

FAULT AND THE MURKOWSKI VOTER: A REPLY TO FLANDERS

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In the lead article for this Symposium,¹ Professor Chad Flanders presents in clear and compelling fashion the principal – and fascinating – questions raised by the attempt of the Alaska Division of Elections to offer a list of eligible write-in candidates to Alaskan voters during the 2010 United States Senate elections. In this short contribution, I use the final issue discussed in Professor Flanders’ review as a convenient point of departure for a return to first principles.

As Professor Flanders describes, just days before the 2010 general election but after Senator Lisa Murkowski was defeated in the Republican party primary and then formally announced her intention to run for re-election with a write-in campaign, the Alaska Division of Elections sent a list of authorized write-in candidates to each polling place.² The list contained the proper spelling of each candidate’s name as presented on his or her application for recognition as a valid write-in candidate.³ Pollworkers were to retain the list and offer it to a voter if (and only if) that voter requested assistance with his or her write-in vote.⁴

The decision to send the list to the polling places was challenged by both the Republican Party and the Democratic Party as a violation of a regulation purporting to prohibit the provision of information at the

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1. Chad Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of Assistant to the Voter*, 28 ALASKA L. REV. 1 (2011).

2. *Id.* at 1.

3. More specifically, the list was of candidates who filed a letter of intent to run as a write-in candidate no later than five days before the election. Under Alaska law, write-in votes for any individual will only be counted if the candidate has filed such a letter of intent. ALASKA STAT. § 15.25.105 (2010).

4. At least one of the authorized write-in candidate lists was posted at a polling place; however, that posting was apparently a mistake and was neither pursuant to, nor consistent with, a Division of Elections policy. Complaint exh. 4, *Alaska Democratic Party v. Fenumiai*, No. 3AN-10-11621CI (Alaska Super. Ct. Oct. 24, 2010) (Letter from Gail Fenumiai, Director, Alaska Division of Elections, to Patti Higgins, Chair, Alaska Democratic Party, Oct. 20, 2010).

polls regarding a write-in candidate.⁵ But, as the Alaska Supreme Court determined, that regulation was ambiguous⁶ and subject to a state statutory mandate to assist voters in need of help.⁷ Ultimately, the court found that the Division of Elections was justified in providing a list of write-in candidates, purged of partisan affiliation labels, to allow voters to access the proper spelling of a candidate's name upon request.⁸

There is no need to assume that the strictly nonpartisan⁹ Division of Elections wished to assist Murkowski's candidacy in order to explain its desire to provide the list. Murkowski filed her letter of intent to become a recognized write-in candidate for U.S. Senate on October 13, 2010, just 20 days before the election.¹⁰ It is quite rare for write-in candidates to generate enough interest in the electorate to present a serious challenge to the candidates on the ballot; indeed, before Murkowski, the last person to win a U.S. Senate race as a write-in candidate was Strom Thurmond, who was elected as a write-in candidate in 1954.¹¹ Successful write-in campaigns are sufficiently rare

5. See ALASKA ADMIN. CODE tit. 6, § 25.070(b) (2011) ("Information regarding a write-in candidate may not be discussed, exhibited, or provided at the polling place, or within 200 feet of any entrance to the polling place, on election day."); see also § 25.070(d) ("Instructions for indicating a write-in choice will be posted in each polling place. If the instructions are not understood, the voter may ask an election official for assistance.").

6. The regulation could be considered ambiguous in at least two respects. First, it is not clear whether the regulation was intended to apply solely to the "provision" of information by third parties, or whether it was also intended to exclude the provision of information by poll workers. Second, it is not clear whether the regulation was intended to apply solely to potentially persuasive "information" about write-in candidates, or whether it was also intended to exclude more mechanical "information," such as the accurate spelling of the candidate's name.

7. See ALASKA STAT. § 15.15.240 (2010) ("A qualified voter needing assistance in voting may request an election official, a person, or not more than two persons of the voter's choice to assist. If the election official is requested, the election official shall assist the voter.").

8. Order, *Alaska v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 29, 2010), available at <http://aprn.org/wp-content/uploads/2010/10/AK001.pdf>. As Professor Flanders has noted, in construing the statute, the Alaska Supreme Court relied on what Professor Rick Hasen has labeled the Democracy Canon. Flanders, *supra* note 1, at 12-13; see also Rick Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

9. See ALASKA STAT. § 15.10.105(b) (2010).

10. See Memorandum for Partial Summary Judgment exh. 2-A, *Miller v. Treadwell*, No. 3:10-cv-00252 (D. Alaska Dec. 27, 2010) (Alaska Letter of Intent: Write-in Candidate for U.S. Congress).

11. See William Yardley, *Murkowski Wins Alaska Senate Race*, N.Y. TIMES, Nov. 17, 2010; see also Richard Winger, *Senator Lisa Murkowski Weighing Write-in Campaign*, BALLOT ACCESS NEWS, Sept. 8, 2010, available at <http://www.ballot-access.org/2010/09/08/senator-lisa-murkowski-weighing-write-in-campaign/>

that the Division of Elections might not have foreseen the need to tailor its regulations for such an eventuality.

Murkowski's campaign, however, presented a highly unusual chance of victory—and thereby two sizable concerns. First, her write-in campaign offered the unusual likelihood that there would be an abundance of questions about the write-in process from those who did not see Murkowski on the ballot.¹² A torrent of questions from confused voters to civic-minded volunteer pollworkers, in turn, risked the chance that pollworkers would flout a flat ban on information, unintentionally providing impermissibly persuasive information in an attempt to provide at least *some* useful help.¹³

Second, Murkowski's write-in campaign offered the unusual likelihood that the write-in entries could be outcome-determinative, resulting in high-stakes disputes over each write-in entry. According to the Alaska Statutes, write-in votes are counted if, *inter alia*, "the name, as it appears on the write-in declaration of candidacy," is written in the appropriate space.¹⁴ A flat ban on information about write-in candidates increased the risk of slight variations in the way that Murkowski's name was written on the ballot, with a consequently increased chance of litigation over whether each particular variation met the statutory standard. Conversely, providing a list with the proper spelling increased the chance that individuals would accurately write their preferred entries in a picture-perfect manner, thereby reducing the number of

(last visited Apr. 3, 2011) (cataloging prior significant Alaska write-in campaigns, none of which exceeded 20% of the vote).

12. See Flanders, *supra* note 1, at 10 n.52.

13. For example, it is unclear whether poll workers would naturally maintain a bright line between assisting in the voting process and providing information on candidates, particularly with respect to the mechanics of casting a vote for a particular individual. The Alaska Republican Party suggested that poll workers could lawfully not only offer spelling assistance to voters who affirmatively indicated a desire to vote for Lisa Murkowski, but that they could even prompt the voter to allow the poll worker to write the name on the ballot on the voter's behalf. Opp. to Pet. for Review at 5-6, *Alaska v. Alaska Democratic Party*, No. S-14054 (Alaska Oct. 28, 2010), available at media.trb.com/media/acrobat/2010-10/214498380-28165941.pdf. The more that poll workers are allowed (or encouraged) to engage in this sort of dialogue, the more likely the potential for unintentional, but improper, prompting. From an earnest and eager poll worker's perspective, after hearing five voters ask for assistance in spelling "Lisa Murkowski," it may seem entirely natural to hear a sixth voter asking how to spell "Lisa ..." and interject "Murkowski?"—despite the presence of other "Lisa"s on the list of official write-in candidates. See Alaska Div. of Elections, November 2, 2010 General Election Candidate List, http://www.elections.alaska.gov/ci_pg_cl_2010_genr.php#uss. The Division of Elections could well have thought that providing poll workers with a written list to give voters as a reference might help avoid such improper exchanges.

14. ALASKA STAT. § 15.15.360(a)(11) (2010).

ballots subject to dispute about the meaning of the statutory standard, and thereby reducing the potential stakes of post-election litigation.

The pre-election decision to provide the list might thus have been justified, at least in part, by the State's desire to reduce the incidence of error. Curiously, as Professor Flanders notes at the conclusion of his review, this decision seems to bleed quickly into the question of how to resolve any errors that nevertheless occurred.¹⁵ Alaska statutes require voters to write in the name of their preferred candidate.¹⁶ Apart from all of the other reasons to construe this requirement in one manner or another, should the fact that an "answer key" was provided before the election have affected whether this statutory requirement was construed with greater or lesser latitude in post-election challenges?¹⁷

It is important to recognize that the two issues need not necessarily be connected. There is no inherent reason why procedures for addressing residual error on write-in ballots should be controlled—or even influenced—by procedures to reduce the incidence of error in the first place, any more than those procedures for addressing residual error should be controlled by ballot access rules, procedures for qualifying eligible voters, or any other aspect of the "election ecosystem."¹⁸ After all, the nature of the lighting in a polling place might also reduce the incidence of error on a write-in ballot, but it seems foolish to suggest that the standard for evaluating misspellings ought to vary with a poll site's choice of fluorescent bulbs. In order for the provision of the write-in list to influence the standards for counting ballots, there must be a valid *reason* to link the two policies.

As Professor Flanders implicitly recognizes,¹⁹ the presence or absence of a link seems to turn largely on whether some notion of blame or fault is relevant to the decision. For example, imagine that "Lisa Merkowsky" would be counted under a less exacting interpretation of

15. See Flanders, *supra* note 1, at 26–27.

16. § 15.15.360(a)(10).

17. Even strict textualists will likely concede *some* need for construing the applicable statutory standard to embrace something other than purely literal meaning. Strict construction of this statute would preclude counting any deviation whatsoever from the candidate's name "as it appears" on the write-in declaration of candidacy — including, say, font style or size. Any other construction involves application of a policy choice — grounded in legislative intent, or democratic theory, or values premised on the role of fault, as explored below — layered onto the words of the statute itself.

18. The exceedingly useful phrase is borrowed from STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2007).

19. See Flanders, *supra* note 1, at 27 (reciting the argument that "there is simply no *excuse* for the voter if he or she misspells the name of the candidate") (emphasis added).

the Alaska statutory standard, but rejected under a more exacting interpretation. If the existence of the list at the polls, and solely the existence of the list at the polls, causes the standard for evaluating write-in entries to become more exacting,²⁰ the change in the standard must be due to an assessment that each voter had the opportunity to use the list to spell “Murkowski” correctly, at least some voters who misspelled “Murkowski” would not have misspelled “Murkowski” had they used the list, and we feel justified in blaming—and punishing—such voters in the event that they failed to check the list and offer the correct spelling. Conversely, if there is no list at the polls, and the lack of such a list alone causes the standard for evaluating write-in entries to become less exacting, it must be because we feel justified in excusing a minor mistake because the absence of a list absolved the voter of a meaningful modicum of fault.

The frame of “fault” or moral culpability is not a new development in election law.²¹ Yet while scholars have devoted substantial attention to the uses and abuses of fault-based rationales for regulation in other substantive areas,²² the propriety of fault as a first principle has been underexplored in the election law context.

It is not immediately clear why a frame of “fault”—bearing all of the freight of moral transgression—should play any meaningful part in selecting the standards for counting the entry of a write-in ballot cast by an eligible voter. Desert may still play a hotly disputed role in establishing the nature of the eligible electorate,²³ but once electors as a

20. I presume that there is no rational reason why the poll site presence of a list of write-in candidates should justify a *less* exacting standard for evaluating write-in ballots, such that voters in polling places with the list would be permitted more latitude for error than those in polling places without.

21. See, e.g., Edward B. Foley, *The Founders' Bush v. Gore: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23, 45–46 (2010); see also Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1059 n. 29 (2010).

22. See, e.g., Omri Ben-Shahar & Ariel Porat, *Foreword: Fault in American Contract Law*, 107 MICH. L. REV. 1341 (2009) (introducing symposium on fault in contract law); Linda Kelly Hill, *No-Fault Death: Wedding Inheritance Rights to Family Values*, 94 KY. L.J. 319 (2005–2006) (examining fault-based rationales in probate matters); Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CINN. L. REV. 207 (2010) (examining fault-based rationales in the context of divorce); Virginia E. Nolan & Edmund Ursin, *An Enterprise (No-Fault) Liability Suitable for Judicial Adoption—With A “Draft Judicial Opinion”*, 41 SAN DIEGO L. REV. 1211 (2004) (examining fault-based rationales in personal injury cases); Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOKLYN L. REV. 889 (2005) (examining fault-based rationales in products liability);

23. For example, arguments based on fault drive some discussions of felony disenfranchisement. See, e.g., Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. &

class have been admitted to the ballot box, election regulations are not commonly justified—at least explicitly—by the degree to which they facilitate counting only the votes of the more deserving eligible citizens.²⁴ Indeed, regulations premised *solely* on punishing voters for “fault” might well run afoul of the Voting Rights Act’s ban on tests of intelligence or adequate moral character.²⁵

Instead, if “fault” is to have a role in election regulation, it must be because the tangible consequence of a voter’s “fault” otherwise fulfills a purpose valued in the elections context. Unpeeling the focus on “fault” might well reveal valid underlying considerations in some electoral circumstances. In the scenario presented by the Alaska write-in candidates’ list, however, principles based on “fault” seem poorly suited to the relevant electoral decision.

First, in the abstract, regulation based on fault may be useful for deterrence; for instance, punishing a wrongdoer can help deter future repeat wrongdoing. However, this general theory does not translate well to the Alaska scenario. The alleged wrong in this instance is a failure to adequately use the available list of write-in candidates in order to ensure proper spelling. Changing the standard for evaluating write-in entries based upon this presumed wrong does little to foster deterrence. Specifically, there is little reason to believe that a voter would intentionally repeat the relevant wrongdoing unless he or she were punished for failure to use the provided list. It is unlikely that a voter would want to vote for Murkowski, know that she does not know how to spell Murkowski’s name, understand that spelling Murkowski’s name incorrectly may have consequences for the vote’s validity based on the severity of the error, know that the official list is available to consult, and intentionally ignore the list—then, in a subsequent election, repeat the cycle with another write-in vote. Though data concerning repeat

POL. 159, 172 (2001); see generally Alec C. Ewald, *An “Agenda for Demolition”: The Fallacy and the Danger of the “Subversive Voting” Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109 (2004) (critiquing the argument). In a very different context, arguments about the relative wisdom of the electorate—perhaps conflated with notions of desert, if not wrongdoing—drive some discussions of popular judicial elections. See, e.g., Michael R. Dimino, Sr., *The Worst Way of Selecting Judges – Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 299 (2005).

24. To say that such justification is uncommon is not to say that it is unheard of. See, e.g., George Will, *Opinion, Voting Blocks*, WASH. POST, Sept. 5, 1991, at A21.

25. See 42 U.S.C. § 1973aa (2006) (prohibiting the denial of a vote based on a voter’s failure to “demonstrate the ability to read, write, understand, or interpret any matter, . . . demonstrate any educational achievement or . . . knowledge of any particular subject, [or] possess good moral character”).

write-in voting for legitimate candidates are not readily available, it seems like a fairly uncommon practice; the incidence of repeat write-in voting by voters who *know* that they may be misspelling the names of their preferred candidates and know that there are poll site means to correct the problem must be smaller still.

If the aim is not specific deterrence, but general deterrence—making an example of the “Merkowsky” voters in order to ensure that others in future elections check the write-in list—the deterrent value of setting the standard for evaluating entries based on the availability of the write-in list may be larger, but not by much. Again, the problems are knowledge and intent; deterrence can only be effective if the target understands that she is committing an act that triggers consequences. Here, the future write-in voter would not only have to know about the 2010 decision to construe the standard for counting write-in entries more strictly because of the list, but would also—and crucially—have to know that she risked misspelling the name of her preferred write-in candidate. Ultimately, these are intriguing empirical questions: whether individuals generally know when they are likely to misspell someone’s name, and whether the careful watchers of legal standards are also likely to be carefully attuned to their own careless misspellings. But if the pool of citizens offering write-in votes for legitimate candidates is small as an initial matter, then the pool of citizens who are careful enough to understand the import of the write-in candidates’ list and careful enough to seek it out, but careless enough to benefit from its existence, is likely minute. And if deterrence is the primary benefit to changing the standard for evaluating write-in entries,²⁶ the value of deterring these vanishing few individuals must be measured against the impact of adjusting that standard on the “Merkowsky” voters most immediately affected by the decision.²⁷

26. It is important to remember that the question at hand is not whether to construe the standard for counting write-in entries with more or less latitude, but whether to favor a particular choice *because* a list was available at the polls. In a forthcoming piece, I address the former matter: the substance of a standard for counting write-in votes, among other election-related mistakes. I suggest a standard that I believe to be more efficiently calibrated to the incentives of each actor and of the polity as a whole, based not on the magnitude of error or degree of deviation from a statutory standard, but on the “materiality” of the mistake. See generally Justin Levitt, *The Dynamic Nature of Materiality and the Values of the Vote* (2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1477663>.

27. The effect of tallying or not tallying a “Merkowsky” vote is not the only cost of a decision to tighten the standard for counting write-in entries based on the presence of a list at the polls. If standards are set sufficiently high to cause each write-in voter to take every possible step to ensure that the write-in name is correct, then each such voter will want to check (or double-check, or triple-

Crafting the standard for counting write-in votes based on the presence of an official list of candidates at the polls seems even less sensible if premised on a remedial or retributive rationale. In theory, fault can serve as a legitimate basis for demanding remedial measures, to internalize societal cost for some wrongdoing. In this case, however, failing to check an available list of write-in candidates creates no cost to be repaid. Similarly, there seems to be little retributive value in punishing voters for failing to check an available list of write-in candidates given the negligible to nonexistent global harm to the election system as a whole inflicted by that failure. If voters achieved some sort of unfair advantage by failing to check the list of write-in voters, that might be a further reason to prefer a fault-based rule, but it is difficult to discern the advantage gained by an eligible voter who fails to check the list of write-in candidates and thereby misspells the name of the preferred candidate.

In election law generally, there is one further purpose occasionally served by acknowledging fault, but that purpose is also notably absent in the context of the Alaska scenario above. There is a long-recognized interest in finality in the administration of elections, and an equally long-recognized interest in frugality. Given endless time and endless resources, it might be possible to devise procedures that actually ensure that every eligible voter's preferences are accurately recorded. However, with seriously limited quantities of both, it is necessary to make some procedural decisions in determining a winner that leave some eligible voters' preferences unrecognized. Designing these choices so that a cutoff precluding the counting of an eligible elector's vote requires some element of voter fault – or, even stronger, avoiding whenever possible cutoffs that prevent the counting of a vote when an eligible elector is not at fault – comports with our moral intuition far better than establishing a cutoff that is merely arbitrary.

Here, if resource allocation were the most important interest in determining the standard to be used to count write-in votes, and there were a substantial difference in the resources consumed using a more exacting standard than a less exacting standard, the fact that the list was available at the polls might provide an incremental moral thumb on the scale to justify the cheaper option.

Whatever merit the role of fault might have in justifying such resource-based decisions in other areas of election law, however, it is

check) the official list at the polls. If there is only one such list at each polling place, there is a risk that lines will develop and disrupt the voting process; if there are multiple such lists, the state loses some of the administrative efficiency gained by keeping the write-in candidate off of the ballot in the first instance.

less convincing in the Alaska context. When the Alaska returns were in, the volume of ballots with a write-in candidate—and the prospect that a write-in candidate may have won the U.S. Senate race—made it clear that each of those ballots would have to be evaluated manually to determine whether the ballot could be counted and for whom.²⁸ With manual review of each ballot already on the menu, the choice of the particular standard for counting or refusing to count “Lisa Merkowsky” should not have led to substantial differences in the time or cost of the count as long as the standard chosen could be consistently applied to the substantial majority of cases. Put another way, it takes approximately the same amount of time to manually assess whether a particular handwritten ballot accurately spells “Lisa Murkowski,” as it does to assess whether the entry has proper phonetic spelling,²⁹ or whether the chosen candidate is unmistakable, or any of several available alternative standards. Without a substantial difference in the resources consumed under one standard or another, there is little reason to allow the voter’s “fault” to drive the choice in question.

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After the November 2010 election, Alaska courts were faced with a pile of write-in ballots and the need to construe a statutory standard for determining which ballots would count and which ballots would not. It may be that there were valid reasons to construe this statute in an exacting fashion. It may also be that there were valid reasons to forego such a construction. But the only reason to allow this choice to turn on the pre-election provision of a poll site list of write-in candidates is if the decision should be based on the notion that voters more at fault should be incrementally punished, and voters less at fault should be incrementally excused. The Alaska courts declined to consider the existence of the list as a significant element in giving meaning to the

28. It is intriguing to contemplate the impact of technology on election law regulation in this respect. If ballot scanners were sufficiently advanced to tally write-in votes cleaving more closely to the name as written on the declaration of candidacy, but not write-in votes with more errors, that might well create a substantial difference in time and cost in tallying write-in votes automatically rather than tallying them by hand. In that context, a more exacting standard for counting votes aimed at facilitating this machine count and avoiding the burden of a hand count might well be supported by notions of fault, and the existence of a list of write-in candidates at the polls might well be influential in setting that standard.

29. Phonetic accuracy appears to be the standard used by the Division of Elections. See Sean Cockerham, *98% of Write-in Votes Go To Murkowski*, ANCHORAGE DAILY NEWS, Nov. 10, 2010.

statutory standard.³⁰ Given the negligible benefits of driving that statutory construction based on voter fault in this context, the courts' focus should be applauded.

30. The Superior Court mentioned the existence of the list, but did not deem it significant in developing the meaning of the statutory standard. *Miller v. Campbell*, No. 1JU-10-1007CI, 2010 WL 5072024, at 16-17 (Alaska Super. Ct. Dec. 10, 2010). The Alaska Supreme Court ignored the existence of the list entirely. *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).