the first response option from a list, especially in low-information situations or for poorly informed respondents.[6] While the survey methodologists have studied this phenomenon extensively in recent years, it is clear that candidates running for office, and many previous court decisions, have been aware of the possibility of a bias towards the first-named candidate on a ballot, even if they did not pin a precise psychological term to the phenomena.[7]

Miller and Krosnick compiled an extensive literature review of ballot order effects from social science. Of the thirty or so studies they examined, they argue that only two did not suffer from problematic methodological flaws, but "surprisingly, these (two) investigations found no name-order effects at all" (p. 297).[8] Miller and Krosnick's study, a recent and thorough examination of the problem, only focused on three counties in Ohio, and found significant name-order effects in 48% of the 118 races they studied. Importantly, Miller and Krosnick found that the variance across the races could be explained by county-specific differences, by whether races were partisan, involved an incumbent, and had substantial media attention.

Unfortunately, election administrators do spend considerable resources in each election trying to minimize or eliminate candidate name-order effects. The costs of rotating candidate names across all of the precincts in a county, for example,

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[5] Joanne M. Miller and Jon A. Krosnick, 1998. "The Impact of Candidate Name Order on Election Outcomes", *Public Opinion Quarterly*, 62: 291-330.

[6] Jon A. Krosnick, 1991. "Response Strategies for Coping with the Cognitive Demands of Attitude Measures in Surveys." *Applied Cognitive Psychology*, 5:213-36.

[7] There is an extensive literature on ballot order effects, in particular, the potential bias for the first-named candidate on a ballot. One of the most widely cited pieces from this early literature is the short monograph by Henry M. Bain and Donald S. Hecock, 1957, **Ballot Position and Voter's Choice**, Detroit: Wayne State University Press. In California, the state Supreme Court issued an important ruling that set the stage for the development of the current randomization and rotation system in 1975 in the case of *Gould v. Grubb*, 14 Cal. 3d 661. This case was relied upon extensively in the Compton decision, and involved a challenge to a Santa Monica law that allowed incumbents to be listed first on a ballot; the court ruled that this practice violated the equal protection clause, but left it up to the trial court to determine the exact extent of the exact effect this practice had on Santa Monica elections.

[8] The two studies cited by Miller and Krosnick as not being methodologically flawed are Robert Darcy, 1986, "Position Effects with Party Column Ballots," *Western Political Quarterly*, 39: 648-62 and David Gold. 1952, "A Note on the Rationality of Anthropologists in Voting for Officers," *American Sociological Review*, 17: 99-100.

involves substantial printing costs in counties using paper-based ballots or programming costs where electronic systems are employed. These costs are incurred, furthermore, in spite of social science research that finds only weak evidence for candidate name-order effects and which has not studied at all the impact that different candidate name-order procedures have on possible primacy effects. For example, is it sufficient to rotate in a county across state legislative districts, or should rotation be done across precincts? Or, should randomization and rotation be done for only certain races?

This is clearly an area of ballot design that needs substantial social science research, in short order. Instead of seeing the vast differences in randomization and rotation practices within and across states as a hurdle for scientific study, researchers clearly need to exploit those differences as important variance to use to explain any name-order effects that can be shown in empirical research. Furthermore, controlled laboratory experiments are necessary to examine with precision the impacts of different name-ordering procedures, as well as the set of mitigating factors on name-ordering effects. For example, maybe California's election law has the situation backwards: if it can be shown that name-ordering effects are most likely in non-partisan and low-information contests, then randomization and rotation should be done for local or municipal races, not for statewide contests!

3. Ballot Design for Individual Candidate Races

In addition to the question about the ordering of candidate names on a ballot, there are other important questions about how ballots are designed for each individual race. Most importantly, how useful is it for ballots to contain information other than the candidate's name --- the party affiliation of the candidate, whether a candidate is the incumbent or not, and the occupation of the candidate? Social science has not provided a great deal of insight into the exact importance of these different cues on ballots, despite the presence of a great deal of social science theory about why such cues might be helpful for voter decisionmaking.[9] But which cues are better to provide for voters, and in which order should they be used? And when it comes to information like the candidate's occupation, who should be given the task of compiling that information --- the election official or the candidate?[10]

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[9] The literature about how partisan, incumbency, and other cues can help poorly informed voters is too extensive to even summarize in this context. Much of the relevant literature is summarized in R.Michael Alvarez, 1997, **Information and Elections**, Ann Arbor: The University of Michigan Press.

[10] For example, the 2002 Democratic Official Sample Ballot for the March 5, 2002 Democratic primary in California is instructive. The primary race for Insurance Commissioner, a race where there is no incument, involves John Garamendi, and the line below his name in the sample ballot reads "Businessman/Rancher"; in fact, Garamendi had been California's first elected Insurance Commissioner and most recently was Deputy Secretary of Interior in the Clinton administration. His opponents include Bill Winslow ("Attorney/Insurance Consultant"), Thomas Calderon

Furthermore, there are many typographical questions to ask about the design of individual candidate races. What is an appropriate font size to use? Should the candidate names be in bold face --- and what about their partisan affiliation and other potential voter cues? How close should their name be to the place the voter makes her mark? Should an individual candidate race be kept on one page, or should it span facing pages (for example, the "butterfly" ballot)? These are all important ballot design questions, albeit very specific ones. Each deserves careful study, with the idea being the elaboration of clear design principles for ballot construction.

4. Design of Entire Ballots

This is a critical question for the design of both paper-based and electronic voting systems. How should the entire ballot be laid out? How can a ballot be developed that is useable, minimizes voter errors, and is cost effective? This is important in many jurisdictions, as Americans are being called upon to vote on more issues and in more candidate races, thus making for longer and more complicated ballots.

With paper-based voting systems, the layout of the entire ballot can be one of the most important administrative decisions made by election officials. In jurisdictions with paper or optically scanned ballots, officials try to reduce costs by packing long ballots onto single pages, even if they have to use small type face, oversized paper stock, and virtually no instructions. Unfortunately, decisions made to pack a long ballot onto a single page of paper for cost considerations might lead to a higher risk of voter mistakes.

Thus, for paper-based voting systems, scientific studies of voter responses to the layout of the entire ballot are necessary. Technical questions of layout must be examined, including appropriate type faces (especially for voters with diminished eyesight), design for differentiating one race from other races, an appropriate number of columns per page.

The design of the entire ballot, though, is equally important for electronic voting systems, especially "touchscreen" voting systems. In sharp contrast to contemporary paper ballots where many races and ballot measures are packed onto a single page of paper, most touchscreen voting systems are constructed so that each race is on a single screen. A voter thus navigates through the ballot, usually in a linear manner, by viewing one race on a screen and by then touching an icon on the screen to move to the next race or screen.

There has been no research that I am aware of regarding if the page-by-page design of touchscreen voting machines leads to a different voting experience

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("Member, California Legislature"), and Tom Umberg ("Prosecutor"). Are these descriptions used by California voters? Are they informative? Can they be more informative?

relative to the typical paper-based system where all of the races are on a single page. There have been some indications in research that undervote rates, especially on down-ticket races, might be quite high on electronic voting machines.[11] However, systematic studies (while necessary) have not been done on the exact differences between the impact of each ballot design.

One common criticism of touchscreen voting layout designs, furthermore, is that they sometimes have poorly designed summary screens. In most touchscreen voting systems on the market today, once a voter has navigated through the entire ballot they can receive a summary screen to examine their entire set of votes before finally casting their ballot. These summary screens vary dramatically between different touchscreen systems; some list only the specific candidates or issues voted on, others highlight undervoted races, and they use different typefaces and colors. Furthermore, exactly how a voter navigates their way back into the ballot to change a vote or undervote also varies between systems.

Each of these ballot layout features in touchscreen systems requires scientific study. To my knowledge, neither election administrators nor election system vendors undertake serious studies of the impact that these design decisions in their touchscreen systems have on the quality of votes cast or on the quality of the voting experience. Also, the basic design of a page-by-page ballot, relative to having the entire ballot on a single page, needs to be studied carefully.

There is a second important question about entire ballot design that deserves further research --- the impact of party-line versus non-party line ballots, and how party-line ballots themselves are designed. The impact of party-line ballots has been researched in political science, both in the context of the Australian ballot reform and in regarding the rise in split-ticket voting.[12] However, much of this research has been historical, and quasi-experimental; there have been no studies that I am aware of that examine the impact of party-line ballots in carefully controlled experimental conditions.

Furthermore, there are vast differences across election jurisdictions that allow for party-line ballots, both in the placement of the party choice on the ballot and in the instructions that are given to voters about how to vote a party-line. These

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[11] See Caltech/MIT Voting Technology Project, July 2001, *Votign: What Is, What Could Be.* Pasadena, CA: California Institute of Technology.

[12] There is a lengthy literature on party-line ballots, and in particular, on how the Australian ballot reform and the decline in the use of party-line ballots has influenced voting behavior. For representative work, see Walter Dean Burnham, 1965, "The Changing Shape of the American Political Universe," *American Political Science Review* 59: 7-28; Angus Campbell and Warren E. Miller, 1957, "The Motivational Basis of Straight and Split Ticket Voting", *American Political Science Review* 51: 293-312; Jonathan N. Katz and Brian R. Sala, 1996, "Careerism, Committee Assignments, and the Electoral Connection", *American Political Science Review*, 90: 21-33; Jerrold G. Rusk, 1970, "The Effects of the Australian Ballot Reform on Split-Ticket Voting", *American Political Science Review* 64: 1220-1238.

design differences need examination and study, so that their impact on voter errors and the quality of the voting experience can be understood.

5. Voting Instructions

Unfortunately, I am aware of no research on voting instructions. Throughout my own research on voting systems since the 2000 elections, I have encountered no academic research on this important aspect of ballot design. This research vacuum needs to be filled, quickly.

Currently, voting instructions seem to be developed largely by election administrators, sometimes in collaboration with election system vendors, sometimes in collaboration with other interested parties (like voter education groups, or groups representing certain classes of voters with special needs like language concerns or disabilities). Rarely, and possibly never, are proposed voting instructions subjected to any type of experimental or field testing before their implementation.

An important example comes from the 2001 mayoral election in the City of Los Angeles. Working closely with staff from the Los Angeles County Registrar-Recorder's Office (the governmental entity that owns and operates the Votomatic punchcard voting and tabulation machines that are typically then leased to municipalities and other governmental agencies in Los Angeles County for their elections), the Los Angeles City Clerk's Office launched a "Got Chad" voter education campaign. This was an advertising and voter education campaign about how to correctly use the Votomatic punchcard system, for the 2001 mayoral election. The City Clerk's office launched a clever pre-election advertising campaign, a voter education campaign in the mass media, distributed materials to voter education and other groups, developed inserts in the ballot books, and produced posters and instruction cards for polling places.

There is some evidence that the "Got Chad" voter education and instruction campaign was productive in instructing Los Angeles City voters how to use the Votomatic machines. I compared the over- and undervote rates in the 2000 presidential and 2001 mayoral election, in all of the City of Los Angeles precincts; only 16% of precincts had higher overvote rates in 2001, while 22% of precincts had higher undervote rates, in these top-of-the-ticket races. Moreover, in heavily Black precincts, the overvote rate increased in only 10% of precincts, while the undervote rate increased in 5% of precincts; in contrast, in heavily Latino precincts, the overvote rate increased by 8%, and the undervote rate increased by 6%.[13] Clearly, both over- and undervote rates decreased dramatically

[13] Heavily Black or heavily Latino precincts are defined as those in the 90% percentile of Black or Latino population. These data are for precinct voters only.

between these two elections, in the same precincts, especially for nonwhite voters.[14]

Thus while both common sense and some anecdotes indicate that voter instructions on ballots might lead voters to more effectively interact with voting systems, again there is little scientific work on how and why voter instructions influence the voting process. There are a number of open research topics on voter instructions that deserve careful attention:

1. The effectiveness of pre-election distribution of voting instructions, in ballot books and voter information manuals.
2. The effectiveness of mass media distribution of voting instructions, and of education in voting instructions by interest groups.
3. The wording of voting instructions.
4. Technical issues about voting instructions, in particular, typographical issues (point size, color, etc.) and placement issues (in the voting booth, on the ballot, where on the ballot, etc.)

These, and other important issues about voter instructions, deserve scientific study.

6. Language and Images

As American continues to become a more diverse nation, many election jurisdictions are finding they have to provide ballots and voter instructions in multiple languages. Many jurisdictions in California, Texas, Florida, and New York run elections in both English and Spanish; there are now precincts in Los Angeles County where ballots and voter instructions are provided in a number of Asian and European languages.

However, ballot and voter instructions may not directly and clearly translate from English to many of these other languages; this leaves open the question as to whether non-English ballot design and voter instructions are understood and utilized by non-English voters in the same way that English voters understand and use the ballot design and instructions. The impact of language used for ballot design and voter instructions clearly needs scientific examination.

Some nations have devised a different solution to the problem of a diversity of languages, and to alleviate possible problems associated with high rates of voter illiteracy, by not using candidate or party names in their ballot designs. Instead,

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[14] Of course, other factors might have produced, or contributed to, these dramatic declines in over- and undervotes between these two elections. Many voters might have become more aware of "pregnant", dimpled, or hanging chads in the wake of the 2000 election, and thereby were more careful in their use of the Votomatic punchcards in 2001. Other groups, especially groups representing nonwhite voters, worked to educate their constituencies about the Votomatic system in the wake of the 2000 elections. Last, Los Angeles City election administrators were more proactive in their "cleaning" of punchcards in 2001, and were observed by the author removing hanging chads from punchcard ballots before they were run through tabulation machines on election evening.

candidates and especially political parties devise specific pictorial images that become associated with the party through pre-election education campaigns. Voters then cast a vote for a party by selecting an icon on an electronic voting machine (in the case of Brazil, for example), rather than touching a square or circle next to the name of a candidate or party.

It is not clear whether pictorial icons would easily translate to the American system of elections, especially given the long length of ballots in the United States. A proliferation of pictorial icons would have to be created, not just for each party but also for votes on ballot measures, and for candidates in non-partisan races. But pictorial icon ballot design should be tested, relative to more typical ballot designs, to determine whether they lead to a more accurate and higher quality voting experience for voters (or certain classes of voters).

7. A Scientific Agenda for Studying Ballot Design

Each of the dimensions of ballot design discussed above can, and should, be examined within the context of careful scientific analysis. Research agendas based on both controlled experimental studies and on quasi-experimental designs should be developed and implemented.

A prototype of a controlled experimental study on the "butterfly" ballot could take the following form. Two small groups of randomly selected registered voters from an election jurisdiction could be contacted about participation in a research project on election technologies. Subjects could be offered small inducements for their participation. One group would be the control group, and they would be asked to participate in a hypothetical election, using the same ballot style used in that election jurisdiction in the most recent election. The experimental group would be asked to participate in a hypothetical election, "voting" for the same set of candidates as the control group, but using a "butterfly" ballot. Both groups would be interviewed, either using a quantitative or qualitative approach, before and after their "voting" about their experience and opinions about the ballot. The ballots cast by both groups could then be examined for errors, and for deviations in the vote cast from the voter's stated "vote" in the follow-up interview. Such a study design could produce a powerful, and clear, analysis of the precise effects of the butterfly ballot on voter behavior in the ballot booth.

However, many important quasi-experimental studies can also be conducted using data from historical and contemporary elections. First, there are collections in various archives of election ballots; an interesting example is the Munro collection of ballots at the Huntington Library in San Marino, California. One study has been conducted using this archive, examining the impact of the Australian ballot reform in the United States.[15] Archival research should be

[15] Lisa A. Reynolds, 1995, "Reassessing the Impact of Progressive Era Ballot Reform", Ph.D. Dissertation, University of California, San Diego.

undertaken to study the details of historical ballot designs, and to link the designs with voting behavior and election outcomes.

Second, there is a great deal of heterogeneity in the United States in ballot designs, even for election jurisdictions using the same type of voting system. For a prime example, one important difference in the ballot designs currently in use for optically scanned ballots is whether the voter indicates her vote by filling in a circle or by connecting two broken lines to make a solid unbroken line. Some jurisdictions use the first type of ballot, others the second type. Data about overvotes, undervotes, and ballot spoilage rates could be collected for contemporary elections for each type of ballot design, and could be linked with other demographic and political data from each jurisdiction. A statistical analysis of such databases could demonstrate what impact these two different optical scan ballot designs have on election outcomes and voting behavior.

Third, by working more closely with election administrators, researchers could conduct detailed "before and after" studies of changes of ballot designs in particular election jurisdictions. For example, if researchers learn about an important change in voter instructions --- or about a voter education campaign about how to use a particular voting system --- they can work with the particular election jurisdiction to track and collect specific data so as to measure the impact of the change in voter instructions by studying changes in aggregated election statistics. Also, researchers could work with election administrators to conduct surveys of voters leaving polling places after some change in ballot design was implemented to elicit opinions and perceptions of the new design. Last, polling place workers themselves can be interviewed within the context of this type of quasi-experimental study to obtain their assessment of the ballot design change, and to gather data on the problems that voters had with the new ballot design.

Within each type of study, though, there are many evaluative dimensions to consider. The first and most obvious are indicators of voter error. Unfortunately, while the concept is obvious, a precise measure for voter error may be difficult to operationalize. Most studies have taken the "residual" or roll-off rate (the difference between the number of votes cast and the number counted for a specific race) as a measure of error, while others look at more specific measures like over- or undervotes. One problem with these approaches is that they do not differentiate between intentional and unintentional actions by voters. This is an area where social scientists have done little study --- but where more research is obviously needed and a place where controlled experimental studies might be very helpful.[16] Secondly, there is what I have termed the "quality of the voting experience." This is a broad concept, and should incorporate measures of the

[16] The only study that attempts to differentiate intentional from unintentional voter errors that I am aware of is Stephen Knack and Martha Kropf's 2001 unpublished analysis, "Roll Off at the Top of the Ballot: Intentional Undervoting in American Presidential Elections." Knack and Kropf examine presidential exit poll data and compare it to aggregate voting statistics to estimate the rate of unintentional undervoting in presidential elections.

voter's satisfaction, efficacy, and perception that his or her cast vote would be counted. Third, we should focus attention on studying the impact of ballot design on pollworkers. People who work in polling places on election day are typically most clearly exposed to the problems with existing ballot designs; quantitative and qualitative studies of their perceptions of the problems voters face are critical for quasi-experimental studies of ballot design.

Last, studies of ballot design should include as important independent variables attributes of voters. Important and obvious attributes to study are disabilities, especially vision impairment and physical disabilities. But not as obvious, but perhaps as important, are the many factors that lead some voters to be considered poorly informed (factors like educational attainment, income, weak social connectedness and capital). Given that many ballot design issues revolve around the cognitive capabilities of voters, variance in these capabilities must be factored into studies of ballot design.

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Ohio State Homepage

RESEARCH NEWS

6/30/98

CANDIDATES WHOSE NAMES ARE FIRST ON BALLOT RECEIVE ELECTION BOOST

COLUMBUS, Ohio -- Candidates whose names appear first on an election ballot may attract more voters simply because they're listed before their rivals, a new study suggests.

Researchers found that, in nearly half of the 118 Ohio races they studied (48 percent), the name placement on the ballot significantly affected vote totals. In nearly all the cases, the candidate who was listed first had the advantage.

On average, candidates received 2.33 percent more votes when their names appeared first on the ballots than when their names were listed last, said Jon Krosnick, co-author of the study and professor of psychology and political science at Ohio State University.

However, in some races, candidates received as many as 6 percent more votes when listed first than when listed last.

"Our results indicate that there is more than a slim chance that name order could affect the outcome of a close election," Krosnick said.

Findings showed that 3 percent of the races studied would have had different results if only one name order had been used, depending upon which name was chosen. However, on Ohio ballots, candidate names are rotated so that each candidate is listed first on the ballot in approximately the same number of precincts.

Although researchers had long suspected that candidate name order may influence election results, Krosnick said there has been little good research on this topic to date.

Krosnick conducted the study with Joanne Miller, a

graduate student in psychology at Ohio State. Their results will be published in an upcoming issue of the journal *Public Opinion Quarterly*.

For the study, the researchers analyzed precinct-by-precinct vote returns for all the races in the 1992 elections held in the three largest Ohio counties: Franklin (which includes Columbus), Cuyahoga (Cleveland), and Hamilton (Cincinnati).

The results showed that, in general, name order was more likely to have an effect on races in which voters knew less about the candidates, Krosnick said. For example, name order had a stronger affect in non-partisan races.

"Party affiliations act as a cue that help voters decide where a candidate stands on issues," Krosnick said. "If voters don't know if a candidate is a Republican or a Democrat, they may be more likely to let name order influence their vote."

Name order also had a stronger effect on races that received less coverage in the media, suggesting that voters were less well informed about these candidates.

"In 1992, some voters may have gone to the polls mainly to vote in the national presidential election, but then were faced with lots of other candidates running in races that they knew little about," Krosnick said. "In these less-visible races, the order of names played a larger role in voting decisions."

The order of names on the ballot may also be more important for those who are less knowledgeable about politics, Krosnick said. Results showed that name order effects were stronger in Franklin County, where the formal education of voters was lower than in the other two counties studied.

Krosnick noted that only four of the 118 races studied (3 percent) would have had different results if just one name order was used. (The four races were for a Franklin County commissioner, a Cuyahoga County commissioner, a Supreme Court justice race in Franklin County and a Court of Appeals Judge race in Franklin County.)

"In general, most of the name order effects we found were relatively small and concentrated among the less visible races. These effects are doing little to undermine

the democratic process," Krosnick said.

"However, these results shouldn't be ignored. Other states should follow Ohio's lead and balance name order in future elections to ensure fair outcomes," he said.

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Shaken, Not Stirred: Evidence on Ballot Order Effects from the California Alphabet Lottery, 1978 - 2002

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Abstract:
We analyze a natural experiment to answer the longstanding question of whether th name order of candidates on ballots affects election outcomes. Since 1975, Californ law has mandated randomizing the ballot order with a lottery, where alphabet letter would be shaken vigorously and selected from a container. Previous studies, relyin overwhelmingly on non-randomized data, have yielded conflicting results about whether ballot order effects even exist. Using improved statistical methods, our analysis of statewide elections from 1978 to 2002 reveals that in general elections ballot order has a significant impact only on minor party candidates and candidates for nonpartisan offices. In primaries, however, being listed first benefits everyone. fact, ballot order might have changed the winner in roughly nine percent of all primary races examined. These results are largely consistent with a theory of partis cuing. We propose that all electoral jurisdictions randomize ballot order to minimiz ballot effects.

Keywor : ballots, elections, causal inference, natural experiment, randomization, fisher test, partis cue

JEL Classifications: C90, D72, K00

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TESTIMONY OF JOE SONNEMAN, PH.D. GOVERNMENT, ON FAIR ELECTIONS AND NAME-ORDER EFFECTS

ALPHABETIC ORDER CAME FIRST Before statistics, that is, roughly, before 1900, governments often listed candidates on ballots in alphabetic order.

FIRST LISTED, MOST VOTES About 1900, statistics were better understood, and political scientists discovered that voters had a tendency to vote for the names first on the list, and, to a lesser extent, for the name at the bottom of the list. Even Woodrow Wilson–the only political scientist to become President–wrote an article on this "name order" tendency, in 1910.

NAME CHANGE GAMES Once the political scientists began publishing their results, candidates began finding out about this "name order effect" phenomenon, too. Because names were listed alphabetically, candidates began changing their names, for example, from Teller or White or Yerkes to Aaronson.or Abbot or Ackerman.

STATES & TERRITORIES REACT Once candidates began playing name games with the ballot order, States and even the Territory of Alaska took remedial steps to prevent those games from succeeding. Alaska in the 1920s or so began rotating names on ballots, printing as many different versions of ballots as there were candidates. The different versions were then mixed up, so that on the first ballot, one candidate's name would be on top, then on the next ballot the next candidate's name would be on top, and so on, so that each candidate was in each position a roughly equal number of times, negating any name-order effect

BALLOT ROTATION WORKS: ELECTIONS ARE FAIR This ballot rotation system worked well for Alaska for about 70 years.

1995 ALASKAN PROPOSAL About 1995, the Division of Elections and Lieutenant Governor proposed changing to a different system. Under the new system, a drawing would be held for each district, to determine the starting letter of the alphabet. All the ballots in that district would be printed up the SAME way. If there was a 'name order effect,' one candidate would benefit from it, but a random lottery would determine WHICH candidate would benefit.

WHY THE CHANGE? The Division of Elections gave two reasons for the change. They said that voters were confused, because voters would see one sample ballot in the newspapers, and then would get an actual ballot in voting that listed candidates in a different order than the sample. Also, Division of Elections said the cost of printing, mixing, and coding [programming] election machines to 'read' the different versions of each ballot was costly, perhaps as much as $65,000 per 2-year election cycle.

LAWSUIT After trying without success to get Division of Elections to stay with the tried-and-true ballot rotation system of the past 70 years, Joe Sonneman filed a public interest lawsuit against the change. He noted that the 'positional effect' might be as much as 5-7% ad-

vantage, and that many elections in Alaska are decided by margins much less than 5%. To change to a system that by lottery gives ONE candidate the entire positional advantage could be to turn elections themselves into lotteries, he said. Any voter confusion, he said, the Division of Elections caused themselves, by failing to explain to voters and to the press that ballots would have candidates' names rotated, and by failing to provide samples of all the different versions. The cost of conducting FAIR elections, with ballot rotation, was small in relation to the State's total two-year $5 billion budget, he said, and the importance of having fair elections very great.

COURTS UPHOLD: NEW SYSTEM 3-2 The Superior Court ruled for the State on summary judgement. The Supreme Court by a 3-2 vote found that Sonneman did have standing as a public interest litigant, but also found that the Legislature was not required to conduct elections in the fairest possible way, but only in a 'reasonable' way. The dissent noted that the State presented no evidence to contradict Sonneman's assertions of a 'name order effect;' agreed that many Alaska elections are decided by margins narrower than the asserted 5-7% name order effect, and agreed that whether or not there was a 'name order effect' was a material factual question which should have prevented summary judgment.

PROPOSED AMENDMENT Rep. Gruenberg now proposes an amendment which–as I understand it–would not bring back full ballot rotation, but which would extend the alphabet lottery (randomization) to the **precinct** level. One study[1] reports that in Ohio, a "well-studied" State, "[m]any Ohio counties randomize and rotate candidate names by precincts."

SONNEMAN'S RECOMMENDATION: My own feeling is that the proposed amendment is a "middle way" between the present system and full ballot rotation, and will likely only partially resolve 'name order' effects at only a partial cost [compared to ballot rotation]. Because I think **fair elections are essential** to 'small-d' democracy, and the **cost very minimal** compared to Alaska's 2-year budget of about $4-5 billion, I'd say that the **proper course is full ballot rotation**, the same system that satisfied a much less-wealthy Alaska for about 70 years.

HOW TO THINK ABOUT IT Ask yourself, if in the next election you were defeated by a very narrow margin by a candidate whose name was drawn in a lottery so as to appear on the top of the ballot, above your own name, would **you then** think it wise to eliminate 'name-order effects' and make Alaska elections as fair as possible?

If your answer is "Yes," then vote for full ballot rotation, even at higher cost. If you say "Maybe," then the proposed amendment before you today may partly satisfy, at a milder cost. If you would still think "No, it's OK for election results to be decided partly or wholly by lottery, what's most important is cutting costs, not fair elections," then stick with the present system.

REAL NAME-ORDER EFFECTS? Of course, a lot hinges on whether or not 'name

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[1]Alvarez, R., "Ballot Design Options" (Cal. Inst. Technology, Feb. 17, 2002), p. 3.

order effects' are real. Discussion on this has gone back and forth and back again over the years. At first, no one knew about statistics nor about name order effects. Then, about 1900-1910, such effects were recognized, both the "primacy" effect for visual choices, such as ballots, and the "recency" [or last] effect for oral choices.

Overview of Name Order Effect Studies In recent years, some studies claim either that there is no name-order effect, that there is a name-order, or that the name-order effect is strong under certain conditions–such as when the race is non-partisan or is a primary election, or when the voters are ignorant or poorly-informed. I cite a few studies below, but be aware that one extensive review critiques most other studies as being "methodologically flawed."[2]

No Name Order Effect "Most states assign one candidate in every primary election the top spot instead of rotating the order of candidate names."[3] This practice implies a disbelief in name-order effects, or an unwillingness to act on such a belief. "Miller and Krosnick ... argue that only two [studies, of 30] id not suffer from problematic methodological flaws, but 'surprisingly, these (two) investigations found no name-order effects at all).[4]

Name Order Effect Does Exist "Political professionals have long taken for granted that the top spot on the ballot provides an advantage to the candidate whose name occupies it."[5]

One study reviewed 1998 Democratic primary results in New York City, finding that of 79 contested elections, the four statewide races were all significantly affected by position bias, and in 67 of the 75 'local' elections [Congress, state legislature, judgeships, and party positions], "the first position received more than its expected percentage of the vote."[6] "In seven of the 79 contests, the first-position advantage *exceeded* the margin of victory."[7] [Emphasis in original].

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[2]Miller & Krosnick, "The Impact of Candidate Name Order on Election Outcomes," *Public Opinion Quarterly* 62:291-330, 295-97 {"most of the earlier studies are methodologically flawed"} (1998), cited in Koppel & Steen, below, at 3, citation at 11.

[3]Koppell, J., & Steen, J., "The Effects of Ballot Position on Election Outcomes", originally research re: *Koppell v. New York State Board of Elections* (97 F.Supp. 2d 477), at 2.

[4]Alvarez, at 3, citing to Miller and Korsnick [note 2 here], and those two studies Alvarez reports these two at his note 8 as: Darcy, R. "Position Effects with Party Column Ballots", *Western Political Quarterly*, 39; 648-61 (1986), and Gold, D., "A Note on the Rationality of Anthropologists in Voting for Officers,", *American Sociological Review*, 17, 99-100 (1952).

[5]Koppell, et al., at 2.

[6]Koppell et al, at 2-7.

[7]Koppell et al, at 8.

So that study found "clearly demonstrated" position effects, with "little doubt" about it.[8]

Researchers in 48 percent of 188 Ohio [electoral] races studied found name placement on the ballot significantly affected vote totals, almost always "the candidate who was listed first had the advantage." The **average advantage was "2.33 percent more votes"** for being listed first instead of last, but "in some races, candidates received **as many as 6 percent more votes** when listed first than when listed last."[9] (Emphasis added).

Conditional Name Order Effect Name-order effects may be more pronounced when there are no cues, such as 'party' labels to distinguish candidates, such as in non-partisan races, or in primary elections [in closed primaries], if for example all candidates on a ballot are from the same party.[10] "In general, name order was more likely to have an effect on races in which voters knew less about the candidates... [and] on races that received less coverage in the media... [or] where the formal education of voters was lower."[11] "[I]n general elections ballot order has a significant impact only on minor party candidates and candidates for non-partisan offices ... [but] in primaries ..., being listed first benefits everyone .. [and] ... **ballot order might have changed the winner in roughly nine percent of all primary races** examined."[12]

The "primacy effect" is "well documented in survey methodology, where there is often a noticeable bias for respondents to provide the first response option from a list, especially in low-information situations or for poorly informed respondents."[13]

No Clear Answer "The literature is contradictory, with no clear patterns in the findings across studies."[14] "[C]andidate or party position on the ballot **may** affect voting behaviour...."[15]

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[8]Koppell et al, at 10.

[9]Grabmeier, J., "OSU Research News: Candidates Whose Names are First on Ballot Receive Election Boost" (reporting results of Krosnick, J., and Miller, J.) (1998), see http://researchnews.osu.edu/archive/nameplac.htm

[10]Koppel et al, at 2, "find[ing] that the effect of name-order on primary elections is significantly larger than Miller & Krosnick's estimate for general elections."

[11]Grabmeier, J., at 2.

[12]Ho., D. and Imai, K., at 1 [full citation below].

[13]Alvarez, op. cit., at 3.

[14]Koppel et al, at 2.

[15]"Determination of Order on Ballots," Wall, A. (1997), ed. Alves, H. (2002), from http://www.potlatch.net/main/english/po/pof06.htm

(Emphasis added). "Previous studies, relying overwhelmingly on non-randomized data, have yielded conflicting results about whether ballot order effects even exist."[16]

CONTROLLING NAME-ORDER EFFECTS "Basic methods for creating the order on the ballot include: [a] some form of alphabetical listing, [b] random draw[ings], and [c] rotating ballot positions."[17]

Alphabetic Listing "Alphabetic-based ballot orders .. may be susceptible to manipulation ... [as when candidates are] changing their names [to gain a more favorable position].[18] Indeed, it was exactly this type of candidate manipulation of alphabetic-based ballot orders that caused many States and the Territory of Alaska instead to rotate ballot positions. Accordingly, a simple alphabetic list should no longer be considered a viable option in producing fair elections.

Random Drawings "A truly random draw for positions on the ballot will prevent any name bias in ballot draw."[19]

But the draw has to be truly random. Consider what is wrong with a 'mixed' draw for the FIRST position, the remaining positions to be in alphabetic order starting from the first letter drawn. What if the candidates' names are, say, Knowles, Miller, and Murkowski? The only way Miller or Murkowski can be listed first is if the letter L or M is drawn. So only 2 of 26 letter-chances let them be first, but Knowles will appear on top if any of 24 other letter-chances are drawn. This example shows that a 'mixed' draw-first-letter-then-alphabetize system could be quite unfair, assuming that name order effects do exist to some degree.

But the real problem with using 'letter lotteries'–especially on a House district-wide basis, is that all the name-order effect goes to only ONE candidate. Where, as in Alaska, elections are often decided by very narrow margins, virtually ANY name-order effect, combined with the letter-lottery, can mean that the winner is really decided by lottery, instead of by

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[16]Ho, D., and Imai, K, "Shaken, Not Stirred: Evidence on Ballot Order Effects from the California Alphabet Lottery, 1978-2002", in Social Science Research Network Electronic Library, Abstract Document, http://papers.ssrn.com/so13/papers.cfm?abstract_id=496863, also cited as Princeton Law & Public Affairs Working Paper No. 04-001 and Harvard Public Law Working Paper No. 89.

[17]Wall, A., *op. cit.*, at 1.

[18]Wall, A., *op. cit.*, at 1.

[19]Wall, A., *op. cit.*, at 2.

election. But choosing candidates by lottery is not what small-'d' democracy is about.[20] The precinct lottery is better ... but rotating names on ballots is a better still method of randomly distributing fairly any name-order effects.

Rotating Ballot Positions "[R]otating ballot positions negates any positioning advantage ... [but f]or inexperienced voters it may be confusing [, while ... it makes ballot counts more complex and has significant cost disadvantages in ballot materials printing and collation, ballot systems design and, to some extent, voter education and election staffing."[21] "[R]otation of candidate names would certainly solve the position effect problem ... [but it makes] printing accurate sample ballots for each voter ... almost impossible."[22]

Ambiguous Solutions One abstract suggested "that all electoral jurisdictions randomize ballot order to minimize ballot effects,"[23] but did not say how that randomization should occur, whether by alphabetic lottery by district (as Alaska does) or precinct (as the amendment proposes), or by rotating names on each ballot times the number of candidates (as Alaska did).

Similarly, another study[24] said "Other states should follow Ohio's lead and balance name order in future elections to ensure fair outcomes," without saying **exactly how** to 'balance name order.' However, that article did note that "on Ohio ballots, candidate names are rotated so that each candidate is listed first on the ballot in approximately the same number of precincts."[25]

Well, that's what the proposed amendment does, randomize by precinct, better than randomizing only by District, not as good [i.e., not as random, not as fair]--but not as costly--as randomizing by voter. A middle way .. but is it right to have elections in any but the fairest way?

Whatever you decide may haunt you later, so decide well.

–Joe Sonneman, Ph.D. Govt. *Se non e vero, e ben trovato.*

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[20]Koppel & Steen, at 10: "Those who accept lotteries or alphabetic ordering for ballot position as an unavoidable part of our election system should reconsider this acceptance of the *status quo*."

[21]Wall, A., *op. cit.*, at 2-3

[22]Koppell & Steen, *op. cit.*, at 10.

[23]Ho and Imai, *op. cit.* at 1.

[24]Grabmeier, *op. cit.*, at 3, quoting Krosnick.

[25]*Ibid.*, at 1.

FOLLOW UP TESTIMONY OF DR. JOE SONNEMAN APRIL 26, 2004
RE: BALLOT ROTATION ["ROLLING BALLOT", "TRADITIONAL WAY," ETC.]]

1. **AVOIDING CONFUSION #1** The Division says differences between sample and actual ballots may confuse voters. I say, the Division needs better to inform voters. The Supreme Court minority in *Sonneman v. State*, 969 P.2d 932, 942 (1998) wrote that "if confusion were a real concern, a clear disclaimer on sample ballots would cure it." So consider a disclaimer (like Amendments 7 or 8) saying "**Any sample ballot must state *in bold type* that 'The order of candidate names may be different on actual ballots.'"**

2. **AVOIDING CONFUSION #2** Footnote 6 of the Supreme Court's dissent notes that the Division now draws letters ONLY to distinguish among the FIRST letter of last names, and under Division regulations, when the FIRST letter of the last name is the SAME, then alphabetical order determines who goes first.

If that is still the way the regulation reads, then, for the upcoming U.S. Senate primary, the Division will draw letters to see if M or K appears first. But "Miller" will always appear before "Murkowski."

You can cure that by rotating names on ballots. That way–the traditional way-- you keep elections consistent with 70 years of Alaska's history. The Supreme Court *majority* even said 'Sonneman is correct in asserting that ballot rotation would be fairer." 969 P.2d at 639 [emphasis added].

3. **GIVE THE GOAL, NOT THE PROCEDURE:** The former AS 15.15.030(6) specified exactly how the Division should print, stack, and mix ballots. See n.2 of 969 P.2d at 634. That precise language may in time become obsolete as technologies change. Instead, you can tell Elections to rotate candidate names so as to equally distribute any possible positional bias. Then let the Division figure out the best way to do it. Amendment W.8 seems to work:

ORDER OF NAMES: For each contested office, the Division shall rotate the order of candidates' names on the ballot to assure, as much as reasonably possible, that *each* candidate's name appears at each position on the list of candidates for that office an equal number of times, on the ballots that are distributed.

4. **OTHER OPTIONS** You may want to add 'intent' language such as:: " **The Legislative purpose of rotating the order of candidates' names on ballots is actually to distribute equally any positional bias which may exist.** " To state your intent is to lessen the likelihood of court cases trying to find out your intent. Intent could be IN the law or in a Letter of Intent from the Committee or from the House, read into the House Journal. Either way makes YOUR intent more certain, especially given Division flexibility.

You might add a definition for "positional bias," but the Supreme Court used that term already,

5. **WHICH AMENDMENT** I've already said I favor full ballot rotation [Amendment W.8], similar to what Alaska used for 70 years without excessive cost or confusion. Fair elections may cost a bit more, but fairness is worth it. The precinct method [W.7] also improves on the present District lottery, but could give one or another candidate a smaller-than-District-sized advantage when precincts do not divide evenly.

Good Fortune! –Dr. Joe Sonneman 324 Willoughby, Juneau AK 99801 463-2624

P.S.: The Supreme Court majority said 1994 ballot rotation actually cost $64,024 [Division claimed $150,00 to $250,000]. *Sonneman v. State*, 969 P2d at 935.

HB

525

23-GH2024\D
Bullock
4/19/04

CS FOR HOUSE BILL NO. 525( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to complaints filed with, and investigations, hearings, and orders of, the State Commission for Human Rights; making conforming amendments; and providing for an effective date."

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

*** Section 1.** AS 18.80.100 is amended to read:

Sec. 18.80.100. Complaint; time limitations. A person who is aggrieved by **a** [ANY] discriminatory **practice** [CONDUCT] prohibited by this chapter may sign and file with the commission a written, verified complaint stating the name and address of the person alleged to have engaged in **the** discriminatory **practice** [CONDUCT], and the particulars of the discrimination. **A complainant may withdraw the complaint at any time before the service of an accusation under AS 18.80.120. A withdrawal must be signed by the complainant and be in writing. A withdrawal does not limit the discretion of the executive director provided in (b) of this section** [THE EXECUTIVE DIRECTOR MAY FILE A

COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION COMES TO THE ATTENTION OF THE DIRECTOR].

* **Sec. 2.** AS 18.80.100 is amended by adding new subsections to read:

(b) The executive director may file a complaint in the manner provided in (a) of this section when a discriminatory practice comes to the attention of the executive director.

(c) A complaint may be filed not later than 180 days after the alleged discriminatory practice or, for a continuing discriminatory practice, not later than 180 days after the alleged discriminatory practice stopped.

* **Sec. 3.** AS 18.80.110 is amended to read:

Sec. 18.80.110. Investigation and conciliation. The executive director or a member of the commission's staff designated by the executive director shall informally investigate the matters set out in a filed complaint, promptly and impartially. If the investigator determines that **there is** [THE ALLEGATIONS ARE SUPPORTED BY] substantial evidence **of a discriminatory practice under this chapter**, the investigator shall immediately try to eliminate **or remedy** the **discriminatory practice through an agreement reached** [DISCRIMINATION COMPLAINED OF,] by conference, conciliation, and persuasion. **If an agreement is reached, it must be reduced to writing and signed by the complainant, executive director, and respondent. The agreement is binding and enforceable under this chapter as an order of the commission. Any agreement reached under this section may include the compromise of damages authorized under this chapter.**

* **Sec. 4.** AS 18.80 is amended by adding a new section to read:

Sec. 18.80.112. Dismissal for administrative convenience. (a) At any time before the issuance of an accusation under AS 18.80.120, the executive director may dismiss without prejudice a complaint for administrative convenience if the executive director determines, in the executive director's discretion, that

(1) the complainant's objection to a proposed conciliation agreement is unreasonable;

(2) the complainant is unavailable or unwilling to participate in a hearing;

(3) relief is precluded by the absence of the person alleged to have engaged in the discriminatory practice;

(4) a hearing will not benefit the complainant;

(5) the person aggrieved by the discriminatory practice has initiated or wants to initiate an action or proceeding in another forum based on the same facts;

(6) a hearing will not represent the best use of commission resources;

(7) a hearing will not advance the purposes stated in AS 18.80.200;

(8) the probability of success of the complaint on the merits is low; or

(9) proceeding to a hearing will not serve the public interest.

(b) Dismissal under this section does not prevent a complainant from

(1) initiating an action or proceeding in another forum; or

(2) filing a new complaint under AS 18.80.100 that adequately addresses the grounds for the dismissal under (a) of this section.

* **Sec. 5.** AS 18.80.120 is repealed and reenacted to read:

Sec. 18.80.120. Hearing. (a) If informal efforts under AS 18.80.110 to eliminate or remedy the alleged discriminatory practice are unsuccessful and the executive director determines, in the executive director's discretion, to refer the complaint for hearing, the executive director shall issue an accusation based on the investigator's determination of substantial evidence and serve the person charged in the accusation and the complainant with notice of the referral and a copy of the accusation. The executive director's decision to refer the complaint to hearing is not reviewable by the commission under this chapter. The location of the hearing is the commission office unless the commission designates another location. The executive director, or the executive director's designee, presents the case in support of the accusation before the commission. The person charged in the accusation may file a written answer and may appear at the hearing, with or without counsel, and submit evidence.

(b) The commission shall follow the procedures in AS 44.62.330 - 44.62.630 (Administrative Procedure Act) except as otherwise provided in this chapter.

(c) An accusation may be amended by the commission only upon a showing of good cause. An amendment to name a different discriminatory practice must be

supported by substantial evidence, and the discriminatory practice must be referred for conciliation as provided in AS 18.80.110, before a hearing may proceed.

(d) In a hearing on an accusation, each element of an accusation or defense must be proven by a preponderance of the evidence.

(e) At any time after the issuance of an accusation, the executive director or the person charged in the accusation may petition for a summary decision on the accusation. The commission shall grant a petition if the record shows that there is no genuine issue of material fact and the petitioner is entitled to an order under AS 18.80.130 as a matter of law.

* **Sec. 6.** AS 18.80.130(a) is amended to read:

(a) At the completion of the hearing **or after consideration of a petition for summary decision under AS 18.80.120(e)**, if the commission finds that a person **charged in an accusation** [AGAINST WHOM A COMPLAINT WAS FILED] has engaged in the discriminatory **practice** [CONDUCT] alleged in the **accusation** [COMPLAINT], it shall order the person to refrain from engaging in the discriminatory **practice** [CONDUCT]. The order must include findings of fact [,] and may prescribe conditions on [THE ACCUSED'S] future conduct relevant to the type of **discriminatory practice. The commission may not order an award of noneconomic or punitive damages** [DISCRIMINATION]. In a case involving **a discriminatory practice** [DISCRIMINATION] in

(1) employment, the commission may order **one or more of the following: the training of the employer, labor organization, or employment agency, and its employees, concerning discriminatory practices;** [ANY APPROPRIATE RELIEF, INCLUDING BUT NOT LIMITED TO,] the hiring, reinstatement, or upgrading of an employee with or without back pay**; the payment of front pay for a period of not more than two years if hiring, reinstatement, or upgrading of an employee is inappropriate because no vacancy exists, the employer's discriminatory practice rendered the employee incapable of returning to work, or the relationship between the employer and employee has so deteriorated as to make working conditions intolerable;** [,] restoration to membership in a labor organization; [,] or admission to or participation in an

apprenticeship training program, on-the-job training program, or other retraining program; **however, an order for back pay or front pay must be reduced by the amount the employee could have earned or could earn by making reasonable and diligent efforts to obtain similar employment;**

(2) housing, the commission may order the sale, lease, or rental of the housing accommodation to the aggrieved person if it is still available, or the sale, lease, or rental of a like accommodation owned by the person **charged in the accusation** [AGAINST WHOM THE COMPLAINT WAS FILED] if one is still available, or the sale, lease, or rental of the next vacancy in a like accommodation, owned by the person **charged in the accusation** [AGAINST WHOM THE COMPLAINT WAS FILED]; the commission may award actual damages, which shall include [, BUT NOT BE LIMITED TO,] the expenses incurred by the complainant for obtaining alternative housing or space; for storage of goods and effects; for moving; and for other costs actually incurred as a result of the unlawful practice or violation.

*** Sec. 7.** AS 18.80.130(c) is amended to read:

(c) If the commission finds that a person **charged in an accusation** [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the discriminatory **practice** [CONDUCT] alleged in the **accusation** [COMPLAINT], it shall issue and cause to be served on the complainant an order dismissing the complaint.

*** Sec. 8.** AS 18.80.130 is amended by adding a new subsection to read:

(f) The interest rate for an award under this section is determined in the manner provided in AS 09.30.070.

*** Sec. 9.** AS 18.80.140 is amended to read:

Sec. 18.80.140. Effect of compliance with order. Immediate and continuing compliance with all the terms of a commission order is a bar to criminal prosecution for the particular instances of discriminatory **practice** [CONDUCT] described in the accusation **issued under AS 18.80.120** [FILED BEFORE THE COMMISSION].

*** Sec. 10.** AS 18.80.270 is amended to read:

Sec. 18.80.270. Penalty. A person, employer, labor organization, or employment agency, who or that wilfully engages in an unlawful discriminatory

practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents, impedes, or interferes with the commission or any of its authorized representatives in the performance of duty under this chapter, or who or that wilfully violates an order of the commission, is guilty of a misdemeanor, and upon conviction by a court of competent jurisdiction, is punishable by a fine of not more than $500, or by imprisonment in a jail for not more than 30 days, or by both.

* **Sec. 11.** AS 18.80.300 is amended by adding a new paragraph to read:

(17) "complainant" means a person who is aggrieved by a discriminatory practice prohibited by this chapter and who has filed a complaint as provided in AS 18.80.100.

* **Sec. 12.** AS 44.62.330(a) is amended by adding a new paragraph to read:

(61) State Commission for Human Rights, where procedures are not otherwise expressly provided in AS 18.80.

* **Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to complaints filed on or after the effective date of secs. 1 - 12 of this Act.

* **Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The State Commission for Human Rights may proceed to adopt regulations necessary to implement the changes made by this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date of the statutory change.

* **Sec. 15.** Section 14 of this Act takes effect immediately under AS 01.10.070(c).

* **Sec. 16.** Except as provided in sec. 15 of this Act, this Act takes effect July 1, 2004.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 525
(H) Publish Date: 2/26/04

Revision Date/Time (Note if correction):
Dept. Affected: GOV
Title "An Act relating to complaints filed with the State Commission for Human Rights.."
RDU Executive Operations
Component Human Rights
Sponsor Rules Committee
Requester Governor
Component No. 1

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
This legislation has no fiscal impact on the Alaska Human Rights Commission.

Prepared by: Gail Fenumiai, Asst. Admin. Director LP
Phone 465-3885
Division Office of the Governor, Administrative Services
Date/Time 2/24/04 9:17 AM
Approved by: Paula Haley, Executive Director
Date 2/24/2004
Agency Alaska Human Rights Commission

(Revised 12/2003 OMB)

TESTIMONY OF DAVID MARQUEZ FOR CSHB 525 (ASCHR BILL)

HOUSE STATE AFFAIRS COMMITTEE

April 19, 2004

My name is David Marquez. My title is Chief Assistant Attorney General and Legislative Liaison for the Department of Law. I am pleased to present on behalf of the Governor, HB 525, regarding the Alaska State Commission for Human Rights.

First I will outline for the Committee what the Administration hopes to accomplish through this bill. If enacted this bill will:

1. **Enhance the effectiveness of the Alaska State Commission for Human Rights by allowing the Commission to evaluate complaints of unlawful discrimination and to allocate its resources to prosecuting those complaints that will best serve the Commission's goal of eliminating unlawful discrimination;**
2. **Improve Commission procedures;**
3. **Enhance the fairness of the Commission's procedures;**
4. **Clarify the remedies that the Commission may award to remedy unlawful discrimination, and**
5. **Make certain housekeeping changes.**

Please let me provide a more detailed description of the benefits this bill will provide;

First, the bill will enhance the effectiveness of the Commission by allowing the Commission to evaluate complaints of unlawful discrimination and to allocate its resources to prosecuting those complaints that will best serve the commission's goal of eliminating unlawful discrimination. HB 525

- Authorizes executive director to choose the complaints of unlawful discrimination that merit pursuit, based on factors such as strength of evidence, severity of alleged violation, employer's history before the commission, or complaint's value in establishing precedent. (Sec. 4)
- Has the effect of reversing *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), which required the director to take to hearing any complaint supported by substantial evidence of unlawful discrimination

without regard to such factors as the weakness of the evidence, or the strength of an employer's affirmative defenses. (Sec. 4)

- Allows complainant to withdraw complaint before accusation is served, but preserves executive director's right to file complaint on her own. (Secs. 1,2)
- Avoids conflicts between (1) staff's exercise of expanded discretion to compromise, dismiss, or pursue complaint and (2) victims' interests, by allowing complainant to opt out of commission procedures, and after withdrawal, to pursue claim independently of commission in another forum. (Sec. 1)

Second, the bill improves Commission procedures. It

- Permits agreements during the prehearing (conciliation) phase to compromise damage claims. (Sec. 3)
- Requires that agreements be reduced to writing, and provides that agreements are enforceable as commission orders. (Sec. 3)
- Requires commission to follow procedures in Administrative Procedure Act, unless AS 18.80 provides different procedure. (Secs. 5, 12)
- Allows the commission to issue a summary decision, which is similar to a motion for summary judgment; if facts are not disputed, the commission can make a ruling without providing a full hearing. (Sec. 5)

Third, HB 525 enhances the fairness of Commission's procedures. It

- Requires the charges in the accusation that the executive director issues after deciding to pursue a complaint to hearing to be based on the investigator's determination of substantial evidence. (Sec. 5)
- Requires that substantial evidence support any new charges of unlawful discrimination that are added when the accusation is amended. (Sec. 5)

- Requires that respondent have an opportunity to address all charges informally (even charges added by amendment) before being required to defend them in a formal hearing. (Sec. 5)
- Ties rate of interest awarded by commission to legal rate in AS 09.30.070, bringing commission into conformity with other administrative agencies and the courts. (Sec. 8)

Fourth, the bill clarifies the remedies that the Commission may award to remedy unlawful discrimination. It

- Prohibits non-economic or punitive damages. (Sec. 6)
- Limits remedies (normally) to restoration of actual benefits lost – *i.e.*, for employers this would mean payment of back pay and hiring, promoting, or reinstating an employee to a position. (Sec. 6)
- But allows the award of front pay for a period of up to one year if a return to work is impossible because no vacancy exists, the employer's unlawful discrimination made the employee incapable of work, or the working environment deteriorated intolerably. (Sec. 6)
- Requires any order to pay wages (front pay or back pay) to be reduced by the amount the employee should be able to earn with a "reasonably diligent" effort. (Sec. 6)

Finally HB 525 makes certain housekeeping changes. It

- Would incorporate current regulation's (6 AAC 30.230) 180-day limitation period for filing complaint. (Sec. 2)
- Adds a definition of "complainant." (Sec. 11)

Thank you Mr. Chairman and members of the Committee. I urge your support of this important bill and respectfully request that it be passed out of Committee. I am happy to answer any questions you may have.

ANALYSIS OF HB 525 (ASCHR BILL)

Enhances effectiveness of the Alaska State Commission for Human Rights by allowing the commission to evaluate complaints of unlawful discrimination and to allocate its resources to prosecuting those complaints that will best serve the commission's goal of eliminating unlawful discrimination

- Authorizes executive director to choose the complaints of unlawful discrimination that merit pursuit, based on factors such as strength of evidence, severity of alleged violation, employer's history before the commission, or complaint's value in establishing precedent. (Sec. 4)
- Has the effect of reversing *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), which required the director to take to hearing any complaint supported by substantial evidence of unlawful discrimination without regard to such factors as the weakness of the evidence, or the strength of an employer's affirmative defenses. (Sec. 4)
- Allows complainant to withdraw complaint before accusation is served, but preserves executive director's right to file complaint on her own. (Secs. 1,2)
- Avoids conflicts between (1) staff's exercise of expanded discretion to compromise, dismiss, or pursue complaint and (2) victims' interests, by allowing complainant to opt out of commission procedures, and after withdrawal, to pursue claim independently of commission in another forum. (Sec. 1)

Improves commission procedures

- Permits agreements during the prehearing (conciliation) phase to compromise damage claims. (Sec. 3)
- Requires that agreements be reduced to writing, and provides that agreements are enforceable as commission orders. (Sec. 3)
- Requires commission to follow procedures in Administrative Procedure Act, unless AS 18.80 provides different procedure. (Secs. 5, 12)

- Allows the commission to issue a summary decision, which is similar to a motion for summary judgment; if facts are not disputed, the commission can make a ruling without providing a full hearing. (Sec. 5)

Enhances fairness of commission's procedures

- Requires the charges in the accusation that the executive director issues after deciding to pursue a complaint to hearing to be based on the investigator's determination of substantial evidence. (Sec. 5)
- Requires that substantial evidence support any new charges of unlawful discrimination that are added when the accusation is amended. (Sec. 5)
- Requires that respondent have an opportunity to address all charges informally (even charges added by amendment) before being required to defend them in a formal hearing. (Sec. 5)
- Ties rate of interest awarded by commission to legal rate in AS 09.30.070, bringing commission into conformity with other administrative agencies and the courts. (Sec. 8)

Clarifies the remedies that the commission may award to remedy unlawful discrimination

- Prohibits noneconomic or punitive damages. (Sec. 6)
- Limits remedies (normally) to restoration of actual benefits lost – *i.e.*, for employers this would mean payment of back pay and hiring, promoting, or reinstating an employee to a position. (Sec. 6)
- But allows the award of front pay for a period of up to two years if a return to work is impossible because no vacancy exists, the employer's unlawful discrimination made the employee incapable of work, or the working environment deteriorated intolerably. (Sec. 6)

- Requires any order to pay wages (front pay or back pay) to be reduced by the amount the employee should be able to earn with a "reasonably diligent" effort. (Sec. 6)

Makes housekeeping changes

- Would incorporate current regulation's (6 AAC 30.230) 180-day limitation period for filing complaint. (Sec. 2)
- Adds a definition of "complainant." (Sec. 11)

HOUSE BILL NO. 525
"AN ACT RELATING TO COMPLAINTS FILED WITH,
AND INVESTIGATIONS, HEARINGS, AND ORDERS OF,
THE STATE COMMISSION FOR HUMAN RIGHTS"

SECTIONAL ANALYSIS
OFFICE OF THE ATTORNEY GENERAL

Section 1: Amends AS 18.80.100 to ensure that a complainant may withdraw a complaint of unlawful discrimination during the investigative and conciliation phases of the procedures and before the executive director issues an accusation, which begins formal hearing proceedings.

Section 2: Adds new subsections to 18.80.100. The power of the executive director to file a complaint is moved to proposed subsection (b).

Proposed subsection (c) incorporates current regulation's (6 AAC 30.230) limitation period for filing complaint: 180 days after the discriminatory act or practice ends.

Section 3: Amends 18.80.110 to require a written and signed agreement if a complaint is resolved in the conciliation phase, to make that agreement the equivalent of a commission order for purposes of enforcement, and to authorize the compromise of a damages claim in the agreement.

Section 4: Adds a new section expanding the discretion of the executive director to dismiss complaints in .appropriate circumstances. The section reverses the Alaska Supreme Court's decision in *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), that a hearing is mandatory if a complaint is supported by substantial evidence because the law did not give the commission staff discretion to discontinue action after an investigator found substantial evidence of unlawful discrimination. *Id.*, at 1373. The

effect of this decision was to require the commission to commit its resources to any complaint supported by substantial evidence without regard to such factors as the weakness of the evidence, the strength of an employer's affirmative defenses, or the significance of the alleged violation.

Subsection (a) expands the discretion of the executive director to pursue complaints based on such factors as, for example, the strength of the evidence, the severity of the alleged violation, an employer's history before the commission, the complainant's cooperation, or the complaint's value in establishing precedent guiding future conduct.

Subsection (b) ensures that the executive director's administrative dismissal is not a dismissal on the merits and that a complainant may file an action with a court or another agency or even file a new complaint with the commission if the reason for the administrative dismissal can be resolved.

Section 5: Repeals and reenacts 18.80.120, which sets out the hearing requirements.

Subsection (a) implements the expanded discretion of the executive director to choose the complaints that commission staff pursue to hearing and provides that the commission may not review the executive director's exercise of that discretion. It also provides that, if the executive director refers a complaint for hearing, the executive director must issue an accusation based on the investigator's determination of substantial evidence.

Subsection (b) adds a requirement that the hearing follow the procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630, except where the statutes

applying to the commission provide otherwise.

Subsection (c) provides for the amendment of an accusation only upon a showing of good cause, and it requires that an amendment adding a different discriminatory practice charge be supported by substantial evidence and that the parties be provided an opportunity to address the new charge in conciliation before the hearing may proceed.

Subsection (d) establishes the burden of proof at a hearing by requiring that the elements of an accusation or defense be proven by a preponderance of the evidence.

Subsection (e) authorizes the commission to issue a summary decision without a hearing in the same manner that a court may issue a summary judgment -- when the facts are not in dispute and the party petitioning for a summary decision is entitled to an order as a matter of law.

Section 6: Amends the remedial provisions in 18.80.130(a) to authorize the commission to order a remedy after a hearing or after considering a petition for a summary decision. It prohibits the commission from issuing awards of noneconomic or punitive damages.

Paragraph (1), addressing employment, is amended to set out the specific remedies that the commission can award to remedy a discriminatory employment practice. To the remedies of hiring, reinstatement or upgrading an employee with or without back pay, it adds the remedy of payment of front pay for a period of two years in special circumstances: if hiring, reinstatement or upgrading of an employee cannot be accomplished because the employer does not have a vacancy; the employer's discriminatory conduct made the employee incapable of returning to work; or the

working environment had deteriorated intolerably. The paragraph adds a duty to mitigate: an order for either front pay or back pay must be reduced by the amount that the employee should have earned by making a reasonable and diligent effort to obtain comparable employment.

Section 7: Makes conforming amendments to 18.80.130(c).

Section 8: Adds a provision tying the rate of interest when the commission awards interest to the legal rate in AS 09.30.070.

Section 9: Makes conforming amendments to 18.80.140.

Section 10: Makes conforming amendments to 18.80.270.

Section 11: Adds a definition of "complainant" to the definition section in 18.80.300.

Section 12: Adds a paragraph to the Administrative Procedure Act adding the commission to the list of agencies that the Act's hearing provisions cover.

Section 13: Applies the law prospectively, to complaints filed after it is enacted.

Section 14: Authorizes the commission to begin adopting regulations to implement the changes before the effective date of the act and provides that the regulations may not take effect before the act's effective date.

Section 15: Provides an immediate effective date for section 14, which authorizes the commission to begin procedures to adopt regulations.

Section 16: Provides an effective date of July 1, 2004.

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Alaska State Commission For Human Rights
800 A Street, Suite 204
Anchorage, AK 99501-3669

PHONE: (907) 276-7474 **FAX: (907) 276-7462**

DATE: April 23, 2004 **TIME:** 12:58 PM

TO: Representative Bruce Weyhrauch
Chair House State Affairs Committee
Alaska State Legislature

FROM: Lisa Fitzpatrick
Chairperson
Human Rights Commission

FAX #: 907/465-2273

THIS FAX IS:

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X	As requested
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ADDITIONAL INFORMATION:

Dear Representative Weyhrauch:

I am sending you the written testimony which you requested regarding HB525. You are welcome to contact me on my cell phone at 830-9820.

Lisa Fitzpatrick
Chairperson

PLEASE CALL IMMEDIATELY IF YOU DO NOT RECEIVE ALL PAGES. THANK YOU.

# of Pages: 7
(Including cover sheet)

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HB 525
TESTIMONY SUBMITTED TO THE
HOUSE STATE AFFAIRS COMMITTEE
APRIL 23, 2004

The Human Rights Commission appreciates the opportunity to submit comments to the House State Affairs Committee on HB 525, a bill that would significantly affect the Commission's authority and procedures. These comments are being submitted by the Commission's Chairperson, Lisa Fitzpatrick, on behalf of the entire Commission.

The Commissioners support the provisions of the bill that provide discretion to the staff to focus agency resources on cases of greater merit. The Commissioners have serious concerns, however, about the limitations on available relief that would be imposed by this legislation. The Commissioners are also concerned about other provisions of the bill that would create additional barriers for victims of discrimination who are seeking a fair remedy for Human Rights Law violations.

BACKGROUND

The Human Rights Commission was created over forty years ago to enforce Alaska's strong public policy against discrimination, and provide an alternative forum to bringing a lawsuit in court. The Commission's purpose is to make whole those persons who are found to be victims of illegal discrimination. When an Alaskan alleges a harm because of discrimination in employment, housing, or a practice by the State because of their race, sex, disability, age, or other prohibited reason, they may file with the Commission. Thousands of Alaskans contact the Commission each year for assistance, but the Commission only accepts complaints that it determines are jurisdictional with the agency. Over the past ten years the Commission accepted an annual average of 453 complaints for filing.

A large percentage of cases are resolved short of a full investigation. Immediately after a complaint is filed, the parties are offered an opportunity to participate in a voluntary mediation program. The Commission's success rate in the program is over 80%. Between one quarter and one third of cases filed with the Commission are resolved through mediation.

If cases don't resolve in voluntary mediation, the Commission staff investigates the allegations, impartially and informally. Investigations are not adversarial, and the informal nature of investigations means that it is not necessary for respondents to hire attorneys to represent them in this process. In fact, only about 20% of respondents, most of whom are large employers, engage legal counsel for this purpose.

After reviewing all of the evidence gathered, the Commission staff makes a threshold determination as to whether there is substantial evidence to support the

allegations. If there is not substantial evidence, the Commission closes the matter and takes no further action. If there is substantial evidence to support the claims, the Commission tries to informally resolve the matter through a process known as conciliation. At this point, the Commission attempts to secure "make whole" relief for the complainant. Nothing prevents the complainant from accepting less than make whole relief, and the Commission often resolves cases at this stage for much less than the complainant would be entitled if they pursued the claim. The Commission will close the case if the complainant refuses to accept relief that the Commission believes is reasonable.

If the matter cannot be resolved through conciliation, the Commission holds a hearing to determine whether unlawful discrimination occurred. Respondents often do hire attorneys at this point in the process, although the Commission encourages the parties to proceed as informally as possible. It is important to recognize, however, that contrary to many common perceptions, neither the Commission nor the Commission's attorney represent the complainant at such hearings. The complainant is the beneficiary of a successful case, but the Commission seeks to enforce the State's important public policy against discrimination when it prosecutes a violation of the law. In this manner, the Commission acts much like a public prosecutor who seeks to enforce the laws of the State. As the United States Supreme Court has said, civil rights enforcement agencies like the Human Rights Commission seek to vindicate the public's interest when seeking remedies that will benefit victims of discrimination.

If, at the conclusion of a hearing, the Commission finds that illegal discrimination has occurred, the Commission can award "make whole" relief—relief that would put the victim in the same position they would have been in absent the illegal discrimination—and no more. In practice, if someone has a case where they want to recover a large damage award, and can find an attorney, they go to court.

Commission cases often don't involve the types of large damages available in court. **The average amount of awards where the Commission has found substantial evidence of discrimination in employment cases is less than forty-eight hundred dollars ($4800).** In most of these cases, people come to the Commission, not the courts, because lawyers cannot afford to take their cases for such small awards. In these situations, the Commission really is the only place a person can come to get relief.

PROVISIONS OF HB 525

Discretion to Dismiss Complaints

The Commissioners support Section 4, which adds a new provision giving the executive director discretion to dismiss complaints before an accusation is issued. This would mean that a hearing would no longer be required by law in every case where substantial evidence is found. This provision allows the Commission to take forward

only those cases that will promote the public policy of the State. Complainants would be free to file a timely case in court after a case is dismissed under this section regardless of the reasons for the dismissal. This section also allows the executive director to dismiss a case prior to a finding of no substantial evidence and promotes efficiency in processing complaints.

Limits on the Type of Relief the Commission Can Award

The Commission believes that this bill goes too far in limiting the amounts and types of remedies that can be awarded. There has been no indication that there are problems with the law or the Commission's awards which would warrant the proposed limits on relief. The Commission discussed some of the limits on relief with the Department of Law, but did not ultimately come to an agreement on all issues. After having these discussions with the Department of Law, and as a result of its ongoing analysis, other problems with the limitations on relief have become more apparent to the Commission.

Currently, the statute now provides for the award of "any appropriate relief." The provisions of Section 6 of the bill remove that authority and limit relief to only those specifically enumerated listed remedies. **This would preclude many types of remedies that are basic, common sense, make whole remedies—ones that do not seek to punish or in any way give a windfall to complainants, but simply to put them in the position they would have been in but for the illegal discrimination.** For example, under current provisions of the bill, the Commission is concerned that it could **NOT:**

Require a reasonable accommodation for a person with a disability– something that can be an integral part of making the workplace accessible to all persons who can otherwise do the job.

Require the payment of retirement benefits where the employer's contributions to a plan are no longer made because a person has been fired due to age discrimination.

Make a person whole for lost benefits that weren't included in their pay check, such as housing, which was part of a compensation package – e.g., in rural Alaska, employees may be paid $10/hour instead of $15, but given a place to live to make up for the difference.

Provide an employee health benefits lost– e.g., where an employer drops a pregnant employee from its insurance upon learning the employee is pregnant, she would be faced with the unexpected cost of having the baby, even though that action was illegal discrimination based on pregnancy.

It would also not allow the Commission to require an employer to remove records of discipline that was discriminatory—e.g., counseling and probationary

documents which were created because of a person's race. Such a record can follow a person and prevent them from getting another job.

Other types of compensation that the Commission is concerned it could **NOT** provide would include:

Vesting in a retirement plan – e.g., in an age discrimination case, an employer fired an employee 6 months before they would vest.

Bonuses – these are not specifically back-pay – e.g. holiday bonuses, profit sharing that would have been available to the employee had the employer not terminated her because of sex discrimination.

Posting of signs and distribution of policies—e.g., regarding sexual harassment or disability. These remedial measures help assure the workplace is free from future problems with discrimination.

Vacation – e.g., what would have accrued if not terminated.

Restoration of Seniority – e.g., lost seniority impacts future bumping and layoffs.

Reimbursed medical costs – e.g. where an employer has provided compensation to offset deductibles or employee co-pay amounts.

Other out of pocket expenses – e.g. those related to seeking other employment after being illegally fired.

The Commissioners are concerned about the limit on front pay to a period of two years and restrictions on when it can be awarded in Section 6. Where appropriate, reinstatement is the preferred remedy for an illegal firing. Front pay is awarded in cases where reinstatement is not feasible, and compensates the victim for the future effects of discrimination when a person has been denied continued employment. Although infrequently used, front pay is an important make whole remedy when needed. Courts have upheld front pay awards for periods of longer than two years where it is justified to make the victim of discrimination whole, and Commission front pay awards have been consistent with judicial precedent.

The Commissioners are opposed to the provision of Section 6 which would require a complainant to make both reasonable and diligent efforts to secure similar employment before allowing an award of back or front pay. The Commissioners recommend using the legal standard applied by the courts, that is, whether a person's efforts are reasonably diligent. The Commission has found this standard to be particularly appropriate in Alaska where long distances and remote areas necessitate considering what is reasonable given the State's unique geography. The Commissioners are opposed to this provision

because it creates two separate standards which would be unfair to Alaskans. The Department of Law has agreed to adopt the Commission's recommended language in this provision.

Restrictions on Amending Complaints

The Commissioners are opposed to the provision in Section 5 that prohibits amendments to the accusation unless the executive director could show that there is "good cause" to do so. The current statute provides that the executive director may amend the complaint "reasonably and fairly." Rules governing the amendment of complaints in superior court allow amending as of right before an answer is filed, and leave to amend is "to be freely given when justice so requires" after that. *See* Civil Rule 15(a). The "good cause" standard is much more stringent than the Commission's present statute or the rules of practice in superior court. The Commissioners request that the current statutory standard or the standard applied in court be used. The Department of Law has agreed to adopt the Commission's recommended language in this provision.

FORCING THE COMMISSION TO PAY ATTORNEY'S FEES WOULD UNDULY HARM THE MISSION OF ELIMINATING DISCRIMINATION

At the House State Affairs Committee hearing on April 21, suggestions were made to require the Commission to pay attorney's fees to respondents in the event the Commission is unsuccessful in proving discrimination at a hearing. **Requiring the Commission to pay attorney's fees would substantially harm the Commission's ability to enforce the Human Rights Law and pursue the State's public policy of preventing and eliminating discrimination.** A mandate similar to Civil Rule 82 would require the Commission to pay 30% of a respondent's attorney's fees when the respondent prevails. In other cases, the Commission could be liable for up to 75% of the fees under the rules governing offers of judgments. These amounts could be up to and exceed $25,000.

In contrast, a rule similar to Civil Rule 82 would limit the fees the Commission could collect when it prevails to 20% of the damages awarded. Since, as noted above, the average Commission award is below $5000, the Commission would receive less than $1000 in fees when it successfully prosecuted a case.

The Commission is a small agency with a very limited budget. In the past two years the Commission lost 20% of its staff and now operates with just 15 employees where it had 22 just four years ago. Requiring the Commission to pay such large amounts for unsuccessful attempts to prosecute violations of the Human Rights Law would most likely mean further reductions in staff and a crippling of the agency's ability to pursue the public's interest in preventing and eliminating discrimination. Such a scheme would be similar to forcing a public prosecutor to pay a criminal defendant when the defendant is found not guilty.

The Commissioners are also extremely concerned that this section would undermine the public's confidence in the agency's diligent enforcement of the law. This could also create an appearance of conflict in the decision making process as the public might view the staff and Commissioner's decisions to be influenced by the concern that fees would be awarded against the agency.

CONCLUSION

The Commission appreciates the opportunity to comment on this bill. The Commissioners recognize the positive aspects of the legislation, but do not believe further limits on the Commission's ability to remedy discrimination are warranted. Again, it is important to note that the vast majority of discrimination claims in Alaska are brought to the Commission. Alaska has a strong and noble public policy against discrimination, and has had a long history of trying to remedy the unfairness that comes with treating people differently for no reason but prejudice or stereotype. This bill would undermine that policy by eliminating full make whole remedies for most acts of discrimination.

HB

527

IOUSE COMMITTEE REPOI

(7)

Date Referred to Committee: March 1, 2004

FURTHER REFERRALS: Judiciary Finance

Date of Committee Action: April 6, 2004

The STATE AFFAIRS Committee considered: **HB 527**

HOUSE BILL NO. 527 **ALASKA SECURITIES ACT**

"An Act relating to the Alaska Securities Act, including reports, proxies, consents, authorizations, proxy statements, and other materials, civil penalties, refunds of proceeds from violations, restitution, and investment adviser representatives; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* HB 527 (STA)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [✓] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
CED		✓		

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gruenberg	-			
	Seaton			✓	
	HOLM			2	
	LYNN			X	
Chair:	Weyhrauch	✓			
Chair:					

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 30, 2004

SUBJECT: CSHB 527(STA) relating to the Alaska Securities Act (Work Order No. 23-LS1792\H)

TO: Representative Bruce Weyhrauch

FROM: Theresa L. Bannister
Legislative Counsel

This memo accompanies a draft of the committee substitute described above.

1. Civil penalty amounts. As we discussed, the increased civil penalty amounts raise an issue as to whether they are sizeable enough to be treated by the courts as criminal matters. A court will determine whether the amount demonstrates a social and ethical judgment by the community of criminality in this situation.[1] The court will give some deference to the legislative identification in the bill of the amount being a civil penalty. Whether the amount of the fine indicates criminality is a question of legislative intent.[2] The fact that a violation under this chapter can involve large amounts of money tends to support the characterization of this as a civil penalty. However, it is a very large amount and may not be appropriate for some situations.

2. Application of AS 45.55.980. It was not clear to me whether you wanted to actually change the current language of the section that deals with the state's jurisdiction. Therefore, the language that is added is designed to work with the current language of the section. If you had in mind changing the provisions in the section, the provisions of (a) - (f) would need to be repealed or modified.

3. Liquidated damages. The reference to liquidated damages has not been included because the doubling of the restitution amount would not be considered liquidated damages in this situation.

If I may be of further assistance, please advise.

TLB:med
04-337.med

Enclosure

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[1] See Baker v. City of Fairbanks, 471 P.2d 386, 402 n.29 (Alaska 1970); Resek v. State, 706 P.2d 288, 291 (Alaska 1985); and Beran v. State, 705 P.2d 1280, 1284 n.4 (Alaska App. 1985).

[2] Resek v. State, 706 P.2d 288, 291 (Alaska 1985).

23-LS1792\P
Bannister
3/30/04

CS FOR HOUSE BILL NO. 527(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to the Alaska Securities Act, including fees and other money received by the administrator of that Act, reports, proxies, consents, authorizations, proxy statements, and other materials, civil penalties, refunds of proceeds from violations, restitution, attorney fees and costs, state jurisdiction, and investment adviser representatives; amending Rules 54(d), 79, and 82, Alaska Rules of Civil Procedure; and providing for an effective date."

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

* **Section 1.** AS 44.55.139 is amended to read:

Sec. 45.55.139. Reports of corporations. A copy of all annual reports, proxies, consents or authorizations, proxy statements, and other materials relating to proxy solicitations distributed, published, or made available by any person to at least 30 Alaska resident shareholders of a corporation that has [TOTAL ASSETS EXCEEDING $1,000,000 AND] a class of equity security held of record by **250** [500]

or more persons and **that** [WHICH] is exempted from the registration requirements of AS 45.55.070 by AS 45.55.138, shall be filed with the administrator concurrently with its distribution to shareholders.

* **Sec. 2.** AS 45.55 is amended by adding a new section to read:

Sec. 45.55.908. Accounting and disposition of receipts. (a) The commissioner of administration shall separately account for the fees and other money received by the administrator under this chapter and remitted to the commissioner of administration under AS 37.10.050.

(b) The legislature may make appropriations from this account to implement the activities of the administrator under this chapter, to maintain an aggressive program of investigation and prosecution of violations of this chapter, to perform all activities necessary to prevent harm to persons in the state from violations of this chapter, and to recover damages for the persons harmed by a violation of this chapter.

* **Sec. 3.** AS 45.55.920(b) is amended to read:

(b) The administrator may issue an order against an applicant, registered person, or other person who knowingly or intentionally violates this chapter or a regulation or order of the administrator under this chapter, imposing a civil penalty of not more than **$100,000** [$2,500] for a single violation, or not more than **$1,000,000** [$25,000] for multiple violations, in a single proceeding or a series of related proceedings.

* **Sec. 4.** AS 45.55.920(c) is amended to read:

(c) For violations not covered by (b) of this section, the administrator may issue an order against an applicant, registered person, or other person who violates this chapter or a regulation or order of the administrator under this chapter, imposing a civil penalty of not more than **$100,000** [$500] for a single violation, or not more than **$1,000,000** [$5,000] for multiple violations, in a single proceeding or a series of related proceedings.

* **Sec. 5.** AS 45.55.920(e) is amended to read:

(e) After an order issued by the administrator under (b) or (c) of this section becomes final and all rights of appeal are exhausted, the administrator may petition the superior court to enter a judgment against a person who is a respondent in the order for

the amount of the civil penalty levied **or the amount of restitution ordered** against the person **and attorney fees and costs as allowed under (g) of this section**. Subject to AS 44.62.570, the filing of the petition for a judgment does not reopen the final order to further substantive review unless the court orders otherwise. A judgment entered under this subsection may be executed on and levied under in the manner provided in AS 09.35.

*** Sec. 6.** AS 45.55.920 is amended by adding new subsections to read:

(f) In an order under (b) or (c) of this section, if another person has been harmed as a result of the violation, the administrator shall also require the violator to refund to the administrator the proceeds received by the violator from the violation and to make restitution to all persons harmed as a result of the violation. The amount of the restitution paid to the harmed person must be two times the amount of loss caused to the person by the violator.

(g) If the administrator is the prevailing party in a court action brought by the administrator under this section, the court shall award to the administrator the actual reasonable attorney fees and actual reasonable costs incurred by the administrator in the action, including all expert witness fees.

*** Sec. 7.** AS 45.55.980 is amended by adding a new subsection to read:

(j) When determining the jurisdiction of the state over persons and acts under this chapter, this section shall be interpreted to apply to persons and activities to the fullest extent allowed by the Constitution of the State of Alaska and the Constitution of the United States.

*** Sec. 8.** AS 45.55.990(15) is amended to read:

(15) "investment adviser representative"

(A) means a natural person who

(i) makes a recommendation or otherwise renders advice regarding securities; manages accounts or portfolios of clients; determines which recommendation or advice regarding securities should be given; solicits, offers, or negotiates for the sale of or sells advisory services; or supervises employees who perform an activity described in this sub-subparagraph; and

(ii) is a supervised person of a state investment adviser that is registered or required to be registered under this chapter **or is a supervised person of a federal covered adviser and has a place of business located in this state,** if a substantial portion of the business of the supervised person is providing to clients who are natural persons the services described in (i) of this subparagraph [, OR WHO IS A SUPERVISED PERSON OF A FEDERAL COVERED ADVISER, HAS A PLACE OF BUSINESS LOCATED IN THIS STATE, AND HAS SIX OR MORE CLIENTS WHO ARE NATURAL PERSONS, IF A SUBSTANTIAL PORTION OF THE BUSINESS OF THE SUPERVISED PERSON IS PROVIDING TO CLIENTS WHO ARE NATURAL PERSONS THE SERVICES DESCRIBED IN (i) OF THIS SUBPARAGRAPH];

(B) means other persons who are not otherwise covered by this paragraph but who are designated by regulation or order of the administrator;

(C) except persons covered by (36)(A)(ii) of this section, does not include a person that would not be defined as an investment adviser representative under 17 C.F.R. 275.203A-3 adopted under 15 U.S.C. 80b-3a (Investment Advisers Act of 1940), as that regulation exists on or after October 1, 1999;

*** Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGES. AS 45.55.920(g), added by sec. 6 of this Act, has the effect of changing

(1) Rule 82, Alaska Rules of Civil Procedure, by establishing different rules relating to the award of attorney fees in actions that are brought under AS 45.55;

(2) Rules 54(d) and 79, Alaska Rules of Civil Procedure, by establishing different rules relating to the award of costs in actions that are brought under AS 45.55.

*** Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 45.55.920(g), enacted by sec. 6 of this Act, takes

effect only if sec. 9 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

* **Sec. 11.** This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE

REPRESENTATIVE BRUCE WEYHRAUCH

ALASKA
STATE CAPITOL
JUNEAU, ALASKA
99801-1182

(907) 465-3744
FAX (907) 465-2273

STATE AFFAIRS COMMITTEE

HB 527
THE ALASKA SECURITIES ACT

SPONSOR'S STATEMENT

In ascending order of importance, this bill would accomplish four things that the division of banking, securities, and corporations seeks to improvement its operations. First, it streamlines a technical definition for investment adviser representative that at present is redundant and, therefore, difficult to comprehend. This is very much a technical amendment.

Second, the bill would give the securities administrator the authority to fine a person who violates the Securities Act up to $100,000 for multiple, knowing or purposeful violations. At present the upward limit is $25,000. The fine for a single instance of a knowing violation is left at its present minimum level of $2,500. The bill would also raise the possible fines for inadvertent violations or violations that cannot be proven to be knowing, from a minimum $500 for a single violation to $25,000 for multiple instances of infringement.

The third element of the bill would give to the securities administrator the authority to order restitution to the victim of a violation of the Act. At present, any fines collected are simply placed in the general fund and the victim is left with nothing but the right to sue. There are, however, instances where suit is impracticable or burdensome for a victim. For example, if a senior citizen is bilked of $10,000, the state can fine the perpetrator, of course, but the senior is left with no other course but to bring an action in court. If the perpetrator is from out of state, as many are, he is almost insulated from an effective legal remedy because interstate actions are very expensive and cumbersome, even for lawyers. With the authority contained in this bill and the present ability to reduce fines and awards to judgment and bring interstate actions, the senior could be reimbursed at least a portion of the losses sustained. It would seem terribly unfair to leave the victim unrecompensed. Most states, as well as the newly minted Uniform Securities Act, adhere to the principle of reimbursement for victims of wrongdoing.

The fourth and most important provision of the bill would lower the jurisdictional limit of the division for oversight of ANCSA corporation proxy matters to those corporations with more than 250 shareholders. At present, those corporations with 500 or more shareholders and $1,000,000 in assets must file with the division copies of annual reports, consents and authorizations, proxies, proxy statements, and other materials related to proxy solicitations that are published or made available to 30 or more

~ More ~

Alaska resident shareholders. The asset limitation is not appropriate because virtually none of the corporations, from the smallest to the largest, book their assets at market value, especially their land holdings. Thus, a corporation could be wealthy in terms of land, yet only carry a much smaller asset balance on their books. This does exempt them from the current reporting requirements.

The limit on shareholders should be reduced, not to burden more corporations, but to enfranchise more Native shareholders in smaller corporations. Many times, the smaller village corporations are the ones that can be, at times, less sensitive to shareholder rights. With this simple reporting requirement imposed, it gives the division the ability to police such matters and educate where needed.

There is nothing in this legislative provision that adds any more burden on a corporation of any size save the requirement to make certain specific disclosures in their proxy statements and make the expenditure for postage to send their materials to the division. This is simply a matter of disclosing more fully to shareholders. The federal statute, ANCSA, already requires every Native corporation to submit its books to audit. This bill does not alter federal law, but adds a requirement of disclosure to shareholders. Title 10 of the Alaska Statutes imposes certain other conditions; not this bill. There is an existing requirement also, that a corporation publish a proxy statement as part of a proxy solicitation. The only requirement this bill would indirectly add by virtue of having a corporation submit to the division's regulations is that certain disclosures would become mandatory. This might add a page or two to the proxy statement, but is not burdensome.

This bill clearly contains beneficial provisions while protecting the investing public and letting shareholders in Native corporations have more information

Contact: Linda Sylvester
Representative Bruce Weyhrauch
465-4963

Released: March 1, 2004

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 527
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: Alaska Securities Act
RDU: Banking, Securities & Corporations(115)
Component: Banking, Securities & Corporations
Sponsor: House State Affairs
Requester: House State Affairs
Component No.: 1233

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (1156)	79.0	79.0	79.0	79.0	79.0	79.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1156 Receipt Supported Services						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation, among other things, increases the civil penalties for people who violate Alaska's Security Act. Penalties increase from $2,500 for a single knowing violation to a maximum of $100,000 for multiple knowing violations, and from $500 to $25,000 for unintentional violations. The department estimates an additional $79.0 in revenues will be collected as a result of this increase. The estimate, which is subject to significant variability, is based on the weighted average of the amount of fines levied and collected over the past five years. Fines have ranged from a low $15.7 to a high of $683.5. Collection rates vary from a low of 0.5% to 85%. This legislation has no fiscal impact on the operations of the division.

Prepared by: Mark Davis, Director
Phone (907) 465-5451
Division: Banking, Securities & Corporations
Date/Time 3/8/04 2:22 PM
Approved by: Edgar Blatchford, Commissioner
Date 3/8/2004
Agency: Department of Community & Economic Development

(Revised 9/2003 OMB)

distribute to the Directors. They should go out in today's mailings. I will send out the article below as well.

Nicole Hallingstad
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From: Irwin Vikki
Sent: Friday, February 27, 2004 9:40 AM
To: Chris McNeil; Harris Rick; Strafford Bill; Duke Patrick; Rinehart Richard; Dick Russell; Wolfe Ron; Antioquia Todd; Hallingstad Nicole; Hotch Janice; Frederiksen Derik; Oliver David; Davis Edward
Cc: Irwin Vikki
Subject: Native corporations pack major punch - ADN - Feb. 27, 2004

Native corporations pack major punch

SURVEY: Assets totaled $2.7 billion in 2002 but many members still live in poverty.

By PAULA DOBBYN, Anchorage Daily News *(Published: February 27, 2004)*
http://www.adn.com/business/story/4788557p-4731430c.html

As calls mount for increased scrutiny of Alaska Native corporations, a new survey of the congressionally created firms describes them as economic powerhouses that generate billions of dollars in revenue, dividends, scholarships and charitable contributions.

Report PDF

Download report (pdf)

The survey of 13 regional corporations and 30 village corporations, formed under the 1971 Alaska Native Claims Settlement Act, was conducted by the Association of ANCSA Regional Corporation Presidents/CEOs. The report found that the sampled corporations had combined revenue of $2.4 billion in 2002, with more than half of that coming from the operations of Arctic Slope Regional Corp. of Barrow and Anchorage-based Chugach Alaska Corp.

The corporations taking part in the survey had assets of $2.7 billion in 2002. They ran a combined Alaska payroll of $408 million, employed 12,123 people statewide and handed out $45.6 million in dividends to shareholders that year, according to the report. The regional corporations together reported $124 million in profits.

"The corporations' importance and influence continue to grow at an exponential rate, giving them a powerful political voice in the state. At the same time, the corporations concern themselves with the social needs of Alaska Natives, as well as their economic well-being," the report said.

Despite the successes, the report mentions that Alaska Natives continue to rank as the ethnic group in Alaska with the lowest per capita income. Natives constitute the largest group of the overall Alaska population living in poverty.

"As we celebrate our successes, we can't forget that despair continues to nip at the heels of many of our family members," wrote Carl Marrs, president of the ANCSA association and chief executive of Anchorage-based Cook Inlet Region Inc., Alaska's most profitable Native corporation.

Many Alaska Natives rely heavily on their corporate dividends to get by, while others get nothing because their corporations don't make the popular payouts.

"Of the 43 corporations surveyed, 26 did not pay dividends in 2002," the report said.

The report's release coincides with recent calls for more accountability from Native corporations and, in some cases, for bigger dividends.

Shareholders of Arctic Slope in January petitioned their corporations to share more of the roughly $1 billion in revenue it makes, in the form of fatter payouts. CIRI shareholders last summer forced the company to cut them checks of $5,000 each for the typical shareholder with 100 shares. The $31 million payout came on the heels of two large cash distributions CIRI made after it cashed out a wireless investment in 2000. Most CIRI shareholders got two checks totalling $65,000.

As some shareholders press for cash, others want to wedge their way farther inside the tightly held and often secretive companies, and exert greater influence over financial decisions and have easier access to company books. Because Alaska Native corporation stock isn't traded publicly, the companies fall outside the scrutiny of the federal Securities and Exchange Commission. That makes them ripe for abuse and corruption, some shareholders say.

A move is about to get under way in Juneau to change that.

Rep. Bruce Weyhrauch, R-Juneau, said he plans to introduce a bill Monday that would shine a brighter spotlight on Native corporations. As it stands now, only corporations with 500 or more shareholders and $1 million or more in assets are required to file their annual reports and proxy materials with state securities regulators. Weyhrauch's bill would eliminate the asset threshold and make any Native corporation with 250 shareholders or more file financial reports and proxy materials with the Division of Banking, Securities and Corporations. The goal is to make smaller companies accountable to their shareholders.

"It gives the public, through the state of Alaska, a greater ability to scrutinize these corporations," said Weyhrauch.

Vince Usera, senior securities examiner, said the change would affect 40 to 50 companies that don't have to report now. The reform is long overdue because too many Native corporations fall outside the scope of any regulation, he said.

"We've been complained to several times about smaller Native corporations that are run like a family business. And the family that has their hands on the wheel runs the entire deal. They don't conform to corporate governance rules. They don't publish anything. They don't have their books audited. They keep their books on the back of a napkin," Usera said.

Usera said it's often impossible to get answers out of Native corporations that currently don't have to send any information to his office.

Recently he tried to help a shareholder of Tetlin Native Corp. who said she had not received dividends from the company for more than a decade. Usera wrote a letter on behalf of the shareholder and addressed it to the person he had listed as Tetlin's chief executive.

He later discovered that the man had been dead for several years.

Daily News reporter Paula Dobbyn can be reached at pdobbyn@adn.com or 257-4317.

A COPY of "Native Corporations: 2003 Annual Economic Impact Report" can be viewed as a link to the story at

www.adn.com

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Cully Corporation

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PROXY STATEMENT FOR ANNUAL SHAREHOLDERS MEETING
Dr. Albert Conference Hall, Ilisagvik College, Barrow, Alaska,
1:00 P.M., Saturday, April 26, 2003

The Date of the this Proxy is March 15, 2003

This statement is furnished in order to explain and to provide further information about the enclosed proxy, which has been sent to you by the board of directors of Cully Corporation (Cully). The proxy form will allow your shares to be voted even though you are not present at the meeting. You should read these instructions and the proxy form carefully before signing. This proxy statement and the accompanying proxy are being mailed to the shareholders on or about March 15, 2003.

Solicitation of Proxies

The Board of Directors of Cully solicits the enclosed proxy for use at the Annual Meeting of Shareholders to be held at the Dr. Albert Conference Hall, Ilisagvik College, Barrow, Alaska on Saturday, **April 26, 2003**. Registration begins at 1:00 P.M.

Annual Meeting Expenses

Cully is paying for the cost of this solicitation for proxies, including the cost of preparing, printing, and mailing the notice of the meeting and proxy material. The cost of any supplemental mailings will also be paid by Cully. Solicitations will be made by mail, except that Directors, Officers, or regular employees of Cully may make solicitations of proxies by telephone and in person. In addition, radio, television, and newspaper advertisements may be used to assist in the solicitation of proxies, if deemed necessary in order to obtain a quorum. In order to obtain a quorum of proxies, Cully will pay for the inspector of election, parliamentarian, election tabulation, salaries and wages of regular employees, telephone, and advertisement expenses. These costs are normal expenses of conducting an annual meeting. No other expenses in connection with this proxy solicitation are anticipated.

Proxy Holder

Unless you indicate otherwise in the blank provided, the proxy form appoints the current board of directors as the proxy holder. The Directors are: Alma M. Upicksoun, Martha Tukrook, Joseph Upicksoun, Lily Anniskett, and Walter Toorak, Sr., Ardys Akers and Genevieve Tukrook. If you give your proxy to the board of directors, they will be responsible for seeing that your shares are voted in accordance with the proxy you have given to them.

Rescission of Proxy

Any proxy received by a Shareholder can be rescinded by attending and voting in person at the Annual Meeting by written rescission received at the annual meeting, or by filing a proxy bearing a later execution date if received before 5:00 p.m. on April 25, 2003.

Financial Statements

The Board of Directors received a clean opinion from the accounting firm of Newhouse & Vogler regarding an audit of the financial statements for the year ended December 31, 2002.

Filing of Proxies

All proxies, Revocation of Proxies, and Powers of Substitution (Hereinafter, "Proxy" or "Proxies") shall be filed with the secretary of the Corporation. A proxy is not valid and may not be voted at the shareholders meeting unless the executed proxy has been filed with the secretary of the corporation no later than 5:00 p.m. April 25, 2003.

In order to make your proxy valid, please date and sign it exactly the way your name appears on the stock records. A person's mark shall constitute a valid signature if it is witnessed by two (2) persons, eighteen (18) years of age or older. All proxies received in writing, which shows intent to empower or revoke a proxy, shall be valid.

All challenges to proxies, ballots, or the conduct of the election or vote shall be made to the Inspector of Election, who shall decide such challenges in accordance with the Articles of Incorporation, By-laws of the corporation, rules of election, and applicable principles of corporate law.

Voting of Shares

The corporation has one class of stock outstanding, designated as Class "A" Settlement Stock. The holders of these classes of stock whose name appear of record on the books of the corporation at the close of business on March 15, 2003 are entitled to vote at the meeting.

Each share of stock entitles the holder to one (1) vote, provided the shareholder is an Alaskan Native as defined by the Alaska Native Claims Settlement Act (ANCSA), as amended. As of March 15, 2003, there were 8,900 shares of Class "A" common stock outstanding. Of those outstanding shares 8,900 are entitled to vote.

Voting of Shares Held Under Custodianship

Alaska law requires that stocks in a corporation organized pursuant to ANCSA to which a minor is entitled must be issued by the corporation to a custodian who will hold the stock for the minor until the shareholder reaches the age of eighteen (18) years. If you are a custodian holding shares for a minor, it is important that you sign and return the enclosed proxy for each minor shareholder for whom you are acting as custodian.

Action to be Taken Under Proxy

After you have executed and returned the enclosed proxy, you may still revoke it (take it back) at any time before the persons to whom you have given your proxy vote your stock. This may be done by notifying the Secretary of the Corporation in writing on or before 5:00 p. m., April 25, 2003, or by registering and attending the meeting in person. Unless you take back the proxy, the persons to whom you have given it will vote the shares as you have directed on the proxy. Unless you direct otherwise, such persons will vote your shares as follows:

a) For the election of two (2) directors, and
b) In their discretion the transaction of such other business as may properly come before the annual meeting or any adjournment thereof.

The By-laws of the corporation provide that the business and property of the corporation shall be managed and controlled by the Board of Directors, consisting of seven (7) members. All directors are required to be shareholders of the corporation and eighteen (18) years of age or over. The Directors shall hold office until his or her term has expired and until his or her successor is elected.

The By-laws provide for the classification of directors into three (3) classes. Listed below are the nominees for the election of the Board of Directors to serve for a three (3) year term. Unless you otherwise instruct the persons holding your proxy, such persons will vote the proxies received by them in their own discretion, but reserve the right to cumulate the votes and distribute them among the nominees in their discretion. (Also refer to the heading in the Proxy Statement "Cumulative Voting of Directors"). If a nominee for some reason does not continue to be available to serve if elected to office.

Lily Anniskett and Charlie Soosuk Attungowruk for seat 1
Walter Toorak, Sr. and Thomas S. Nukapigak for seat 2
Here are the Statement of Qualifications for the 2003 Election Candidates

Lily Anniskett Point Lay, Alaska, Age 53	Cully Board member from April 1997 to present, with fifty-six percent (56%) meeting attendance in 2002. Presently working as acting President for Cully Corporation. Previously employed as EPA Administrator and Inupiat Bilingual Educator. Current representative of Inupiat Community of the Arctic Slope (ICAS). Former Point Lay IRA Mayor & Vice Mayor, member of NSB Health Board and ASRC Board member.
Walter T. Toorak Sr., Anchorage, Alaska, Age 55	Cully Board member from 1973 to present with one hundred percent (100%) meeting attendance in 2002. ASRC Board member 1977-80 and 1991-93. Employed by Cully from 5/98 to 9/99. Employed by ASRC Information Technology 1995-1997. Member Native Village Council of Point Lay from 1990 to 1993.