

Margaret Paton-Walsh
 State of Alaska, Department of Law
 1031 W. 4th Avenue, Suite 200
 Anchorage, AK 99501
 Telephone (907)269-6612
 Facsimile (907)258-4978
Margaret.paton-walsh@alaska.gov
 Attorney for Lieutenant Governor
 Mead Treadwell and the State of Alaska,
 Division of Elections

**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA**

JOE MILLER,)
)
 Plaintiff,)
)
 v.)
)
 LIEUTENANT GOVERNOR MEAD)
 TREADWELL, in his official capacity;)
 and the STATE OF ALASKA,)
 DIVISION OF ELECTIONS,)
)
 Defendants.)

Case No. 3:10-cv-00252 RBB

**AFFIDAVIT OF GAIL FENUMIAI IN SUPPORT OF MOTION TO LIFT
 PRELIMINARY INJUNCTION AND MOTION TO RULE ON SHORTENED
 TIME**

STATE OF ALASKA)
) ss
 FIRST JUDICIAL DISTRICT)

Gail Fenumiai, on oath duly sworn, hereby deposes and says as follows:

1. I am employed by the State of Alaska, Division of Elections, as the Director of the Division of Elections. Although I was hired in this position as of January 2, 2008, I have a long history of employment with the division.
2. I was employed by the Division of Elections from August 1988 through December 1989, and from July 1995 through early January 2003. At the time I left employment with the division in 2003, my position title was Elections Administrative Supervisor.
3. I have personal knowledge of the matters set out in this affidavit.
4. The Senate requirements for certificates of election are as follows:
 - a. The certificate must be an original document signed by the Governor and attested to by the Lieutenant Governor, in his role as the chief state election official. The Governor and Lieutenant Governor therefore must be in the same place to sign the certificate.
 - b. The certificate must be hand-delivered to the Senate Office of Public Records, 232 Hart Senate Office Building in Washington, D.C. before noon on January 3, 2011, when Senator Murkowski's current term in office expires. While the Senate will not convene until January 5, 2011, the Office of the Senate has been unable to assure the state that this changes the January 3 deadline.
 - c. Although certificates may also be mailed, if the certificate does not arrive in time *for any reason*, the senator will not be permitted to take her seat. I understand that because of heightened mail security measures at the

Capitol, the certificate would have to be mailed to the Office of Public Records in Alexandria, Virginia, which could cause further delay.

5. Because of the intervening holidays and the possible complications created by winter weather and holiday travel, I believe that the division must be free to certify the election result no later than December 29, 2010 in order to ensure that the certificate is signed and hand-delivered to the Senate before noon on January 3, 2011.
6. The Governor and Lieutenant Governor have arranged to be in the same city on December 30, 2010 and have scheduled a tentative meeting at which they can sign the certificate if the injunction is lifted. The state is arranging for a state employee to hand deliver this certificate to Washington D.C.
7. After the polls closed on November 2, 2010, the division counted nearly all ballots with automated tally machines. The automated tally machines that the state uses to count ballots do not sort them. Nor do they segregate “overvotes”—ballots on which a voter marked more than one oval for the same race—or “undervotes”—ballots on which a voter failed to mark an oval for a particular race. The machines simply keep track of the total number of ballots fed into them, and of the total number of votes for each candidate. The division determines the number of over and undervotes by comparing the number of votes counted for candidates by the machine with the number of ballots cast. At the end of the machine count, there are no separate stacks of votes for each candidate and ballots that were not counted; there is only a single stack of unsorted ballots. The division thus had to sort and review all ballots cast in the election to identify and count write-in votes.

8. The division employed the following counting process to review write-in votes cast in the November 2010 general election. There were three steps: sorting all ballots; reviewing misspelled write-in ballots and any challenged ballots; and counting the votes. In the first stage of the process the ballots were sorted by 30 election board workers who worked in 15 teams of two. The teams of election workers sorted *all* of the ballots cast in the election, not just write-in ballots.

9. The election workers sorted the ballots into five categories:

- (1) ballots on which the oval was marked correctly next to a candidate's name that was printed on the ballot;
- (2) ballots on which no oval was marked for U.S. Senate, more than one oval was marked for that race, or a name was written in but the oval was unmarked;
- (3) ballots on which the write-in oval was marked and the written name was "Lisa Murkowski" or "Murkowski," spelled correctly, and the ballot was not challenged by any observer;
- (4) ballots on which the write-in oval was marked and the name written appeared to be a variation or misspelling of Lisa Murkowski or Murkowski; this category also included any ballot challenged by an observer in the sorting process;
- (5) ballots on which the write-in oval was marked and the name written in was not "Murkowski," "Lisa Murkowski," or a variation thereof.

10. When a team finished sorting the ballots for a precinct, I went to that team's table.

In this second stage of the process, I determined how to count the ballots in category #4.

I was the only person to make the final decision for each ballot.

11. In reviewing ballots for the U.S. Senate race, I counted as votes for Lisa Murkowski ballots that slightly misspelled "Lisa Murkowski," when they clearly indicated that the voter intended to vote for that candidate. This did not require speculation on my part, as the slightly misspelled versions of Lisa Murkowski were written in the space for a write-in candidate for the U.S. Senate race, and Lisa Murkowski ran a high profile, well publicized campaign for that seat.

12. I did not count any ballots on which a voter wrote a vulgar or insulting variation on a write-in candidate's name.

13. The candidates' observers were able to challenge any determination regarding any ballot. If an observer challenged my decision to count or not count a particular Category #4 ballot for Lisa Murkowski, that ballot was placed into one of two envelopes:

"Challenged Counted" or "Challenged Not Counted." These ballots were segregated. If my decision whether to count or not count a ballot for Lisa Murkowski was not challenged, the ballot was placed either in category #3 or category #5, depending on whether or not I decided to count it for Murkowski.

14. Miller's observers challenged a wide variety of ballots, not just those that were misspelled. They also challenged my decision to count ballots where the voter had written Murkowski in the space below the write-in line, rather than on the line; ballots on which the voter had also written "Republican" or "Rep" or "R" after Murkowski's name; and ballots where the voter had crossed anything out or written something in addition, such as an exclamation mark, or smiley face.


15. During my review, I also examined the ballots in category #2—those on which no oval was marked for U.S. Senate, more than one oval was marked for that race, or a name was written in but the oval was unmarked.

16. I did not count ballots that had no oval filled in for the U.S. Senate race, even if a name was written in. Murkowski campaign observers challenged my decision not to count these “no-oval” ballots if the voter had written-in Murkowski’s name. They also challenged ballots that looked like they might conceivably contain a variation on Murkowski’s name, but which were so badly spelled or poorly written that the voter’s intent was not clear.

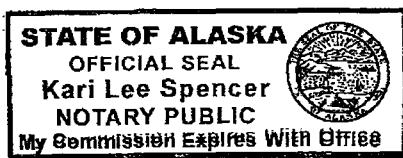
17. If a ballot had two ovals filled in for the U.S. Senate race, I examined the ballot to see where the ovals appeared. If the voter had filled in the oval by the name of a candidate printed on the ballot and also by the write-in choice, I counted the ballot if the voter wrote in the name of the same candidate. I also counted ballots with two ovals marked when it was clear that the voter crossed out one of the ovals. I did this regardless of whether the voter expressed an intent to vote for a write-in candidate or for a candidate whose name was printed on the ballot. Otherwise, I did not count the ballot. This is how Joe Miller received many of his 20 “write-in” votes. Although not all were technically write-in votes for Miller, they were added to Miller’s “write-in” total because that was the easiest way to account for them given that the division was counting write-in votes.

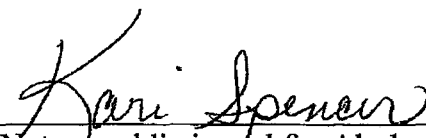
18. In the third stage of the process, the election workers tallied the ballots and recorded the vote totals for the precinct. The workers tallied the ballots in category #3 — those that were spelled correctly and unchallenged — to determine the vote total for

Lisa Murkowski. They also tallied the ballots for Lisa Murkowski in the envelope marked "Challenged Counted" and added them to the vote total for Murkowski but did not commingle them with any other ballots. The workers tallied the ballots in the "Challenged, Not Counted" envelope, but did not add them to the vote total for any candidate, and did not commingle them with any other ballots. All challenged ballots were kept segregated in their special envelopes. The workers also tallied the write-in ballots in category #5, adding those votes to the totals for the other registered write-in candidates or to the "other write-in" category.


Gail Fenuniai

SWORN TO AND SUBSCRIBED before me December 22, 2010.




Notary public in and for Alaska
My commission expires with office