

March 28, 1996

The Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: SCS CSHB 42 (FIN) -- Use of electronic
transmission in absentee voting
A.G. file no: 883-96-0010

Dear Governor Knowles:

At your legislative office's request on your behalf, we have reviewed SCS CSHB 42 (FIN), a bill relating to the use of facsimile transmission in absentee voting.

Section 1 of the bill requires the director of the division of elections to adopt regulations relating to the delivery of absentee ballots by electronic transmission in state elections and to the use of electronic transmission absentee voting in those elections. The section requires that the regulations (1) must provide that a voter voting by electronic transmission must comply with the same time deadlines as apply to voter voting in person, and (2) must ensure the accuracy and, to the greatest degree possible, the integrity and secrecy of the ballot process. The section also requires that an absentee ballot returned by facsimile transmission must contain an acknowledgment by the voter that the voter is voluntarily waiving a portion of the right to a secret ballot to the extent necessary to process the ballot, and be accompanied by a statement executed under oath as to the voter's identity.

Section 2 of the bill amends AS 15.20.081(a), relating to application by mail for absentee ballots, to provide for application by electronic transmission.

Section 3 amends AS 15.20.081(b), relating to the time by which an absentee ballot must be requested. When a voter is requesting to be sent an absentee ballot by mail, the section amends the law to require that the division of elections receive the request at least seven days before the election, instead of the current four. If a voter is requesting to be sent an absentee ballot by electronic transmission, the division must receive the request at least four days before the election. The section also provides that an absentee ballot application submitted by electronic transmission may not include a provision permitting the applicant to register to vote.

Section 4 of the bill amends AS 15.20.081(c), relating to the sending of absentee ballots, to authorize sending by electronic transmission.

Section 5 of the bill makes a technical change to AS 15.20.081(e), relating to the return of absentee ballots by mail, to reflect the fact that the division of elections can send out absentee ballots by electronic transmission, and that they may be returned by mail.

Section 6 of the bill makes a similar technical change to AS 15.20.081(g), which requires the division of elections to maintain records relating to the sending and receipt of absentee ballots.

Section 7 of the bill amends AS 15.20.082, relating to absentee voting from outside the United States, to provide that the new provisions regarding electronic transmission do not apply to the procedures established in this statutory section.

Section 8 of the bill makes a technical change to AS 15.20.211(b), prescribing what happens if a voter requested and did not receive an absentee ballot, to reflect the new provisions on electronic transmission.

Section 9 of the bill defines "state election" for purposes of AS 15.20.010 - 15.20.225, the absentee voting provisions. The definition encompasses primary and general elections for elected state office; elections for constitutional convention delegates; initiative and referendum elections; recall elections for elected state officers; elections to approve or reject proposed constitutional amendments; and elections to ratify or reject state general obligation bonds.

Section 10 of the bill gives the bill an immediate effective date.

We see no constitutional or other legal problems with the bill. However, some discussion is warranted as to one constitutional question that arose while the bill was before the legislature: whether it would violate the portion of art. V, sec. 3 of the Alaska Constitution that provides that "[s]ecrecy of voting shall be preserved." In our opinion the bill does not violate that provision. We believe that a court, if confronted with a constitutional challenge, would likely employ a balancing test, and would find that the minor infringement on ballot secrecy would be outweighed by the bill's effect of enfranchising voters.

There are no reported decisions of the Alaska Supreme Court construing the ballot secrecy language of art. V, sec. 3. However, the minutes of the constitutional convention show that the language was not intended to be absolute. See 2 Minutes of the Alaska Constitutional Convention 812-14. The secrecy provision was offered as a floor amendment to the elections section of the constitution. During the brief debate on it, Delegate Kilcher asked, "How can secrecy be guaranteed if, as in the case of a blind person, in the case of a person who can't read, the election judges might have to assist?" President Egan referred the question to Delegate Hellenthal (not the amendment's sponsor), who responded that "the right to secrecy is not an absolutely unqualified right. It is like the right to freedom of speech. The classic example is that the right of freedom of speech does not give

one the right to yell "fire" in a crowded theatre." Id. at 814. Immediately following this exchange the amendment was adopted by voice vote.

Recognizing that constitutional rights are virtually never absolute, the Alaska Supreme Court has employed balancing of interests to determine whether governmental enactments are consistent with personal rights guaranteed by the Alaska Constitution. See, e.g., Messerli v. State, 626 P.2d 81 (Alaska 1980) (society's interest in knowing identity of person publishing newspaper advertisements seeking to influence outcome of vote on municipal bond proposition generally outweighs person's right, under free speech and privacy provisions of Alaska Constitution, to remain anonymous); Frank v. State, 604 P.2d 1068 (Alaska 1979) (Athabaskan's religious right, under art. I, sec. 4 of the Alaska Constitution, to have fresh game at potlatch outweighs state's interest in enforcing hunting season laws in these limited circumstances). We believe, therefore, that the court would also use a balancing test in a challenge to this bill.

The overriding purpose of provisions for ballot secrecy is to ensure that voters can vote as they wish, without coercion or the fear of reprisals. See, e.g., Kiehne v. Atwood, 604 P.2d 123, 127 (N.M. 1979) (quoting Carabalal v. Lucero, 158 P. 1088, 1092-93 (N.M. 1916)). SCS CSHB 42 (FIN) does not significantly interfere with this purpose. Insofar as ballot secrecy is compromised at the receiving end - the division of elections - there can be no coercion, as the ballot has already been cast. And the division can adopt regulations to ensure that a ballot will be counted regardless of how it is voted. Insofar as secrecy is compromised at the sending end, a voter can decline to use electronic transmission if the voter fears coercion, or can request to send the ballot himself or herself. Moreover, it is likely that many people using electronic transmission will be out of state, so that, when the ballot is transmitted, there will be no one present with any interest in how the voter votes.¹

On the other side of the scale, SCS CSHB 42 (FIN) will apparently allow people to vote who now cannot. It seems likely that the bill will encourage more people away from their normal voting places to vote absentee.

¹ Because SCS CSHB 42 (FIN) requires the division of elections to adopt regulations, it can address specific problems that persons concerned with absentee voting by electronic transmission may have.

In light of this minimal intrusion on ballot secrecy, and the beneficial effects of the bill, we believe that a court, if presented with a challenge, would find that the balancing clearly supports the bill's constitutionality.²

We note that there is already a section of the elections code that impairs ballot secrecy to at least as great a degree as SCS CSHB 42 (FIN) would. AS 15.15.240, enacted by the 1960 legislature, addresses the concerns expressed by Delegate Kilcher (set out above). It provides, in relevant part, "A qualified voter who cannot read, mark the ballot, or sign the voter's name may request an election judge, a person, or not more than two persons of the voter's choice to assist." In our opinion, it cannot be seriously argued that this provision is unconstitutional, in light of the constitutional minutes. We have the same opinion with regard to SCS CSHB 42 (FIN).

We also believe that we should comment on two sections on the bill that are slightly ambiguous. Section 7 of the bill could be read as providing that persons receiving and casting absentee ballots outside of the United States may not use electronic transmission. However, we believe that a better reading is that the section is intended only to provide that the special absentee ballots prescribed by AS 15.20.082 (which possibly will not contain candidate names, if the primary election has not been certified before the special ballot must be prepared) not be voted by electronic transmission.

We believe that this reading is better because of the language of sec. 7 of the bill, which states only that the electronic transmission provisions do not apply to the procedures of

² Moreover, SCS CSHB 42 (FIN) does not impinge on anyone's direct personal rights. Because no one is forced to submit a ballot by electronic transmission, anyone who chooses to vote in this manner is waiving whatever personal rights the voter has to ballot secrecy. And the bill contains a provision to guarantee that such a waiver will be a knowing and voluntary waiver: proposed AS 15.20.066(b)(1) requires that an absentee ballot returned by electronic transmission must contain a statement that the voter understands that, by using electronic transmission, the voter is voluntarily waiving the right to a secret ballot. Therefore we believe that the courts might well not insist on as strong a showing of governmental interest as is required in some other cases. Compare Frank v. State (requiring the government to show •compelling state interests•).

AS 15.20.082, rather than that those provisions do not apply to AS 15.20.082 altogether. Moreover, because the point of this bill is to facilitate voting, and overseas voters generally have the greatest difficulty in voting, it seems unlikely that the legislature would have intended to prohibit this group from using electronic transmission.

We posed this interpretation question to the attorney in the legislature's Division of Legal Services who drafted this bill, and to an aide of Representative Terry Martin, the bill's sponsor. Both confirmed that the purpose of sec. 7 of the bill was as described in this letter.

Questions have also been raised by sec. 9 of the bill of the bill, defining "state election" in the absentee voting statutes. It has been suggested that this definition would have the effect of prohibiting persons casting ballots for federal office by use of electronic transmission. We do not agree. We believe that the wording of sec. 9 of the bill is broad and encompasses all matters and offices being voted upon at an election at which any of the items listed in sec. 9 of the bill are at issue. In other words, if state candidates are on a ballot, the entire election is a •state election• within the meaning of sec. 9 of the bill, and a voter can vote by electronic transmission on the whole ballot, including the federal offices. Since candidates for President and Congress are voted on at the same primary and general elections as candidates for governor and the state legislature, an absentee voter could vote for these federal candidates by electronic transmission.

We reach this conclusion because of the language of sec. 9 of the bill, defining •state election• as •a primary, general, or special election a purpose of which is to• have a vote on one of the listed items. (Emphasis added.) Again, the bill's drafting attorney and Representative Martin's aide agreed with our reading of this section. They explained that the primary intent behind the definition was to exclude voting by electronic transmission in local elections conducted by the state, such as elections for the governing boards of regional educational attendance areas and coastal resource service areas. The intent was not, as they said, to prohibit voting by electronic transmission for federal offices that appear on the same ballot as state offices.

There is one potential, but very insignificant, problem created by the definition of "state election." If there were a special election for Alaska's representative in the United States House of Representatives, created by the death or resignation of the incumbent, voting by electronic transmission would not be allowed. Since, however, there has only been one such election since statehood, this problem seems unlikely to arise. If desired, it could be cured by enactment of a bill amending the definition of "state election" to include special elections for the United States House of Representatives under AS 15.40.140 - 15.40.220. (This problem does not arise with special elections to fill a vacancy to the United States Senate, because AS 15.40.050 provides that such special elections are held contemporaneously with general elections.)

Sincerely,

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