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MINNESOTA'S HISTORIC 2008 ELECTION

Minnesotans made history in 2008 with record voter turnout and two statewide races so close each required a hand recount to determine who won. The last time Minnesota had a statewide election this close was the 1962 governor's race, where Karl Rolvaag ultimately defeated incumbent Elmer L. Anderson by only 91 votes out of 1.3 million ballots cast. In 2008, recounts were conducted in a primary race for a seat on the Minnesota Supreme Court and for U.S. Senator in the general election.

MINNESOTA RECOUNT BASICS

Minnesota law requires a hand recount when the vote margin between the two top candidates in a race is less than one-half of one percent of the total votes cast. The State Canvassing Board, which certifies the results of state elections, officially determines the need for a mandatory recount when it convenes seven days after a state primary or 14 days following a general election. Mandatory recounts are paid for by the Office of the Secretary of State. Candidates at their own expense can request recounts in elections with a larger vote margin. In 2008, the Office of the Secretary of State conducted six mandatory recounts and one at the request of a candidate.

Most election precincts in Minnesota count votes by using optical scanners on Election Day. These scanners have consistently demonstrated more than 99.99 percent accuracy in the counting of ballots where the oval is clearly marked by the voter. However, when a voter circles the name of a candidate instead of filling in the oval next to the candidate's name, the optical scanning machine cannot properly count the vote. Scanners cannot read check marks, circles, or markings outside the oval. State law specifies that recounts be done by hand to ensure that each original ballot is reviewed by an election official to determine a voter's intent.

Recounts are conducted in public. Election officials examine each ballot one by one. Candidates may designate a representative to stand at the recount table to observe the ballot review process. These representatives may "challenge" a recount official's determination of voter intent. State law allows for challenges when voter intent is not clear or the voter marks his or her ballot in such a way as to identify his or her ballot.

In the case of statewide election recounts, the State Canvassing Board reviews each challenged ballot to determine voter intent or if the ballot was marked in such a way so as to identify the voter. Upon conclusion of the board's review and allocation of challenged ballots, the results of the election are certified.

STATE CANVASSING BOARD

The State Canvassing Board was created in 1877 by amendment to the Minnesota Constitution. The amendment states: "The returns of every election for officeholders elected statewide shall be made to the secretary of state who shall call to his assistance two or more of the judges of the Supreme Court and two disinterested judges of the district courts. They shall constitute a board of canvassers to canvass the returns and declare the result within three days after the canvass." The secretary of state chairs the board.

THE 2008 STATEWIDE PRIMARY RECOUNT

Vote totals from the September 9, 2008 primary indicated a need for a recount to determine which candidates vying for an associate justice seat on the Minnesota Supreme Court would advance to the general election. While incumbent-Associate Justice Lorie Skjerven Gildea won the most votes in the primary, only 1,369 votes out of approximately 316,000 cast separated second and third place candidates Deborah Hedlund and Jill Clark. A recount was necessary to determine which of these two candidates would face Gildea in the November election.

On September 16, 2008 the State Canvassing Board convened and announced the first statewide recount in 46 years. Board members were Minnesota Supreme Court Chief Justice Eric Magnuson, Associate Justice Helen Meyer, Fourth District Court Judge Patricia Kerr Karasov, Second District Court Judge Marybeth Dorn and the Chair of the State Canvassing Board, Secretary of State Mark Ritchie.

Anticipating the possibility of a recount, Gary Poser, Director of Elections in the Office of the Secretary of State, developed a plan for administering a recount statewide several months before the elections. His foresight ensured that the recount was conducted cost-effectively and efficiently.

To conduct the recount itself, the Office of the Secretary of State enlisted the assistance of county auditors and city clerks. Recounting of ballots occurred in over 100 locations statewide and was completed in a record-setting three days. The Office of the

Secretary of State received results from all 87 counties before 3 p.m. on September 19. The State Canvassing Board certified those results on September 21. The recount confirmed the primary results. Candidate Deborah Hedlund received more votes (56,513) than Jill Clark (55,172) and advanced to face incumbent candidate Lorie Skjerven Gildea in the general election on November 4.

THE 2008 U.S. SENATE RECOUNT

A record 2.92 million Minnesotans cast ballots in the November 4, 2008 general election. With 78 percent of eligible voters participating, Minnesota again achieved the highest voter turnout in the nation—five percent above number two state, Wisconsin. In the race for U.S. Senator, unofficial election results showed a vote margin of only 215 votes between incumbent Norm Coleman and candidate Al Franken—far less than the one-half of one percent that triggers a hand recount under state law.

Based on the experience from the hand recount conducted in the primary election, the Office of the Secretary of State quickly implemented the plans already in place to conduct this second statewide recount in partnership with local election officials.

State Canvassing Board Reconvenes

For the 2008 general election, Secretary of State Mark Ritchie requested recommendations for state canvassing board appointments from Chief Justice Eric Magnuson of the Minnesota Supreme Court and Chief Judge Kathleen Gearin of the Second Judicial District. Based upon these recommendations, Secretary Ritchie appointed Chief Justice Eric Magnuson, Associate Justice G. Barry Anderson, Chief Judge Kathleen Gearin and Assistant Chief Judge Edward Cleary to serve with him on the State Canvassing Board. The board met on November 18 to certify results for all elections with clear winners and to adopt a recount plan for the U.S. Senate race.

Hand Recount

The Office of the Secretary of State conducted this recount with the goals of accuracy and transparency. The public and media representatives were kept up-to-date about recount locations and procedures and were invited to observe training for recount officials. As part of the recount plan developed and implemented by State Elections Director Gary Poser, hand recounting was conducted in local communities, in either county courthouses or other municipal buildings. Local election officials in more than 80 counties and 30 cities agreed to assist the Office of the Secretary of State in completing this process and conducted the vast majority of the work.

In public view, recount officials meticulously examined each ballot to determine the voter's intent. Official representatives from both the Coleman and Franken campaigns were present at every location and were authorized to "challenge" recount officials' ballot determinations if they disagreed with the decision made by the local official.

On December 5, deputy recount officials completed the hand recount and submitted their results, as well as the candidates' challenged ballots, to the State Canvassing Board for further consideration. It is worthy to note that U.S. Senate candidate representatives agreed with the local recount officials' determination on 99.97 percent of the ballots. Through the hand counting process, the campaigns initially challenged 6,655 ballots, but withdrew most challenges before the State Canvassing Board reconvened, leaving less than 1,000 ballots to be officially considered by the Board.

Board Deliberates

All proceedings of the State Canvassing Board were conducted in full public view. The communications staff of the Office of the Secretary of State worked with Minnesota legislative staff to provide unprecedented video and audio coverage of State Canvassing Board proceedings. This access enabled the public to watch the recount process and to view the challenged ballots that were under review by the Board. Hundreds of thousands of Minnesotans and people across the country and around the world tuned in every day to watch this historic process.

Beginning December 16, the State Canvassing Board met for four days to complete the task of determining the final disposition of challenged ballots and to address other recount related issues. One by one, the Board reviewed and ruled on each challenged ballot, pausing periodically for open deliberations among themselves. Attorneys representing both candidates were present to observe and field questions by Board members.

The Board ruled on a consensus basis on all major issues including the determination of the challenged ballots. Only 14 ballots out of the 2.92 million cast in the November 2008 election were decided by a 3-2 split decision of the State Canvassing Board and even these were split between both candidates.

The board also turned its attention to deliberate on several issues presented by the campaigns. Based on a state attorney general opinion, the Board accepted the machine-count totals from election night as the official vote count for a precinct where a packet of

ballots was lost, but also noted that its decision to do so could be appealed in a court contest. When discussing assertions that double counting of absentee votes had occurred in some precincts, Board members agreed that this matter went beyond the scope and authority of the Board.

When the Board completed the task of examining all challenged ballots, candidate Franken had 49 more votes than Senator Coleman.

Improperly rejected absentee ballots

In mid-November, the Franken campaign asserted that there were absentee ballots that had been improperly rejected by local election officials. They asked the State Canvassing Board to direct local election officials to count any of these that had been properly cast. Approximately 12,000 absentee ballots had been rejected in the 2008 general election. When the State Canvassing Board convened on November 26, the Board members stated that they did not have the authority to order local election officials to count improperly rejected absentee ballots but they did ask local election officials to voluntarily identify any that were improperly rejected to determine the extent of the issue.

Upon close examination, it was determined that the vast majority of rejected absentee ballots did not meet Minnesota legal requirements and were therefore properly rejected. Reasons for rejection included lack of voter signatures or witness signatures on absentee ballot envelopes, voters' signatures on ballot envelopes that did not appear to match the voters' signatures on the ballot applications, voters who were not registered to vote, voters' witnesses who were not registered to vote as state law requires, or ballots that arrived after the required deadline.

While local election officials were reviewing rejected absentee ballots, both campaigns filed briefs on this issue with the Minnesota Supreme Court. The Court responded in an order dated December 18 instructing that improperly rejected absentee ballots be identified and that the campaigns work with local election officials and the secretary of state to establish a process for the review and processing of those identified as improperly rejected. On December 24, the Court issued an order that established a process for counting these validly cast absentee ballots when there was unanimous agreement between the local election officials and the campaigns.

Local election officials eventually identified 1,346 improperly rejected absentee ballots. Of that total, the two campaigns objected to 413 ballots being included. As ordered by the Supreme Court, the remaining 933 ballots were forwarded to the Office of the Secretary of State for counting.

On January 3, 2009 elections staff from the Office of the Secretary of State opened the remaining 933 improperly rejected absentee ballots in full public view at the State Office Building in St. Paul. At the conclusion of counting, Senator Coleman received 305 additional votes while candidate Franken received 481 votes. The remaining votes were allocated to third-party candidates, write-ins or no one, because the voter chose not to vote in the Senate race.

Certification of Election Results

The State Canvassing Board reconvened Monday, January 5, 2009 and certified the recount vote totals. The canvassing report showed candidate Al Franken receiving a total of 1,212,431 votes, and Senator Coleman receiving 1,212,206 votes, a difference of 225 votes.

THE ELECTION CONTEST

Minnesota law allows an individual who loses an election to initiate a lawsuit called an "election contest," to be heard before a panel consisting of three district court judges appointed by the Chief Justice of the Minnesota Supreme Court.

On January 6, 2009 Senator Norm Coleman filed an election contest with the Court. On January 12, Associate Justice Alan Page named Hennepin County District Court Judge Denise Reilly, Pennington County Assistant Chief Judge Kurt Marben, and Stearns County District Court Judge Elizabeth Hayden to a three-judge panel to adjudicate the contest (Supreme Court Chief Justice Eric Magnuson recused himself from the appointment process due to his participation on the State Canvassing Board). The contest was conducted in the Judicial Center courtroom of the Minnesota Supreme Court in St. Paul. Court Administrator Christopher Channing and Judicial Law Clerks Angella Erickson, Fiona Ruthven and Jennifer Hobbs assisted the judges.

The purpose of Senator Coleman's election contest was to determine "who received the largest number of votes legally cast" for U.S. Senator in the 2008 general election. His legal team focused primarily on three issues that were initially raised by his campaign during the recount including:

- The State Canvassing Board's inclusion of votes related to a missing envelope containing 132 ballots from Minneapolis Ward 3, Precinct 1;
- Assertions that double counting of ballots occurred as the result of election judges making duplicate ballots on election night when original ballots would not properly feed through optical scanners; and
- The exclusion of rejected absentee ballots that substantially complied with Minnesota law.

Over the course of seven weeks, the three-judge panel considered 1,717 exhibits, totaling 19,181 pages of pleadings, motions and briefs. In addition to written testimony, the panel heard from 142 witnesses including county and precinct election officials, voters and state officials.

Minneapolis Ward 3, Precinct 1, Ballot Envelope Missing

During the State Canvassing Board proceedings, the Board decided to use the election night machine count and not exclude the votes from the 132 missing ballots based on an opinion from the state attorney general's office. In the election contest, Senator Coleman's attorney disagreed with the Board's decision arguing that because only 1,896 ballots were actually located for the recount, only 1,896 votes should be included in the final vote totals for the precinct.

Alleged Double Counting of Duplicate Ballots

On election night, absentee ballots that do not feed successfully through an optical scanner machine for counting because of the physical condition of the ballot are duplicated by two election judges of differing major political parties. When the duplication process occurs, election judges are instructed to label original and duplicate ballots using consecutive numbers—such as Original 1, Duplicate 1; Original 2, Duplicate 2; etc. The original ballots are then sealed in an envelope and the duplicate ballots are fed through the optical scanner machine to be counted.

Prior to the hand recount, both candidates and representatives of the state attorney general's office argued that the original ballot should be used in the hand recount, since voter intent may not be clearly reflected on the duplicate. It was decided that all ballots marked duplicate be set aside and the original ballots be counted.

As the recount ensued, it became apparent that the number of duplicate ballots within certain precincts did not equal the number of original ballots contained in the original ballot envelopes. Conferring with representatives of the two campaigns and the secretary of state's office, the following procedure was unanimously agreed to:

If the number of duplicate ballots found for a precinct does not equal the number of original ballots in the envelope, the representatives of the two candidates will attempt to agree whether to count the duplicates or the originals. If the two representatives cannot agree, the original ballots shall be counted.

During State Canvassing Board deliberations as well as the election contest, Senator Coleman's legal team alleged that the implementation of this procedure might have resulted in the double counting of some individuals' absentee ballots. Candidate Franken's legal counsel countered stating that there were other explanations for mismatched duplicates and originals and allegations of double counting could not be proven.

Improperly Rejected Absentee Ballots

Senator Coleman's legal team petitioned the three-judge panel to order the counting of an additional 4,800 absentee ballots, which had been previously rejected by local election officials. Candidate Franken's attorney admitted that there were additional absentee ballots that were improperly rejected by local election officials, but asserted that the number was far less than the number claimed by opposing counsel. Coleman's attorney further argued that there was no uniform adherence to the statutory criteria for rejecting absentee ballots in all 87 counties, alleging that many of the 4,800 rejected absentee ballots he wanted counted resembled absentee ballots counted in other counties on election night and on January 3, 2009.

On February 13, 2009 the three-judge panel issued a ruling clearly stating that it intended to adhere strictly to Minnesota law when determining how many, if any, additional absentee ballots would be counted. In support of its ruling, the panel stated:

“In the three weeks since this trial began, the Court has heard testimony from election officials and voters that gives the Court confidence in Minnesota's election system. The government officials responsible for preparing for the general election and the election judges on Election Day worked diligently and did their utmost to ensure that every legally cast vote was counted. Citizens of Minnesota should be proud of their election system...The facts presented thus far do not show a wholesale disenfranchisement of absentee voters in the 2008 general election...The Court is confident that although it may discover certain additional ballots that were legally cast under relevant law, there is no systemic problem of disenfranchisement in the state's election system, including in its absentee-balloting procedures.”

Other Appeals to the Minnesota Supreme Court

As the election contest continued, two other judicial proceedings were initiated related to the U.S. Senate race: One, by candidate Franken related to the issuance of an election certificate, and two, attorney Charles R. Nauen representing individual voters claiming local election officials and election judges rejected their ballots in error.

Candidate Franken petitioned the Court asking that he receive an election certificate based upon the State Canvassing Board's certified results of the recount. The petition noted that if the election contest overturned the Board's certification Senator Coleman would replace Franken in the U.S. Senate. The Court denied Franken's petition but clarified that Minnesota Statutes allow an election certificate to be issued when all state court appeals are exhausted.

In the second petition filed by attorney Charles R. Nauen, on behalf of the 64 individual voters, the Court ordered that the petition be referred to the three-judge panel adjudicating the election contest. The panel was instructed to rule on the Nauen petition as well as the other petitions brought before it.

After attorneys made closing arguments for Senator Coleman and candidate Franken on March 6, the three-judge panel took slightly more than three weeks to review all evidence presented in the contest including more than 5,000 rejected absentee ballots. On March 31, the panel ordered the Office of the Secretary of State to collect 400 previously rejected absentee ballots from 42 counties and 20 Hennepin County cities. Many of the ballots included those from the 64 individuals who petitioned the Court to have their ballots included in the count. After inspection by the judges, the panel ordered 351 of the 400 be counted.

On April 7, 2009 secretary of state staff, under the direction of State Elections Director Gary Poser, counted the ballots in the presence of the three-judge panel in open court. Upon completion, Poser announced to the panel that of the 351 counted, candidate Franken received 198 votes, Senator Coleman 111 votes and the remaining 42 ballots were placed in a third category for votes for other candidates or voters who did not specify a candidate.

Election Contest Decision

On April 13, 2009 the three-judge panel issued a unanimous ruling stating that candidate Al Franken received the most votes in the 2008 U.S. Senate general election. Candidate Franken received 1,212,629 and Senator Coleman received 1,212,317. Franken now led by 312 votes.

In its decision, the three-judge panel upheld the decision of the State Canvassing Board related to the lost ballots in Minneapolis Ward 3, Precinct 1. The panel noted, "(t)he record contains no allegations or evidence of fraud or foul play with respect to the missing envelope of ballots. The record contains no evidence to suggest the Election Day totals from Minneapolis Precinct 3-1 are unreliable. Every indication is that the Election Day totals from Minneapolis Precinct 3-1 are an accurate count of the ballots cast."

The panel also upheld the agreement made between election officials and the campaign's attorneys to count the "original" ballots during the recount for precincts that had a mismatched number of "original" and "duplicate" ballots. The judges stated that the "(c)ontestants did not prove by a preponderance of the evidence that any double counting of votes occurred."

The panel also addressed Senator Coleman's assertions that his voters' rights to equal protection under the U.S. Constitution were violated. Coleman's attorney had argued before the panel that election officials from different counties applied varying levels of discretion in administering state election law and rules relative to accepting absentee ballots. The panel concluded that it lacked jurisdiction to consider Coleman's equal protection claim by stating that evidence related to that claim is preserved for the U.S. Senate. The panel also noted, "(t)he Minnesota legislature enacted clear, uniform standards regulating absentee voting in this state. Election officials exercised reasonable discretion within the confines of Minnesota election law and under a comprehensive, state-wide training program in determining whether a voter met the statutory requirements of absentee voting."

Addressing accusations related to the quality of Minnesota's election system, the panel concluded:

"(t)he overwhelming weight of the evidence indicates that the November 4, 2008 election was conducted fairly, impartially, and accurately...There is no evidence of a systemic problem of disenfranchisement in the state's election system, including in its absentee balloting procedures...After seven weeks of trial, the factual record is devoid of any allegations of fraud, tampering, or security breaches on Election Day, during the recount process, or during the election contest."

The final paragraph of the three-judge panel's unanimous decision stated:

“The citizens of Minnesota should be proud of their election system. Minnesota has one of the highest voter-participation rates in the country. The Office of the Secretary of State and election officials throughout Minnesota counties and cities are well-trained, fair, and conscientious and performed their duties admirably. Minnesota could not conduct elections without the hard work and diligence of its dedicated professionals and citizen volunteers, and the Court is proud of their service.”

THE COLEMAN APPEAL TO THE MINNESOTA SUPREME COURT

In a series of public interviews with the media soon after the three-judge panel ruling, Senator Coleman said that he believed it was important to see the entire appeals process through to the Minnesota Supreme Court to ensure that all votes legally cast in the 2008 general election were counted. On April 20, 2009 Senator Coleman filed a notice with the Court challenging the outcome of his election contest lawsuit. Senator Coleman’s appeal asked the Court to consider equal protection arguments related to the treatment of absentee ballots in different counties, whether the trial court erred in accepting the votes from 132 lost ballots in Minneapolis and whether the court overstepped its authority in applying a strict standard to the acceptance of absentee ballots. The Court responded to Senator Coleman’s appeal by scheduling oral arguments on June 1, 2009.

Chief Justice Eric Magnuson and Associate Justice G. Barry Anderson recused themselves from the proceeding due to their participation on the State Canvassing Board. The remaining five justices of the Minnesota Supreme Court including Justices Paul H. Anderson, Christopher J. Dietzen, Lorie Skjerven Gildea, Helen M. Meyer, and Alan C. Page vigorously questioned Senator Coleman’s attorney Joe Friedberg and candidate Franken’s attorney Marc Elias during oral arguments on June 1. The Court then recessed to allow time to deliberate and render a ruling.

On June 30, 2009 the Minnesota Supreme Court issued its highly anticipated ruling. In its unanimous opinion, the Court rejected Senator Coleman’s appeal and upheld the three-judge panel’s decision stating that candidate Al Franken received the highest number of legally cast votes in the 2008 U.S. Senate race and was entitled to the certificate of election. Following the ruling, Senator Coleman held a news conference at his home in St. Paul where he graciously conceded to his rival. Later that evening, Governor Tim Pawlenty arrived back from Washington D.C. to sign the certificate of election.

The certificate was then hand delivered to Secretary of State Mark Ritchie who promptly co-signed the document in his office in the State Office Building. Following the final signature, the certificate of election was immediately forwarded to the U.S. Senate to notify the body that Minnesota had selected its second U.S. Senator. Al Franken was sworn in as Senator on the floor of the United States Senate by Vice President Joe Biden on July 7, 2009. This final act concluded the largest and longest recount in Minnesota history.