

## Write-In Spellings

*Miller v. Campbell*

(*Ralph R. Beistline, D. Alaska 3:10-cv-252*)

One week after the 2010 general election, a bit after 5:00 p.m. on Tuesday, November 9, Joe Miller, Republican candidate for U.S. Senator from Alaska, filed an action in the District of Alaska to enjoin Alaska from counting as votes misspellings of the name of incumbent Lisa Murkowski, who was running as a write-in candidate because Miller had defeated her in the Republican primary.<sup>1</sup>

The court originally assigned the case to Judge John W. Sedwick, but he recused himself on November 10 because of his “negative opinion of Mr. Miller.”<sup>2</sup> Judge Sedwick was chief judge when Miller resigned from his position as the court’s Fairbanks magistrate judge, with only minutes’ notice, to run for the Senate.<sup>3</sup> In addition, Judge Sedwick’s wife contributed to Murkowski’s write-in campaign.<sup>4</sup>

The court reassigned the case to Judge Ralph R. Beistline.<sup>5</sup> Judge Beistline was away on vacation at the time, but all of the other judges also recused themselves.<sup>6</sup> With the help of his three law clerks working in chambers, Judge Beistline was able to preside over the case remotely and electronically.<sup>7</sup> No proceeding was necessary in his court.<sup>8</sup>

In his filings, Miller asked the court to order Alaska to respond to his motion for a preliminary injunction by noon on November 10 and requested a hearing on

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1. Complaint, *Miller v. Campbell*, No. 3:10-cv-252 (D. Alaska Nov. 9, 2010), D.E. 1; *Miller v. Treadwell*, 736 F. Supp. 2d 1240, 1241 (D. Alaska 2010); Order at 1, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010), D.E. 16 [hereinafter Nov. 10, 2010, Order]; *Miller v. Treadwell*, 245 P.3d 867, 874 (Alaska 2010) (“Without seeking a statutorily available vote recount by the Division [footnote omitted] or filing a lawsuit in state court to contest the election [footnote omitted], on November 9 Miller filed a federal court lawsuit.”); see Kyle Hopkins & Sean Cockerham, *Miller Files Suit Over Spelling*, Anchorage Daily News, Nov. 10, 2010, at A1; Richard Mauer, *Miller Moves Forward with Suit*, Anchorage Daily News, Nov. 23, 2010, at A1. See generally Richard L. Hasen, *What to Expect When You’re Electing*, Fed. Law., June 2012, at 35–37 (summarizing the litigation).

2. Recusal Order, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010), D.E. 11; see Richard Mauer, *Judge Steps Down from Miller Case*, Anchorage Daily News, Nov. 11, 2010, at A14.

3. Recusal Order, *supra* note 2 (“Mr. Miller’s failure to give reasonable notice of his resignation left the court with no judicial officer resident in Fairbanks, and no ability to fill the vacancy for many months.”); see Mauer, *supra* note 2.

4. Recusal Order, *supra* note 2 (“As a federal judicial officer, it is my duty to discourage political activity by my family members, and I do so. Nevertheless, members of my family have civil rights which they are entitled to exercise.”); see Mauer, *supra* note 2.

5. Docket Sheet, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010); see Mauer, *supra* note 2. Tim Reagan interviewed Judge Beistline for this report by telephone on May 8, 2012.

6. Interview with Hon. Ralph R. Beistline, May 8, 2012.

7. *Id.*

8. *Id.*

the motion at 3:00 p.m. that day.<sup>9</sup> Miller also sought the court's forgiveness for an overlong brief.<sup>10</sup> Judge Beistline ruled that Alaska could have an additional five days to respond to Miller's overlong brief, and Miller could have another three days to reply.<sup>11</sup>

The parties then engaged in a timing spat. On the day of Judge Beistline's order, Alaska moved to dismiss the action on the ground that state court was the appropriate forum<sup>12</sup> and requested that briefing on its motion be completed by November 15.<sup>13</sup> On November 11, which was the federal holiday of Veterans Day, Miller responded that the court's previous briefing schedule was fast enough.<sup>14</sup> On the following day, Judge Beistline reaffirmed his original briefing schedule.<sup>15</sup> Alaska filed its opposition to Miller's injunction motion on November 15,<sup>16</sup> and on that day requested oral argument on November 19, if needed, because the lawyer arguing the case would be out of the country after that.<sup>17</sup> Miller responded that day that he would be out of the state on November 19, so oral argument should be held on November 20.<sup>18</sup> Judge Beistline reminded the parties that he would decide whether to hold oral argument after reading the briefs.<sup>19</sup>

Judge Beistline did not hold oral argument.<sup>20</sup> On Friday, November 19, Judge Beistline ruled that there was no reason to enjoin the counting of the ballots, because separate tallies were retained for correctly spelled names and incorrectly spelled names.<sup>21</sup> Judge Beistline determined that resolution of which votes should be counted should be determined by the state courts, so he stayed the case and en-

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9. Plaintiff's Motion for Shortened Time, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 9, 2010), D.E. 5-10; see Hopkins & Cockerham, *supra* note 1.

10. Plaintiff's Motion for Overlong Brief, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 9, 2010), D.E. 5.

Local rules limit briefs supporting motions other than motions to dismiss or for summary judgment to 25 pages. D. Alaska L.R. 10.1(m). Miller's brief was 36 pages in length, including the signature page. Preliminary Injunction Brief, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 9, 2010), D.E. 5-1.

11. Nov. 10, 2010, Order, *supra* note 1.

12. Motion to Dismiss, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010), D.E. 17; see Richard Mauer, *Miller Challenged in Wrong Court, State Says*, Anchorage Daily News, Nov. 12, 2010, at A5.

13. Defendants' Motion for Shortened Time, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010), D.E. 18.

14. Plaintiff's Opposition to Shortened Time, *id.* (Nov. 11, 2010), D.E. 20.

15. Docket Sheet, *supra* note 5 (D.E. 21).

16. Opposition to Preliminary Injunction, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 15, 2010), D.E. 23.

17. Defendants' Argument Motion, *id.* (Nov. 15, 2010), D.E. 27.

18. Plaintiff's Opposition to Argument Motion, *id.* (Nov. 15, 2010), D.E. 28.

19. Docket Sheet, *supra* note 5 (D.E. 30); see Richard Mauer, *Judge Rejects AFN Intervention in Miller Lawsuit*, Anchorage Daily News, Nov. 17, 2010, at A14.

20. Interview with Hon. Ralph R. Beistline, May 8, 2012.

21. Order at 1-2, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 19, 2010), D.E. 39 [hereinafter Nov. 19, 2010, Order], available at 2010 WL 5071599; see William Yardley, *Naming of Alaska Winner Delayed*, N.Y. Times, Nov. 20, 2010, at A11.

joined certification of the election until the state courts could resolve the matter, conditional on a state court action's being filed by November 22.<sup>22</sup>

Meanwhile, Judge Beistline denied a motion by the Alaska Federation of Natives to intervene in the action in opposition to Miller because, "The State of Alaska is responsible for and fully capable of representing the interests of all its citizens."<sup>23</sup>

On the day of Judge Beistline's stay, Miller filed an amended complaint and five other documents.<sup>24</sup> On Monday, Judge Beistline reminded the parties that the case was stayed.<sup>25</sup>

Miller filed an action in the state's Fairbanks court on November 22, adding several objections to how votes were counted.<sup>26</sup> On Alaska's motion, the action was transferred to Juneau on November 29, and Judge William B. Carey received the case on November 30.<sup>27</sup> Judge Carey permitted Senator Murkowski to intervene; in addition to defending misspellings of her name, she wanted write-in votes for her to count even if the voter did not fill in the bubble for write-in votes.<sup>28</sup> Judge Carey also denied the Alaska Federation of Natives' motion to intervene as a party, but permitted it to participate as an amicus curiae.<sup>29</sup> On Friday, December 10, Judge Carey upheld all decisions by the Division of Elections.<sup>30</sup>

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22. Nov. 19, 2010, Order, *supra* note 21, at 2–4; [Miller v. Treadwell](#), 736 F. Supp. 2d 1240, 1241–42 (D. Alaska 2010); [Miller v. Treadwell](#), 245 P.3d 867, 874 (Alaska 2010); *see* Becky Bohrer, *Miller's Challenge Will Be in State Court*, Anchorage Daily News, Nov. 20, 2010, at A1; Hasen, *supra* note 1; Sandhya Somashekhar, *Murkowski Poised for Second Full Senate Term*, Wash. Post, Dec. 28, 2010, at A5.

23. Docket Sheet, *supra* note 5 (D.E. 31, Nov. 16, 2010); *see* Motion to Intervene, [Miller](#), No. 3:10-cv-252 (D. Alaska Nov. 15, 2010), D.E. 24; AFN Opposition to Injunction, *id.* (Nov. 15, 2010), D.E. 23; Joinder in Alaska Opposition to Injunction, *id.* (Nov. 15, 2010), D.E. 25; *see* Mauer, *supra* note 19 (describing AFN as "the state's largest Native organization").

24. Docket Sheet, *supra* note 5 (D.E. 40–45); [Miller](#), 736 F. Supp. 2d at 1241; *see* Bohrer, *supra* note 22.

25. Docket Sheet, *supra* note 5 (D.E. 46).

26. [Miller v. Campbell](#), No. 1JU-10-1007CI (Alaska Super. Ct. Nov. 22, 2010); Opinion at 4, [Miller](#), No. 1JU-10-1007CI (Alaska Super. Ct. Dec. 10, 2010) [hereinafter Alaska Super. Ct. Opinion], available at 2010 WL 5072024, filed as attachment to Notice, [Miller](#), No. 3:10-cv-252 (D. Alaska Dec. 10, 2010), D.E. 62; Notice, [Miller](#), No. 3:10-cv-252 (D. Alaska Nov. 22, 2010), D.E. 47 (including a copy of the state court complaint); [Miller v. Treadwell](#), 245 P.3d 867, 874 (Alaska 2010); *see* Mauer, *supra* note 1.

27. Alaska Super. Ct. Opinion, *supra* note 26, at 4; *see* Becky Bohrer, *Murkowski Lawyers: Miller Makes False Claims*, Anchorage Daily News, Nov. 30, 2010, at A1 (reporting that the move of the case 620 miles would bring it closer to the physical location of the ballots).

28. [Miller](#), 245 P.3d at 874, 877–78; Alaska Super. Ct. Opinion, *supra* note 26, at 4; *see* Becky Bohrer, *Judge Lets Murkowski Into Case*, Anchorage Daily News, Dec. 3, 2010, at A4.

29. Alaska Super. Ct. Opinion, *supra* note 26, at 4.

30. Alaska Super. Ct. Opinion, *supra* note 26; [Miller](#), 245 P.3d at 874; [Miller v. Treadwell](#), 736 F. Supp. 2d 1240, 1242 (D. Alaska 2010); *see* Sean Cockerham, *Miller Loses Election Lawsuit*, Anchorage Daily News, Dec. 11, 2010, at A1; William Yardley, *Court Rejects Challenge to Alaska Write-In Votes*, N.Y. Times, Dec. 11, 2010, at A14.

Knowing that Judge Carey was going to issue his ruling on that day<sup>31</sup> and wanting to ensure that Alaska would be fully represented when the U.S. Senate convened in January, Alaska moved earlier in the day to lift Judge Beistline's stay,<sup>32</sup> expedite resolution of the case,<sup>33</sup> and permit the certification injunction to continue only if Miller immediately appealed a judgment against him.<sup>34</sup> Judge Beistline agreed to expedite consideration of the motions and required a response from Miller by Monday, December 13, at 10:00 a.m.<sup>35</sup> Judge Beistline granted Miller's request for two additional hours.<sup>36</sup>

On the Monday after Judge Carey's Friday ruling, Alaska filed amended motions taking into account how Judge Carey actually ruled and a briefing schedule established by Alaska's supreme court in the event of an appeal.<sup>37</sup> On Tuesday, Judge Beistline denied Senator Murkowski's motion to intervene<sup>38</sup> and accommodated the Alaska supreme court briefing schedule by giving Miller 48 hours from the entry of the supreme court's decision to present his position to the federal court.<sup>39</sup>

Both Miller and Murkowski appealed the Alaska trial court ruling,<sup>40</sup> and on Wednesday, December 22, Alaska's supreme court affirmed the trial court.<sup>41</sup>

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31. See Becky Bohrer, *Judge to Rule by Friday on Miller's Election Challenge*, Anchorage Daily News, Dec. 9, 2010, at A4.

32. Motion to Lift Stay, *Miller v. Campbell*, No. 3:10-cv-252 (D. Alaska Dec. 10, 2010), D.E. 48.

33. Motion to Expedite, *id.* (Dec. 10, 2010), D.E. 49.

34. Motion to Re-Condition Preliminary Injunction, *id.* (Dec. 10, 2010), D.E. 51 (seeking an order that "the injunction against certification will be lifted unless Mr. Miller files an appeal with the Alaska Supreme Court by the end of the business day following the issuance of that order"); see Motion to Expedite Motion to Re-Condition Preliminary Injunction, *id.* (Dec. 10, 2010), D.E. 50.

35. Order, *id.* (Dec. 10, 2010), D.E. 55.

36. Docket Sheet, *supra* note 5 (D.E. 64, Dec. 10, 2010); see Plaintiff's Statement, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 10, 2010), D.E. 61.

37. Amended Motion, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 14, 2010), D.E. 67; Notice of Supplemental Facts, *id.* (Dec. 13, 2010), D.E. 66.

38. Order at 1, *id.* (Dec. 14, 2010), D.E. 75 [hereinafter Dec. 14, 2010, Order] ("Murkowski is clearly an interested party in this dispute. However, her interests are well represented by Defendants and she raises no new federal claims."); see Murkowski Motion to Intervene, *id.* (Dec. 10, 2010), D.E. 57; Murkowski Motion for Shortened Time on Her Motion to Intervene, *id.* (Dec. 10, 2010), D.E. 56; Prospective Intervenor's Joinder in Motion to Lift Stay, *id.* (Dec. 10, 2010), D.E. 53; Proposed Intervenor Answer, *id.* (Dec. 10, 2010), D.E. 58.

39. Dec. 14, 2010, Order, *supra* note 38, at 2–3; see Sean Cockerham, *Ruling on Senate Race May Be Today*, Anchorage Daily News, Dec. 17, 2010, at A1.

40. *Miller v. Treadwell*, No. S-14121 (Alaska Dec. 13, 2010); *Miller v. Treadwell*, No. S-14112 (Alaska Dec. 13, 2010).

41. *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010); *Miller v. Treadwell*, 736 F. Supp. 2d 1240, 1242 (D. Alaska 2010); see Sean Cockerham, *Supreme Court Rules Against Miller*, Anchorage Daily News, Dec. 23, 2010, at A1; Somashekhar, *supra* note 22; William Yardley, *Court Ruling Favors Murkowski*, N.Y. Times, Dec. 23, 2010, at A23.

Judge Beistline had a law clerk attend the December 17, 2010, oral argument before Alaska's supreme court to help the judge stay on top of the case's progress. Interview with Hon. Ralph R. Beistline, May 8, 2012.

Taking into account the federal holiday of Friday, December 24, Judge Beistline gave Miller until 9:00 a.m. on Monday, December 27, to move his federal case forward and gave Alaska until the following Wednesday morning to respond.<sup>42</sup> On December 27, Miller filed a motion to lift the injunction against certification so that Alaska would be fully represented in January, arguing that correction to its representation could be resolved later.<sup>43</sup> Miller also filed a second amended complaint<sup>44</sup> and a motion for summary judgment.<sup>45</sup>

On December 28, Judge Beistline ruled that Miller's federal constitutional claims were without merit, and he dismissed the action.<sup>46</sup>

In dismissing the action, Judge Beistline noted, "What we have before us is a poorly drafted state statute. Wisdom would suggest that the Alaska Legislature act to clarify it to avoid similar disputes in the future."<sup>47</sup> On May 17, 2011, Alaska's governor approved an amendment to Alaska's statutes providing that "in counting votes for a write-in candidate, the [elections] director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained."<sup>48</sup>

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42. Docket Sheet, *supra* note 5 (D.E. 78).

43. Notice of Consent, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 27, 2010), D.E. 79; see William Yardley, *Republican Drops a Tack in Alaska Senate Race*, N.Y. Times, Dec. 28, 2010, at A12.

44. Motion to Amend Complaint, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 27, 2010), D.E. 80; *Miller*, 736 F. Supp. 2d at 1241, 1246 (accepting amended complaint).

45. Summary Judgment Brief, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 27, 2010), D.E. 82; Summary Judgment Motion, *id.* (Dec. 27, 2010), D.E. 81; *Miller*, 736 F. Supp. 2d at 1242.

46. *Miller*, 736 F. Supp. 2d 1240; see Lisa Demer, *Federal Judge Dismisses Miller's Lawsuit*, Anchorage Daily News, Dec. 29, 2010, at A1; Felicia Sonmez, *Murkowski Is Certified Victor in Senate Race*, Wash. Post, Dec. 29, 2010, at A4; William Yardley, *State to Declare Victory for Murkowski*, N.Y. Times, Dec. 29, 2010, at A13.

47. *Miller*, 736 F. Supp. 2d at 1243.

48. Alaska Stat. § 15.15.360(d) (2012); Enrolled 2011 Alaska S.B. 31, available at <http://www.legis.state.ak.us/PDF/27/Bills/SB0031Z.PDF>.