

State of Minnesota
In Supreme Court

Al Franken,

Petitioner,

vs.

Timothy Pawlenty, as Governor, and Mark Ritchie, as Secretary of State,

Respondents,

and

Norm Coleman,

Intervenor.

**BRIEF AND APPENDIX OF AL FRANKEN IN SUPPORT OF PETITION FOR
ORDER TO ISSUE CERTIFICATE OF ELECTION**

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I. INTRODUCTION

On January 5, 2009, after a meticulous, six-week statewide recount, the Minnesota State Canvassing Board declared Petitioner Al Franken the winner of the November 2008 election for United States Senator from the State of Minnesota. However, on January 12, Respondents Secretary of State Mark Ritchie and Governor Timothy Pawlenty declined to issue a certificate of election to Franken. The decision to withhold the certificate has not only interfered with the Senate's seating of Franken and left Minnesota without its full complement of representation in Washington; it is also illegal. The officials' refusal reflects a misreading of state law, and it creates an impermissible conflict with the United States Constitution and federal statute.

Respondents read a provision of Minnesota's election laws—Subdivision 2 of Minn. Stat. § 209.C40—as prohibiting the issuance of the certificate until after a state court has adjudicated the election contest filed by Intervenor Norm Coleman. That interpretation of state law incorrectly reads the cited provision in isolation. It ignores the more specific statutory provisions regarding both United States Senate contests and recounts. Respondents' interpretation conflicts with federal constitutional and statutory law and with this Court's precedents applying those federal principles.

The effect of Respondents' actions is that two state officials have blocked the seating of a United States Senator beyond the deadline specified in federal constitution and statute, even after a statewide recount that ended just before the Senate swore in its other elected Senators. Such conduct constitutes an impermissible encroachment into the affairs of the federal government.

II. STATEMENT OF ISSUE PRESENTED

Whether Minnesota election law and supreme federal law require state officials to follow Minnesota law and precedent and timely issue the election certificate for the office of United States Senator pending the outcome of a state-court election contest not even initiated before the federal deadline for the new Senate term.

III. STATEMENT OF THE CASE

Minnesota held its General Election on November 4, 2008. After the initial canvass, the small margin between United States Senate candidates Franken and Coleman triggered an automatic recount under Minn. Stat. § 204C.35. Over nearly two months, Respondent Secretary of State Ritchie led a team of state and local officials and volunteers that conscientiously, over innumerable hours, recounted the nearly three million votes cast. By early January, the mandatory statewide recount was complete.

The results revealed that Franken had received the greater number of the votes lawfully cast: 1,212,431 to 1,212,206. (Appendix 10, 17.) On January 5, 2009, the State Canvassing Board convened to certify these figures. In accord with Minn. Stat. § 204C.33, subd. 3, and Minn. R. 8235.1100, the State Canvassing Board declared Franken the winner of the election. (App. 1.)

Although he could have brought it earlier, and could have brought it in the United States Senate where he had served, the next day Coleman responded with a Notice of Contest in state court.¹ On January 12, Franken sent a letter to Secretary Ritchie and

¹ The notice, unlike the mandatory recount, seeks a geographically piecemeal remedy. On January 12, Franken moved to dismiss the Notice of Contest on the ground that Coleman's notice was deficient under both Minn. Stat. §§ 209.021 and 209.12, which require that

Governor Pawlenty noting that the 111th Congress had convened and Minnesota lacked representation from a second Senator. (App. 18.) Secretary Ritchie and Governor Pawlenty nonetheless declined to certify the election, citing Minn. Stat. § 204C.40, subd. 2. (App. 21.) This Petition followed.

IV. ANALYSIS

A. Minnesota's Election Laws Require that a Certificate Issue Pending a Contest over a United States Senate Race

1. A Contest Delays the Issuance of a Certificate Only for Certain Non-Federal Offices; Otherwise, the Certificate Must Issue.

Minnesota law provides that “for every state and federal candidate declared elected by . . . the State Canvassing Board,” “the secretary of state *shall* prepare a certificate.” Minn. Stat. § 204C.40, subd. 1 (emphasis added). Specifically, “[i]n an election for United States senator, the governor shall prepare an original certificate of election, countersigned by the secretary of state, and deliver it to the secretary of the United States Senate.” *Id.* This is precisely the procedure that federal law requires of states when the new Senate term begins, *see* 2 U.S.C. §§ 1a & 1b, indicating Minnesota's intent to comply with that mandate. In addition, “[e]xcept as otherwise provided in this section, the secretary of state . . . shall deliver an election certificate on demand to the elected candidate.” Minn. Stat. § 204C.40, subd. 1.

As these non-discretionary mandates make clear, Respondents must issue an election certificate on demand to any federal candidate, such as Franken, who has been declared elected by the State Canvassing Board. Pending an automatic recount, of course, the

contestants specify the grounds on which the contest will be made and strictly limit the court's decision-making authority. The Motion will be heard on January 21, 2009.

certificate is delayed. *See id.* (“If a recount is undertaken by a canvassing board pursuant to section 204C.35, no certificate of election shall be prepared or delivered until after the recount is completed.”). In the case of an election contest, by contrast, Respondents’ duties are not suspended. Rather, a certificate must issue and, if the contest makes such action necessary, subsequently “the court may invalidate and revoke the certificate as provided in chapter 209.” *Id. See also* Minn. Stat. § 209.07 (“When the court decides an election contest for any office other than state senator or state representative, and the time for appeal has expired or, in case of an appeal, if the contestant succeeds in the contest, the court may invalidate and revoke any election certificate which has been issued to the contestee”).

For “certain offices,” a different timeline governs the issuance of election certificates.

Subdivision 2 of Minn. Stat. § 204C.40 reads:

Time of issuance; certain offices. No certificate of election shall be issued until seven days after the canvassing board has declared the result of the election. In the case of a contest, an election certificate shall not be issued until a court of proper jurisdiction has finally determined the contest. This subdivision shall not apply to candidates elected to the office of state senator or representative.

Respondents incorrectly contend that this provision prohibits them from issuing the certificate to Senator-elect Franken. But, in fact, Subdivision 2 expressly limits the circumstances in which officials can delay issuing the certificate. Such delay is permissible *only* when an election contest will be “finally determined” by “a court of proper jurisdiction.” *Id.*

By both statute and constitutional mandate, United States Senate election contests are not contests that will be “finally determined” by “a court of proper jurisdiction.” The plain language of Minn. Stat. § 209.12 makes this clear. Section 209.12, which governs election

contests for federal congressional elections, provides that “the only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election.” *Id.* As for “[e]vidence on any other points specified in the notice of contest,” that evidence “must be taken and preserved by the judge trying the contest, or by some person appointed by the judge for that purpose; *but the judge shall make no findings or conclusion on those points.*” *Id.* (emphasis added). In other words, when a contest concerns a congressional office, the “final *judicial* determination of the contest” is necessarily not a final determination of the contest, as there is no court of proper jurisdiction capable of reaching a determination as to all the contest’s specified points. Minn. Stat. § 209.12 (emphasis added). This in turn explains why it is necessary for the court administrator, at the end of the court proceedings and upon application, to “promptly certify and forward the files and records of the proceedings, with all the evidence taken, to the presiding officer of the Senate.” *Id.* Only the Senate—not a “court of proper jurisdiction”—will ever “finally determine[] the contest.”

As the Court has long recognized, only the Senate has authority to determine finally whether to seat one of its Members. *See Odegard v. Olson*, 264 Minn. 439, 119 N.W.2d 717, 719 (1963) (citing U.S. Const. Art. I, § 5, cl. 1, and stating that “each house of Congress is the sole judge of the election returns and qualifications of its members, exclusive of every other tribunal, including the courts”); *see also infra*, Part IV.B.2. The Senate is, of course, not a court, and it is therefore not a “court of proper jurisdiction” within the meaning of Minn. Stat. § 204C.40, subd. 2. *See Odegard*, 119 N.W.2d at 721 (“[T]he term ‘proper court’ . . . does not include the Congress of the United States.”).

By contrast, in contests involving many of Minnesota’s non-federal offices, a reviewing court does have authority to “finally determine[]” all points specified in an election contest. In such cases, the court can decide: (1) “an irregularity in the conduct of an election or canvass of votes”; (2) “the question of who received the largest number of votes legally cast”; and (3) “deliberate, serious, and material violations of the Minnesota Election Law.” Minn. Stat. § 209.02. It is for these non-federal offices that the election certificate cannot issue until the contest is complete, for it is only in these contests that a Minnesota court is a “court of proper jurisdiction” that can “finally determine[] the contest.” *See* Minn. Stat. § 204C.40, subd. 2. Because congressional offices are subject to different rules and limitations, *see* Minn. Stat. § 204C.40, subd. 1; Minn. Stat. § 209.12, *Odegard*, 119 N.W.2d 717, there is no basis for delaying issuance of the certificate once the recount has concluded.

2. The Statutes Specifically Provide for a Certificate to Issue After a Recount in the Case of a Senate Election

The interplay between the two subdivisions of Minn. Stat. § 204C.40 further demonstrates the proper reading of Minnesota’s election-certificate provisions. While the provision of Subdivision 2 addressing a delay of a certificate does not apply to federal congressional contests, Subdivision 1 expressly addresses United States Senate races. It states:

In an election for United States senator, the governor shall prepare an original certificate of election, countersigned by the secretary of state, and deliver it to the secretary of the United States Senate. . . . If a recount is undertaken by a canvassing board pursuant to section 204C.35, no certificate of election shall be prepared or delivered until after the recount is completed. In case of a contest, the court may invalidate and revoke the certificate as provided in chapter 209.

Minn. Stat. § 204C.40, subd. 1.

Thus, this provision, specifically addressing Senate elections, indicates that a certificate should be prepared and delivered *after a recount*. It further anticipates that a certificate will be issued *before a contest*, for it provides that the court may revoke the certificate should a contest subsequently determine that a different candidate should have received it.

Respondents' interpretation—that a certificate cannot issue before a contest has been adjudicated by a state court—negates the last sentence of Subdivision 1: “In case of a contest, the court may invalidate and revoke the certificate as provided in chapter 209.” By its very terms, Subdivision 1 anticipates the conditional or provisional issuance of a certificate. Notably, as discussed *infra*, Part IV.B.2, the Senate has historically sat Senators-elect based on conditional certificates pending state contests, and this result furthers both constitutional and policy objectives.

If there is any tension between Subdivisions 1 and 2 with regard to the timing of a certificate, Subdivision 1 must prevail. It is both more specific, as it expressly applies to Senate elections, and, unlike Subdivision 2, its reach is not limited to contests subject to final court determination and to situations where there has been no statewide recount. *See Marshall County v. State*, 636 N.W.2d 570, 576 (Minn. Ct. App. 2001) (more specific statute prevails) (citing Minn. Stat. § 645.26, subd. 1); *see Odegard*, 119 N.W.2d at 719 (individual provisions of election contest law should not be read in isolation).

In sum, Respondents' statutory interpretation relies on a provision, Minn. Stat. § 204C.40, subd. 2, that does not apply to federal legislative races; disregards two more specific and relevant provisions, *id.* §§ 204C.40, subd. 1 & 209.12; and fails to follow this Court's binding precedent, *see Odegard*, 119 N.W. 2d at 719-722.

B. The United States Constitution and Federal Statutes Require the Court to Construe Minnesota Law So That the Certificate Issues Pending the Contest

As explained above, Respondents' interpretation must be rejected because it conflicts with Minnesota law directly addressing congressional elections. In addition, Respondents' interpretation impermissibly conflicts with the United States Constitution and federal statute. When reviewing a statute, this Court assumes that the legislature "does not intend to violate the United States and Minnesota Constitutions." *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). Thus, if the Court can "construe a statute to avoid a constitutional confrontation, [it is] to do so." *In re Civil Commitment of Giem*, 742 N.W.2d 422, 429 (Minn. 2007). Here, the Minnesota Legislature has made clear that it intends the state process to satisfy federal standards, and the statute should be read to carry out that intent.

As the Court has long recognized, the United States Senate is the "sole judge of the election returns and qualifications of its members, exclusive of every other tribunal, including the courts." *Odegard v. Olson*, 119 N.W.2d 717, 719 (Minn. 1963) (citing U.S. Const. Art. I, § 5, cl. 1). The very justification for this authority is "to resist encroachment" by other branches of government. *See Scheibel v. Pavlak*, 282 N.W.2d 843, 847 (Minn. 1979). Yet if the Court were to construe Minn. Stat. § 204C.40 in the manner proffered by Respondents—to bar the issuance of a certificate beyond the start of the new Senate term and until the Minnesota election contest reaches some sort of stopping point—that ruling would squarely interfere with the work of the Senate. The Court must reject such a conflict with federal law.

1. Federal Law Entitles the Citizens of Each State to Two Senators and Imposes a Mandatory Duty on State Officials to Certify the Election of those Senators

Under the United States Constitution and federal statutes, Minnesota has an obligation to structure and operate its election system so as to provide its citizens full representation in a timely fashion. Several federal obligations are critical here:

First, Article I, Section 3, and Amendment XVII of the United States Constitution state that “[t]he Senate of the United States *shall* be composed of *two* Senators from each State . . .” (emphasis added). This provision not only establishes the contours and structure of the United States Senate but it ensures that all states have an equal voice in one of the two Houses of Congress.

Second, Article I, Section 4, Amendment XX, and 2 U.S.C. § 1 provide that when a state holds an election for the office of United States Senator, the Senator “elected by the people” will commence his or her term “on the 3d day of January” after the election, unless Congress decides otherwise. U.S. Const., Art. I, § 4, as amended by Amendment XX; 2 U.S.C. § 1. This year, by unanimous consent, the Senate delayed swearing-in to January 6, 2009. Two weeks later, critical business of the Senate is well underway.

Third, 2 U.S.C. §§ 1a & 1b impose affirmative federal obligations on state officials to certify the election of any Senator “chosen” to the President of the Senate of the United States and to countersign that certificate. *See* 2 U.S.C. § 1a (“It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States.”); *id.* § 1b (requiring secretary of state of the State to countersign the certificate); *see also Phillips v. Rockefeller*, 321 F. Supp. 516, 521 (S.D.N.Y.) (“It is federal law, namely the provisions of 2 U.S.C. §§ 1a and

1b (1964), that impose upon the defendants the duty of certifying to the President of the Senate the winner of [the] election. Thus, in making this certification the defendants will . . . be acting pursuant . . . to duties imposed by federal statute”) *aff’d*, 435 F.2d 976 (2d Cir. 1970). The Minnesota Legislature was responding directly to these federal mandates through enactment of Minn. Stat. § 204C.40, subd. 1.

Through the meticulous and tireless efforts of the State Canvassing Board, local and state officials, and volunteers, the state has made considerable efforts to fulfill its duty to certify the election of its Senator. Indeed, the Board declared a winner of the election prior to January 6. But the refusal of Respondents to perform their mandatory duty to issue a certificate, even on an interim basis pending the resolution of the contest, leaves the Senate without its full complement and leaves Minnesotans without the full representation to which they are entitled. The people of Minnesota have been represented with only half their due during critical votes in the past several weeks, including the confirmation of cabinet secretaries and consideration of multi-billion dollar economic recovery measures. The Senate has been similarly deprived of members. In light of the upcoming contest trial and the possibility of future appeals, this situation is likely to continue for weeks, if not months, further preventing Minnesota from fulfilling its obligations to its citizens and to the United States Senate. Federal constitutional and statutory law wisely prohibits this result.

2. Delaying the Certificate Impermissibly Encroaches on the Senate’s Authority Set Forth in Article I, Section 5, of the United States Constitution

Withholding the certificate for weeks or even months while the contest litigation continues violates yet another federal principle; it impermissibly encroaches on the Senate’s authority in violation of Article I, Section 5 of the United States Constitution.

The federal Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members.” Art. I, § 5, cl. 1. As then-Judge Scalia has observed, “It is difficult to imagine a clearer case of ‘textually demonstrable constitutional commitment’ of an issue to another branch of government to the exclusion of the courts, than the language of Article I, section 5, clause 1 The provision states not merely that each House ‘may judge’ these matters, but that each House ‘shall be *the* Judge.’” *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (Scalia, J.) (internal citations omitted and emphasis in original) *cert. denied*, 480 U.S. 911 (1987); *see also Reed v. County Commissioners of Delaware County, Pa.*, 277 U.S. 376, 388 (1928); *Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 613 (1929); *Roudebush v. Hartke*, 405 U.S. 15, 18-19 (1972).

In *Odegard*, the Court recognized the delicate balance between the strict constitutional mandate and the important service the state provides by conducting elections for federal office. A candidate for Congress had filed suit to enjoin the Minnesota secretary of state from issuing a certificate of election to his opponent. The candidate relied on a precursor to § 204C.40, the text of which was almost identical to the language upon which Respondents rely: “In the case of a contest, the certificate may not be issued until the proper court has determined the contest.” Minn. Stat. § 204.32, subd. 2 (1961). Notwithstanding this language, the Court refused to enjoin the certificate. Citing Article I, section 5, clause 1, the *Odegard* Court construed Subdivision 2—specifically, its command that a certificate may not be issued until the proper court has determined the contest—as not applying to congressional races. 119 N.W.2d at 720. The Court made clear that “[t]he determinative fact in the mechanics of this particular election is the act of the state canvassing board in declaring the election of the respondent pursuant to the authority of that board” *Id.*

Moreover, the Court’s holding was constitutional, not merely statutory. *Id.* (“[W]e must come to the conclusion that s 204.32, subd. 2, has no application to a contest in the United States Senate or House of Representatives. *Our courts are divested of jurisdiction by U.S. Const., art. I, s 5.*”) (emphasis added).² The Court continued: “While the state legislature may regulate the conduct of elections subject to the limitations expressed in U.S. Const., art. I, s. 4, it should be conceded that . . . each house of Congress is the sole judge of the election returns and qualifications of its members, exclusive of every other tribunal, including the courts.” *Id.* at 719.

If the Court did not have the authority to order state officials to withhold a contested certificate of election for the federal legislative position, then surely Respondents do not have that authority on their own, relying only on nearly identical statutory language, to withhold the certificate.

Odegard’s careful policing of Minnesota courts’ involvement in congressional elections is in full accord with a long line of Minnesota precedent. *See, e.g., Youngdale v. Eastvold*, 232 Minn. 134, 44 N.W.2d 459, 462 (1950) (“It is clear that our courts have no jurisdiction over the election of representatives to congress, but that congress is its own judge of the elections, returns, and qualifications of its members.”); *In re Williams’ Contest*, 198 Minn. 516, 270 N.W. 586, 587 (1936) (“[T]here can in reason and logic be no room to doubt that [Minnesota courts] may not now entertain jurisdiction” over which congressional candidate

² It is true the *Odegard* was decided before the passage of Minn. Stat. § 209.12, which sets forth a statutory mechanism by which a party can bring a limited state-court election contest in a congressional race. In light of *Odegard’s* reliance on Article I of the U.S. Constitution, however, Minn. Stat. § 209.12 does not affect its holding. Nor is there any language in the new section that indicates any legislative intent to undercut the Court’s holding as to issuance of the certificate of election.

received the most votes); *State ex rel. 25 Voters v. Selvig*, 170 Minn. 406, 212 N.W. 604, 604 (1927) (affirming dismissal of an application challenging an election to the House of Representatives because the House's "exclusive jurisdiction" rendered any decision by Minnesota courts "officious and nugatory").

The wisdom of *Odegard* (and other Minnesota precedents acknowledging the supremacy of federal election law) is shown by the most recent and noteworthy example of tension between federal requirements and state post-election procedures: *Bush v. Gore*, 531 U.S. 98 (2000). As here, the United States Supreme Court confronted an immediate federal statutory deadline. That deadline (3 U.S.C. § 5, which requires that a state name its choices for the office of presidential elector) was not as binding on the state as the statutes here; was not directly required by the United States Constitution; and was set more than a month in advance of the elected official's term. Still, it was a federal deadline that the state had volunteered to meet. As here, an automatic statewide recount had already been conducted and had filled many of the weeks after the general election. As here, the candidate with the smaller vote total in the recount criticized the proceedings and had initiated a state election contest. As here, the contestant focused the contest on alleged irregularities in selected localities, not a statewide remedy based on uniform application of standards that, according to the contestant, were required as a matter of state election law.

The United States Supreme Court found that while states enjoyed substantial leeway in structuring their process for participating "in the federal electoral process," *Bush*, 531 U.S. at 110, they were obligated to have a process in place, one meeting "rudimentary requirements of equal treatment and fundamental fairness," *id.* at 109, that could meet the

federal calendar. As here, "[t]hat date is upon us," *id.*, and yet the state election contest could not "be conducted [constitutionally] without substantial additional work," *id.*

The self-limited holding of *Bush v. Gore* with respect to equal protection is no doubt controversial, and time remained in that case before the presidential term was to begin. Here, the effect on the federal constitutional calendar and the seating of the federal official is much more dramatic, and yet Franken requests a much narrower remedy – the limited state election contest can proceed, but breach of the federal deadlines must be remedied as soon as possible by issuance of the provisional certificate.

3. Minnesota's Own Statutes, Precedents, and Policies Reflect the Constitutional Limitations Set by Article I, Section 5, of the United States Constitution

Following *Odegard*, the Minnesota legislature passed § 209.12, presumably in an effort to provide a constitutional process by which Minnesota courts might play a narrow and defined role in congressional election contests. Minn. Laws 1963, c. 682, § 2. Though Minnesota courts have expressed concerns over analogous statutes, they have not yet determined whether § 209.12 is constitutional.³ At a minimum, however, Minnesota law

³ See, e.g., *Derus v Higgins*, 555 N.W.2d 515, 518 (Minn. 1996) (acknowledging, in the analogous context of state-senator contests, "[w]e have stated that the constitutionality of the role assigned the judicial branch with regard to legislative election contests by Minn. Stat. c. 209 is open to question"); see also *id.* at 519 (Page, J., concurring specially) ("To the extent that Minn. Stat. § 209.10 purports to grant [authority to resolve a primary election contest on its merits] to the judicial branch of government, it is unconstitutional."). Although this Court need not decide the issue in light of the deficiencies in the Contestants' notice, Franken respectfully submits that state-run election contests for congressional offices—and in particular Minn. Stat. § 209.12—cannot be reconciled with *Odegard* and Art. I, § 5, cl. 1. Rulings reached in other jurisdictions confirm this conclusion. See, e.g., *Young v. Mikva*, 363 N.E.2d 851, 851 (Ill. 1977) ("Because the Constitution gives Congress the exclusive authority to judge the elections of its members, many State courts have construed legislation authorizing election contests to exclude elections for seats in Congress or have simply held that State courts cannot constitutionally entertain such proceedings"); *Hoffmann v. Sumner*,

requires that § 204C.40 and § 209.12 be interpreted consistently with *Odegard* and the United States Constitution—and therefore in a manner that ensures the statutes do not encroach on the constitutional authority of the United States Senate and play havoc with the federal calendar. A more aggressive (and less precise) reading of the statutes – *i.e.*, the one advanced by Respondents – would violate Minnesota's doctrine of constitutional avoidance. *See Koenig*, 666 N.W.2d at 372; *In re Civil Commitment of Gien*, 742 N.W.2d at 429.

Specifically, § 204C.40 and § 209.12 cannot be construed and applied to allow ongoing state election-contest litigation to delay the issuance of an election certificate, and certainly not to delay issuance beyond January 6. Such delay would interfere—indeed, has already interfered—with the Senate’s ability to address the election and qualifications of its members, and, should it so choose, to seat a full complement to do the nation’s business. Under the current Rules of the United States Senate, a Senator-elect is expected to present a state election certificate to the Secretary of the Senate. *See* Standing Rules of the Senate, Rule II (“The Secretary shall keep a record of the certificates of election”; “The presentation of the credentials of Senators elect . . . shall always be in order . . . ; and all questions and motions arising or made upon the presentation of such credentials shall be proceeded with until disposed of.”). Members of the Senate recently have advanced an interpretation of Senate rules that flatly prohibits the seating of a Senator-elect without a

230 Cal. Rptr. 746, 747-48 (Cal. App. 1986) (court had no jurisdiction to hear election contest to primary election); *Laxalt v. Cannon*, 397 P.2d 466 (Nev. 1964) (dismissing contest filed by U.S. Senate candidate, holding that Congress has exclusive authority to judge the elections of its members); *Opinion of Justices*, 142 A.2d 532, 535 (Me. 1956); *State ex rel. Wettengel v. Zimmerman*, 24 N.W. 2d 504, 507 (Wis. 1946); *Belknap v. Board of Canvassers*, 54 N.W. 376 (Mich. 1893); *see also* 107 A.L.R. 205 (collecting cases).

state certificate.⁴ Of course, when the certificate is presented, that does not necessarily end the matter; Coleman will have his chance to be heard by the Senate on his disputes with the election. For as long as Respondents refuse to issue the certificate, however, the Senate is deprived of the information and credentials it normally relies upon to seat Senators-elect—even on a provisional basis subject to contest.⁵

Consequences of this sort illustrate why prompt issuance of a certificate stands on such strong policy grounds—and why there is such an extensive history of states issuing election certificates prior to the resolution of related election contests.⁶ It is critical that each

⁴ See, e.g., *Burris v. White*, ___ N.E. 2d ___, 2009 WL 51026 (Ill. 2009) (explaining that “when the Senate convened, Mr. Burris appeared at the Capitol Building to be sworn in as a United States Senator. He was not permitted to do so and was barred from the Senate floor on the grounds the Secretary of State had not countersigned or affixed the state seal to Mr. Burris’ appointment papers.”).

⁵ As a spokesperson for Senator Harry Reid, the Majority Leader of the Senate, has made clear, “[t]he best way for the people of Minnesota to have full representation as soon as possible would be for the Minnesota governor and secretary of state to send us a provisional or conditional certificate of election for Al Franken.” Kevin Diaz, *Stalled Senate race fuels bad blood in Congress*, Star Tribune (Jan. 16, 2009), available at <http://tinyurl.com/9b74jm>.

⁶ See, e.g., *Borders v. King County*, 4 Election L.J. 418, 419 (2005) (describing an election contest in Washington State which was initiated prior to issuance of the certificate of election but resolved after); Paul E. Salamanca and James E. Keller, *The Legislative Privilege to Judge the Qualifications, Election, and Returns of Members*, 95 Kentucky L.J. 241, 249 (2006-2007) (describing a Kentucky court requiring that state officials issue a certificate of election to a senator-elect but refusing to stop the losing candidate from pursuing an election contest); Logan Scott Stafford, *Noteworthy Arkansas Jurists: William Wallace Wilshire*, 41 Ark. Lawyer 26, 26 (2006) (describing the Arkansas governor’s office issuing an election certificate to a candidate, whom the Congress then seated while an election contest was underway); Mr. Dawes, *J. Sterling Morton vs. Samuel G. Daily*, House Comm. of Elections, H.R. Rep. No. 37-69, at 1-18 (2d. Sess. 1862) (describing the governor of the Territory of Nebraska revoking a certificate of election after an election contest); see also, e.g., N.J.S.A. 19:29-9 (“If the judgment [in a New Jersey “Contest of Nominations or Elections”] be against the incumbent, and he has already received a certificate of election, the judgment shall annul it). Other states go even further, ensuring that election contests for congressional races will not hold up election certificates by declaring the former unconstitutional. See, e.g., *Rogers v. Barnes*, 474 P.2d 610, 612 (Colo. 1970) (court had no jurisdiction to hear contest to primary

State be fully represented in Congress, and, at the same time, that each congressional body has the ability to judge the elections and qualifications of its own members. *See Scheibel*, 282

N.W.2d at 847; *Morgan*, 801 F.2d at 450. As then-Judge Scalia observed in *Morgan*:

While it is not [a court's] role to examine the wisdom of a disposition that appears so clearly in the text and history of the Constitution, we may observe that it makes eminent practical sense. The pressing legislative demands of contemporary government have if anything increased the need for quick, decisive resolution of election controversies. Adding a layer of judicial review, which would undoubtedly be resorted to on a regular basis, would frustrate this end. What is involved, it should be borne in mind, is not judicial resolution of a narrow issue of law, but review of an election recount, with all the fact-finding that entails.

801 F.2d at 450.

These important policy and constitutional objectives are accomplished only if Minnesota statutes, properly interpreted, mandate issuance of the certificate on a provisional basis pending the contest. *See supra* Part A; *see also* Minn. Stat. § 204C.40, subd. 1. The arrangement, among other things, provides important information and credentials to the

election premised on voting irregularities and noting that “section 5 empowers Congress, and Congress alone, to determine charges of voting irregularity, for example, stemming from a general election and concerning the offices of United States Senator and member of the United States House of Representatives”); *Laxalt*, 397 P.2d at 467 (dismissing election contest after completion of recount in Senate race, rejecting argument that a state court could decide an election contest as an “aid to the final decision of the Senate,” and noting that legal authority “overwhelmingly” supported dismissal); *McLeod v. Kelly*, 7 N.W. 2d 240, 242 (Mich. 1942) (where plaintiff challenged county canvassing board’s certification of returns for congressional race, and expressly disavowed any claim that a recount was sought, the court found that it had no authority to interfere because “the final determination as to who is entitled to the office rests solely and entirely with the house of representatives in Congress”); *LaCaze v. Johnson*, 305 So. 2d 140, 146 (La. Ct. App. 1974) (Court had no jurisdiction to “determine the validity of certain absentee ballots and to conduct an evidentiary hearing as to the alleged malfunction of one voting machine” because the “forum for a resolution of these issues is the United States House of Representatives”); *see also Morgan*, 801 F.2d at 447 (affirming summarily, on the ground that “the Constitution so unambiguously proscribes judicial review of the proceedings,” the District Court’s dismissal of a challenge to the decision by the House of Representatives to seat a candidate).

legislative body as it decides whether provisionally to seat an elected candidate. *See, e.g.*, Melinda Henneberger, *Senator Is Resilient During Inquiry*, N.Y. Times, Sept. 17, 1997, at A16 (describing the U.S. Senate conditionally seating Senator Mary Landrieu while Senate investigations continued into the underlying election); *see also* 68 Cong. Rec. 989 (Dec. 22, 1927) (article by Senator George W. Norris of Nebraska) (describing “Senators elect who for one reason or another had their right to sit in the Senate contested,” but who “have, upon the presentation of the certificate of election, been sworn into the Senate . . . and the final issue determined” thereafter).

Nor does complying with federal law undercut any important state policy, as is conclusively shown by the statutory treatment of state legislative elections. In the context of its own election contests, the Minnesota Legislature has likewise recognized both the constitutional and policy need for the prompt issuance of a certificate. Minnesota law provides that a contest will not delay a certificate for a candidate elected to the Minnesota Legislature, *see* Minn. Stat. § 204C.40, subd. 2, precisely because, under Minnesota Constitution Article IV, Section 6, “[e]ach house shall be the judge of the election returns and eligibility of its own members.” *See id.* § 209.10, subd. 6 (“This chapter does not limit the constitutional power of the house of representatives and the senate to judge the election returns and eligibility of their own members.”); *Scheibel*, 282 N.W.2d at 847 (describing this legislative authority as “an absolute grant of constitutional power” and noting that “the very justification for this legislative authority is to resist encroachments”). Thus, although the Legislature has set forth a procedure by which it is to be provided with evidence to aid in its ultimate determination of which candidate is to be seated, *see* Minn. Stat. § 209.10, it has prohibited delay of a certificate pending court review, *id.* § 204C.40, subd. 2.

The same interpretation must be adopted for the United States Senate. Minn. Stat. § 204C.40, subd. 2 and § 209.12 cannot and should not be read to impose greater burdens on the Legislature's federal counterpart than the Legislature deems constitutional for itself. *See Fettes v. Mayo Foundation for Medical Educ. and Research*, 547 N.W.2d 423, 425 (Minn. Ct. App. 1996) (statutes must be construed to avoid an absurd result).

V. CONCLUSION

On November 4, the citizens of Minnesota elected a senator. Over two months have since passed. On January 5, after weeks of meticulous hand recounting, the State Canvassing Board certified the results. The next day, the 111th United States Congress began its work, in accordance with constitutionally imposed deadlines. Yet to this day, only one senator sits from Minnesota. Respondents simply refuse to provide the Senate with the appropriate paperwork.

Respondents' refusal to issue the election certificate is based on an interpretation of Minn. Stat. § 204C.40 that is contrary to Minnesota law, federal statute, and the United States Constitution. For the reasons set forth above, Senator-Elect Franken respectfully requests that this Court issue an Order, pursuant to Minn. Stat. § 204B.44, requiring Governor Pawlenty and Secretary Ritchie to promptly prepare and countersign a certificate of election and deliver the certificate to the President of the United States Senate.

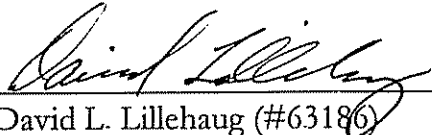
Dated: January 20, 2009

Respectfully submitted,

PERKINS COIE LLP

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Application for Admission Pro Hac Vice Pending

Attorneys for Petitioner Al Franken

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State of Minnesota

SECRETARY OF STATE

CERTIFICATE

We, the undersigned legally constituted State Canvassing Board, as required by law, canvassed the report compiled by the State Recount Official of the summary statements submitted by the Designated Recount Officials of the recount of the votes cast for candidates for United States Senator at the State General Election held Tuesday, November 4, 2008, and the dispositions made by this Board of the ballots challenged during the recount. We have specified in the following report the names of candidates receiving votes and the number received by each.



Handwritten signature of Mark Ritchie in black ink.

Mark Ritchie
Secretary of State

Handwritten signature of Eric Magnuson in black ink.

Eric Magnuson
Chief Justice, Minnesota Supreme Court

Handwritten signature of G. Barry Anderson in black ink.

G. Barry Anderson
Associate Justice, Minnesota Supreme Court

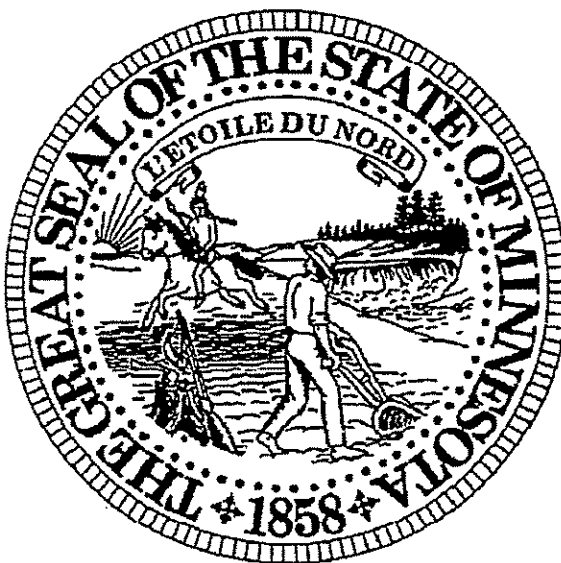
Handwritten signature of Kathleen R. Gearin in black ink.

Kathleen R. Gearin
Chief Judge, Second Judicial District Court

Handwritten signature of Edward J. Cleary in black ink.

Edward J. Cleary
Assistant Chief Judge, Second Judicial District Court

Recount Canvassing Report
2008 Minnesota State General Election
Tuesday, November 4, 2008



Recount of the Votes Cast for United States Senator

*Recount of the Office of U.S. Senator
Minnesota State Canvassing Report
January 5, 2009*

Minnesota Voter Statistics

<u>County</u>	<u>Registered as of 7AM</u>	<u>Registered on Election Day</u>	<u>Absentee Ballots Regular</u>	<u>Absentee Ballots Federal</u>	<u>Absentee Ballots President</u>	<u>Total Voting</u>
AITKIN	10482	1234	1119	4	2	9455
ANOKA	189349	33223	12926	129	22	182559
BECKER	19307	2926	1762	12	0	17038
BELTRAMI	25237	4762	1888	24	6	22313
BENTON	21538	4115	1106	0	0	19429
BIG STONE	3614	240	280	4	0	3023
BLUE EARTH	38855	9351	2455	12	1	35183
BROWN	15549	2218	1051	3	2	13680
CARLTON	19942	3508	1474	0	0	18530
CARVER	53059	8495	4666	33	8	49806
CASS	18582	2307	2028	1	8	16388
CHIPPEWA	7335	1036	532	5	1	6393
CHISAGO	31228	5955	2172	1	0	29411
CLAY	31750	8066	2479	22	0	29334
CLEARWATER	5136	652	333	2	0	4333
COOK	3561	356	543	5	1	3362
COTTONWOOD	6838	720	551	0	1	6084
CROW WING	38334	5800	4221	49	2	35299
DAKOTA	241276	41783	26225	230	38	225933

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DODGE	11136	1934	580	8	8	10253
DOUGLAS	23894	2999	2415	10	3	21012
FARIBAULT	9386	1149	651	5	0	8201
FILLMORE	13532	1417	716	0	0	11287
FREEBORN	19376	2631	1868	12	2	17369
GOODHUE	28712	3993	2249	9	0	25902
GRANT	4244	454	371	0	0	3629
HENNEPIN	722777	133219	84041	1591	147	665485
HOUSTON	12364	1575	807	8	0	10953
HUBBARD	13009	1761	1363	8	0	11706
ISANTI	21331	3946	1304	4	2	20122
ITASCA	26967	3222	1813	5	3	24510
JACKSON	6442	641	519	0	0	5694
KANABEC	9122	1574	591	4	0	8536
KANDIYOHI	24736	3465	1999	14	2	21985
KITTSOON	2949	166	203	5	0	2602
KOOCHICHING	7671	931	750	13	0	6834
LAC QUI PARLE	4802	476	383	0	0	4224
LAKE	7701	954	577	0	0	6991
LAKE OF THE WOODS	2806	188	185	3	0	2328
LE SUEUR	16388	2431	924	16	0	15088
LINCOLN	3818	288	269	1	1	3159
LYON	14850	2327	1092	8	0	12773
MCLEOD	21007	3646	1328	2	0	19124

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MAHNOMEN	3046	298	170	1	1	2360
MARSHALL	5445	465	302	44	0	4781
MARTIN	13136	1345	965	3	2	10798
MEEKER	14159	1690	960	4	0	12610
MILLE LACS	14651	2658	1023	8	0	13612
MORRISON	18979	2442	1301	0	0	16850
MOWER	21901	3017	1922	15	0	19302
MURRAY	5439	503	431	3	0	4868
NICOLLET	20114	3805	1270	3	0	18286
NOBLES	10258	1359	769	8	1	8886
NORMAN	3990	456	279	2	0	3478
OLMSTED	85368	13027	8513	33	2	76636
OTTER TAIL	35722	5245	3776	36	3	32845
PENNINGTON	7415	1496	535	3	2	6856
PINE	16521	3055	957	8	1	14485
PIPESTONE	5544	632	467	3	0	4843
POLK	17039	2785	1190	0	0	15406
POPE	7365	952	644	4	0	6577
RAMSEY	317028	55847	30133	520	144	278169
RED LAKE	2500	351	160	0	1	2218
REDWOOD	9302	1075	637	8	2	7851
RENVILLE	9425	1138	635	9	0	8185
RICE	36641	5843	2380	59	6	31913
ROCK	5721	744	470	0	0	5011
ROSEAU	8758	1320	655	13	1	7756

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SAINT LOUIS	134550	20142	7950	22	4	119435
SCOTT	71722	11921	5887	29	10	67321
SHERBURNE	47397	9203	3554	3	1	45121
SIBLEY	8710	1088	452	0	0	7765
STEARNS	87249	19283	5106	76	7	79028
STEELE	21397	3104	1734	6	0	19760
STEVENS	6647	1131	384	0	0	5659
SWIFT	5810	744	359	0	0	5274
TODD	13963	1786	934	4	0	12313
TRAVERSE	2378	180	197	1	2	2056
WABASHA	13390	1742	818	13	2	11963
WADENA	7840	1141	714	1	2	7232
WASECA	10760	1716	654	12	11	9933
WASHINGTON	147437	22290	16594	127	14	137323
WATONWAN	6042	614	431	5	0	5295
WILKIN	4038	481	290	4	0	3446
WINONA	30932	7497	1952	26	5	28038
WRIGHT	67959	13310	4792	106	10	65749
YELLOW MEDICINE	6301	821	411	1	1	5601
STATE OF MINNESOTA (AB)	0	264	902	31	0	933
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
	3199981	542140	289468	3516	495	2921147

*Recount of the Office of U.S. Senator
Minnesota State Canvassing Report
January 5, 2009*

Votes Cast for United States Senator

<u>County</u>	<u>IP DEAN BARKLEY</u>	<u>R NORM COLEMAN</u>	<u>DFL AL FRANKEN</u>	<u>LIB CHARLES ALDRICH</u>	<u>CP JAMES NIEMACKL</u>	<u>WI WRITE- IN**</u>
AITKIN	1770	3617	3893	40	32	7
ANOKA	30504	82308	66800	771	536	146
BECKER	2226	8437	6016	100	70	14
BELTRAMI	2267	9454	10033	139	94	15
BENTON	4071	8473	6485	84	79	15
BIG STONE	476	1211	1274	12	8	0
BLUE EARTH	6182	13660	14483	219	121	39
BROWN	2684	6329	4435	64	40	2
CARLTON	2555	6099	9521	83	72	8
CARVER	7875	26968	14102	208	130	43
CASS	2504	7685	5888	68	60	12
CHIPPEWA	1283	2419	2559	29	27	5
CHISAGO	5317	13768	9833	133	78	19
CLAY	3431	13032	12067	187	89	25
CLEARWATER	460	2109	1596	29	15	0
COOK	458	1207	1620	19	20	3
COTTONWOOD	1051	2770	2131	32	29	4
CROW WING	5474	16107	13025	149	129	21
DAKOTA	34066	102701	85298	981	657	173

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DODGE	1853	4771	3384	56	53	8
DOUGLAS	3723	10077	6856	75	56	13
FARIBAULT	1509	3599	2911	53	27	6
FILLMORE	1604	4772	4630	60	59	6
FREEBORN	2920	6566	7432	122	66	13
GOODHUE	5047	11176	9242	110	89	11
GRANT	630	1483	1469	6	7	2
HENNEPIN	84912	237712	329616	3019	1649	614
HOUSTON	942	5027	4597	74	30	4
HUBBARD	1692	5751	4024	57	38	10
ISANTI	3648	9564	6557	96	60	17
ITASCA	3183	9263	11544	112	126	14
JACKSON	930	2478	2145	44	23	1
KANABEC	1631	3745	2980	44	50	4
KANDIYOHI	3378	10246	8007	84	59	10
KITTSOON	278	1077	1168	18	10	2
KOOCHICHING	721	2847	3090	31	32	4
LAC QUI PARLE	779	1611	1746	19	12	3
LAKE	863	2432	3549	31	16	8
LAKE OF THE WOODS	258	1204	770	14	19	1
LE SUEUR	3268	6321	5270	72	45	8
LINCOLN	341	1464	1272	16	16	0
LYON	1994	6089	4410	65	52	8
MCLEOD	4147	9093	5496	94	119	18

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MAHNOMEN	299	858	1142	16	8	2
MARSHALL	598	2322	1752	24	13	4
MARTIN	1869	5108	3589	64	40	0
MEEKER	2797	5697	3870	60	69	10
MILLE LACS	2654	5852	4801	72	69	14
MORRISON	3274	7826	5424	89	61	6
MOWER	2859	6844	9093	142	74	14
MURRAY	560	2334	1866	20	16	0
NICOLLET	3312	7237	7384	92	46	10
NOBLES	903	4192	3534	45	45	5
NORMAN	460	1334	1576	26	12	2
OLMSTED	10666	35334	28589	496	230	61
OTTER TAIL	4263	17199	10740	167	101	20
PENNINGTON	822	3239	2595	49	24	7
PINE	2489	5683	6016	71	71	15
PIPESTONE	369	2637	1681	23	25	4
POLK	1715	7353	5926	89	50	7
POPE	1171	2749	2559	23	20	2
RAMSEY	36708	92952	142251	1342	796	315
RED LAKE	311	984	834	15	14	0
REDWOOD	1569	3642	2454	35	53	4
RENVILLE	1854	3275	2909	46	25	4
RICE	5428	12061	13680	135	93	27
ROCK	426	2656	1750	41	19	3
ROSEAU	743	4394	2421	48	32	2

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SAINT LOUIS	14283	38320	64531	521	349	121
SCOTT	11615	33839	20693	291	184	55
SHERBURNE	8066	22887	13405	170	150	39
SIBLEY	1976	3499	2158	42	29	6
STEARNS	15003	36224	26161	395	239	56
STEELE	4173	8647	6552	107	63	10
STEVENS	784	2526	2250	28	20	5
SWIFT	1007	1879	2294	28	18	3
TODD	2346	5536	4177	58	52	6
TRAVERSE	381	837	794	12	3	0
WABASHA	2305	4959	4466	64	25	10
WADENA	1107	3683	2294	37	27	4
WASECA	2285	4229	3261	58	24	4
WASHINGTON	20711	63804	50562	556	332	70
WATONWAN	1065	2104	2019	30	16	5
WILKIN	453	1814	1074	23	10	2
WINONA	2782	11318	12761	259	102	21
WRIGHT	13010	32999	18664	267	233	46
YELLOW MEDICINE	1028	2313	2174	21	24	3
STATE OF MINNESOTA (AB)	101	305	481	7	2	0
	<u>437505</u>	<u>1212206</u>	<u>1212431</u>	<u>13923</u>	<u>8907</u>	<u>2340</u>

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	<u>WI MICHAEL CAVLAN**</u>	<u>WI JOHN H. EVAN**</u>	<u>WI ANTHONY KEITH PRICE**</u>	<u>WI JACK SHEPARD**</u>
AITKIN	0	0	0	0
ANOKA	0	0	2	0
BECKER	0	0	0	0
BELTRAMI	0	0	0	0
BENTON	0	0	0	0
BIG STONE	0	0	0	0
BLUE EARTH	0	0	0	0
BROWN	0	0	0	0
CARLTON	0	0	0	0
CARVER	0	0	0	0
CASS	0	0	0	0
CHIPPEWA	0	0	0	0
CHISAGO	0	0	0	0
CLAY	0	0	0	0
CLEARWATER	0	0	0	0
COOK	0	0	0	0
COTTONWOOD	0	0	0	0
CROW WING	0	0	0	0
DAKOTA	0	0	9	0
DODGE	0	0	0	0
DOUGLAS	1	0	0	0
FARIBAULT	0	0	0	0

*Recount of the Office of U.S. Senator
Minnesota State Canvassing Report
January 5, 2009*

FILLMORE	0	0	0	0
FREEBORN	0	0	0	0
GOODHUE	0	0	0	0
GRANT	0	0	0	0
HENNEPIN	12	0	0	0
HOUSTON	0	0	0	0
HUBBARD	0	0	0	0
ISANTI	0	0	0	0
ITASCA	0	0	0	0
JACKSON	0	0	0	0
KANABEC	0	0	0	0
KANDIYOHI	0	0	0	0
KITTSOON	0	0	0	0
KOOCHICHING	0	0	0	0
LAC QUI PARLE	0	0	0	0
LAKE	0	0	0	0
LAKE OF THE WOODS	0	0	0	0
LE SUEUR	0	0	0	0
LINCOLN	0	0	0	0
LYON	0	0	0	0
MCLEOD	0	0	0	0
MAHNOMEN	0	0	0	0
MARSHALL	0	0	0	0
MARTIN	0	0	0	0
MEEKER	0	0	0	0

*Recount of the Office of U.S. Senator
Minnesota State Canvassing Report
January 5, 2009*

MILLE LACS	0	0	0	0
MORRISON	0	0	0	0
MOWER	0	0	0	0
MURRAY	0	0	0	0
NICOLLET	0	0	0	0
NOBLES	0	0	0	0
NORMAN	0	0	0	0
OLMSTED	0	0	0	0
OTTER TAIL	0	0	0	0
PENNINGTON	0	0	0	0
PINE	0	0	0	0
PIPESTONE	0	0	0	0
POLK	0	0	0	0
POPE	0	0	0	0
RAMSEY	0	0	0	0
RED LAKE	0	0	0	0
REDWOOD	0	0	0	0
RENVILLE	0	0	0	0
RICE	0	0	0	0
ROCK	0	0	0	0
ROSEAU	0	0	0	0
SAINT LOUIS	0	0	0	0
SCOTT	0	0	0	0
SHERBURNE	0	0	0	0
SIBLEY	0	0	0	0

*Recount of the Office of U.S. Senator
Minnesota State Canvassing Report
January 5, 2009*

STEARNS	0	0	0	0
STEELE	0	0	0	0
STEVENS	0	0	0	0
SWIFT	0	0	0	0
TODD	0	0	0	0
TRAVERSE	0	0	0	0
WABASHA	0	0	1	0
WADENA	0	0	0	0
WASECA	0	0	0	0
WASHINGTON	0	0	0	0
WATONWAN	0	0	0	0
WILKIN	0	0	0	0
WINONA	0	0	0	0
WRIGHT	0	0	0	0
YELLOW MEDICINE	0	0	0	0
STATE OF MINNESOTA (AB)	0	0	0	0
	<hr/> 13	<hr/> 0	<hr/> 12	<hr/> 0



Election Name: 2008 State General Recount
Election Date: November, 2008
Report Name: OSS Final Recount Summary Report

Print Date: 1/3/2009
Print Time: 6:42:31 PM
Printed by: OSS

Office: US SENATOR

County Number - Name	Nov. 4, 2008 Votes Counted for COLEMAN	Nov. 4, 2008 Votes Counted for FRANKEN	RECOUNT Number of Ballots for COLEMAN (as recounted)	RECOUNT Number of Ballots for FRANKEN (as recounted)	RECOUNT Number of All Other Ballots (as recounted)	RECOUNT COLEMAN and Other Ballots Challenged by FRANKEN	RECOUNT FRANKEN and Other Ballots Challenged by COLEMAN	Ballot Disposition for COLEMAN	Ballot Disposition for FRANKEN	Ballot Disposition for Other	Change in Ballots Counted for COLEMAN	Change in Ballots Counted for FRANKEN	Final Recount Totals for COLEMAN	Final Recount Totals for FRANKEN
01 - AITKIN	3615	3892	3617	3891	1951	0	2	0	2	0	2	1	3617	3893
02 - ANOKA	82280	66789	82219	66742	33442	102	74	89	58	29	18	11	82308	66800
03 - BECKER	8401	6001	8365	5919	2640	54	98	52	97	3	36	15	8437	6016
04 - BELTRAMI	9454	10030	9452	10032	2856	3	4	2	1	4	0	3	9454	10033
05 - BENTON	8469	6486	8444	6462	4465	30	25	29	23	3	4	-1	8473	6485
06 - BIG STONE	1208	1272	1209	1270	539	3	3	2	4	0	3	2	1211	1274
07 - BLUE EARTH	13665	14481	13553	14350	6876	122	141	107	133	23	-5	2	13660	14483
08 - BROWN	6327	4433	6323	4433	2915	6	3	6	2	1	2	2	6329	4435
09 - CARLTON	6099	9517	6082	9477	2906	20	47	17	44	6	0	4	6099	9521
10 - CARVER	26966	14102	26950	14094	8724	21	10	18	8	5	2	0	26966	14102
11 - CASS	7685	5884	7682	5887	2810	5	3	3	1	4	0	4	7685	5888
12 - CHIPPEWA	2419	2558	2418	2558	1413	3	2	1	1	3	0	1	2419	2559
13 - CHISAGO	13765	9835	13763	9829	5800	5	5	5	4	1	3	-2	13766	9833
14 - CLAY	13037	12077	13028	12065	4215	4	3	4	2	1	-5	-10	13032	12067
15 - CLEARWATER	2109	1595	2109	1595	581	1	0	0	1	0	0	1	2109	1596
16 - COOK	1206	1620	1202	1617	533	8	2	5	3	2	1	0	1207	1620
17 - COTTONWOOD	2765	2132	2767	2129	1154	5	4	3	2	4	5	-1	2770	2131
18 - CROW WING	16103	13025	16098	13018	6159	10	12	9	7	5	4	0	16107	13025
19 - DAKOTA	102696	85288	102329	84941	37868	386	356	372	357	48	5	10	102701	85298
20 - DODGE	4771	3383	4761	3373	2089	12	15	10	11	6	0	1	4771	3384
21 - DOUGLAS	10072	6854	10058	6833	4071	19	25	19	23	2	5	2	10077	6856
22 - FARIBAULT	3598	2909	3595	2909	1684	4	3	4	2	1	1	2	3599	2911
23 - FILLMORE	4771	4629	4770	4614	1864	3	27	2	16	12	1	1	4772	4630
24 - FREEBORN	6565	7429	6566	7431	3357	0	1	0	1	0	1	3	6566	7432
25 - GOODHUE	11172	9243	11157	9237	5476	23	9	19	5	7	4	-1	11176	9242
26 - GRANT	1483	1468	1483	1466	678	0	3	0	3	0	0	1	1483	1469
27 - HENNEPIN	237691	329445	237118	328780	98085	700	874	594	836	137	21	171	237712	329616

28 - HOUSTON	5028	4596	5028	4596	1326	1	2	1	1	1	-1	1	5027	4597
29 - HUBBARD	5751	4027	5751	4023	1925	0	1	0	1	0	0	-3	5751	4024
30 - ISANTI	9562	6555	9554	6552	3991	10	5	10	5	0	2	2	9564	6557
31 - ITASCA	9264	11542	9260	11540	3697	4	5	3	4	2	-1	2	9263	11544
32 - JACKSON	2477	2148	2422	2106	1062	62	37	56	39	4	1	-3	2478	2145
33 - KANABEC	3747	2978	3739	2978	1809	8	3	6	2	2	-2	2	3745	2980
34 - KANDIYOHI	10246	8003	10242	8003	3728	6	3	4	4	1	0	4	10246	8007
35 - KITTSON	1075	1168	1077	1165	354	1	3	0	3	1	2	0	1077	1168
36 - KOOCHICHING	2846	3091	2827	3077	885	21	16	20	13	4	1	-1	2847	3090
37 - LAC QUI PARLE	1608	1746	1597	1722	861	17	25	14	24	4	3	0	1611	1746
38 - LAKE	2434	3550	2428	3548	996	5	1	4	1	1	-2	-1	2432	3549
39 - LAKE OF THE WOODS	1203	769	1198	763	354	7	7	6	7	1	1	1	1204	770
40 - LE SUEUR	6320	5267	6304	5255	3495	22	12	17	15	2	1	3	6321	5270
41 - LINCOLN	1463	1273	1464	1272	422	0	0	0	0	0	1	-1	1464	1272
42 - LYON	6087	4410	6085	4408	2272	5	3	4	2	2	2	0	6089	4410
43 - MCLEOD	9092	5494	9083	5490	4529	15	7	10	6	6	1	2	9093	5496
44 - MAHNOMEN	858	1138	858	1138	360	3	2	0	4	0	0	4	858	1142
45 - MARSHALL	2321	1749	2322	1749	729	3	1	0	3	1	1	3	2322	1752
46 - MARTIN	5111	3588	5106	3588	2096	4	0	2	1	1	-3	1	5108	3589
47 - MEEKER	5697	3870	5649	3865	3039	51	7	48	5	5	0	0	5697	3870
48 - MILLE LACS	5849	4797	5827	4791	2956	26	11	25	10	2	3	4	5852	4801
49 - MORRISON	7823	5425	7824	5424	3600	2	1	2	0	1	3	-1	7826	5424
50 - MOWER	6839	9090	6836	9088	3367	8	6	8	5	1	5	3	6844	9093
51 - MURRAY	2334	1865	2333	1866	668	1	0	1	0	0	0	1	2334	1866
52 - NICOLLET	7237	7384	7234	7376	3664	3	9	3	8	1	0	0	7237	7384
53 - NOBLES	4189	3531	4188	3533	1164	3	2	4	1	0	3	3	4192	3534
54 - NORMAN	1334	1576	1334	1576	579	0	0	0	0	0	0	0	1334	1576
55 - OLMSTED	35332	28592	35316	28574	12708	21	22	18	15	8	2	-3	35334	28589
56 - OTTER TAIL	17200	10738	17195	10736	4896	6	6	4	4	4	-1	2	17199	10740
57 - PENNINGTON	3237	2595	3237	2595	1022	2	0	2	0	0	2	0	3239	2595
58 - PINE	5682	6089	5681	6014	2767	2	3	2	2	1	1	7	5683	6016
59 - PIPESTONE	2637	1680	2632	1670	524	6	10	5	11	0	0	1	2637	1681
60 - POLK	7353	5922	7349	5923	2127	4	4	4	3	1	0	4	7353	5926
61 - POPE	2749	2557	2749	2557	1265	0	2	0	2	0	0	2	2749	2559
62 - RAMSEY	92861	142079	92767	142056	43030	204	209	185	195	33	91	172	92952	142251
63 - RED LAKE	984	834	984	834	400	0	0	0	0	0	0	0	984	834
64 - REDWOOD	3641	2453	3642	2454	1755	0	0	0	0	0	1	1	3642	2454
65 - RENVILLE	3274	2907	3274	2908	2000	2	0	1	1	0	1	2	3275	2909
66 - RICE	12059	13675	12057	13676	6192	5	5	4	4	2	2	5	12061	13680
67 - ROCK	2657	1750	2650	1743	604	6	8	6	7	1	-1	0	2656	1750
68 - ROSEAU	4394	2420	4394	2420	936	1	3	0	1	3	0	1	4394	2421
69 - SAINT LOUIS	38281	64436	38212	64310	16558	128	228	108	221	27	39	95	38320	64531
70 - SCOTT	33827	20687	33755	20632	12785	91	65	84	61	11	12	6	33839	20693
71 - SHERBURNE	22886	13399	22454	12973	8818	440	434	433	432	9	1	6	22887	13405
72 - SIBLEY	3498	2158	3498	2156	2108	1	2	1	2	0	1	0	3499	2158
73 - STEARNS	36219	26155	36097	26052	16753	128	113	127	109	5	5	6	36224	26161

74 - STEELE	8644	8552	8645	8544	4562	2	10	2	8	2	3	0	8647	6552
75 - STEVENS	2523	2248	2520	2246	880	6	5	6	4	1	3	2	2526	2250
76 - SWIFT	1878	2291	1879	2293	1104	1	0	0	1	0	1	3	1879	2294
77 - TODD	5530	4172	5503	4135	2599	33	44	33	42	2	6	5	5536	4177
78 - TRAVERSE	835	791	837	794	425	1	0	0	0	1	2	3	837	794
79 - WABASHA	4958	4462	4950	4451	2533	10	18	9	15	3	1	4	4959	4466
80 - WADENA	3681	2292	3675	2287	1251	10	10	8	7	5	2	2	3683	2294
81 - WASECA	4228	3263	4228	3261	2459	2	0	1	0	1	1	-2	4229	3261
82 - WASHINGTON	63811	50571	63756	50504	22899	52	59	48	58	5	-7	-9	63804	50562
83 - WATONWAN	2103	2017	2100	2009	1172	4	10	4	10	0	1	2	2104	2019
84 - WILKIN	1814	1074	1807	1064	544	7	11	7	10	1	0	0	1814	1074
85 - WINONA	11317	12755	11302	12737	3956	23	22	16	24	5	1	6	11318	12761
86 - WRIGHT	32989	18663	32773	18528	14085	244	143	226	136	25	10	1	32999	18664
87 - YELLOW MEDICINE	2311	2171	2311	2167	1114	2	7	2	7	0	2	3	2313	2174
89 - STATE OF MINNESOTA (AB)	0	0	305	481	147	0	0	0	0	0	305	481	305	481
Office Totals:	1211590	1211375	1209240	1209228	496067	3281	3373	2966	3203	507	616	1056	1212206	1212431

January 12, 2009

VIA MESSENGER

The Hon. Tim Pawlenty
Governor, State of Minnesota
State Capitol
Saint Paul, MN 55155

The Hon. Mark Ritchie
Secretary of State, State of Minnesota
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55101

Re: **2008 United States Senate Election**

Dear Governor Pawlenty and Secretary of State Ritchie:

We represent Al Franken. On January 5, 2009, after a meticulous hand recount of the ballots, the State Canvassing Board declared the result of the General Election held on November 4, 2008. The Board certified that Mr. Franken was chosen by Minnesota voters to serve as United States Senator for the term that commenced January 3, 2009.

The interests of the State, its constituents, and the Nation are best served when Minnesota is fully represented in Washington, D.C. As the United States Constitution states, at Article I, Section 3, and Amendment XVII, "The Senate of the United States *shall* be composed of two Senators from each State . . ." (emphasis added). Now that the State Canvassing Board has acted and the 111th Congress has convened, it is time for Minnesota to have two Senators working for us.

Pursuant to the United States Constitution, Article I, Section 5, and federal statute, 2 U.S.C. §§ 1, 1a, 1b & 7, it is now the duty of the Governor to certify Mr. Franken's election, under the Seal of the State of Minnesota, to the President of the United States Senate, and it is the duty of the Secretary of State to countersign the certificate.

Attorneys & Advisors
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Minneapolis, Minnesota
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The Hon. Tim Pawlenty
The Hon. Mark Ritchie
January 12, 2009
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Former Senator Norm Coleman has, of course, initiated an election contest in an attempt to overturn the State Canvassing Board's declaration and certification that Al Franken received the most votes in the election. Neither state law nor a lawsuit in state court may excuse, suspend or operate to delay the issuance of the certificate of election.

As held by the Minnesota Supreme Court, under the United States Constitution and federal statute the sole power and jurisdiction to "be the Judge of the Elections, Returns and Qualifications of its own Members" rests in the United States Senate, not in any state statute or court. *See Odegard v. Olson*, 119 N.W.2d 717, 720 (Minn. 1963) (House of Representatives is "final and exclusive judge of the legality of election"); *In re Williams' Contest*, 270 N.W. 586, 587 (Minn. 1936) (after canvassing board has declared result, Congress has exclusive jurisdiction as to who received the greater number of votes); *25 Voters v. Selvig*, 212 N.W. 604 (Minn. 1927) (once election result declared, state court judgment "would be both officious and nugatory").

The idea that a certificate of election should be issued before a legislative election contest is concluded is hardly novel. Indeed, Minnesota law provides that a contest will not delay a certificate for a candidate elected to the Minnesota Legislature, *see* Minn. Stat. § 204C.40, subd. 2, precisely because, under Minnesota Constitution, Article IV, Section 6, each house is "the judge of the election returns and eligibility of its own members." This recognizes the constitutional authority of those bodies and the importance of full representation. The same result is required under the United States Constitution and federal law for precisely the same reasons.

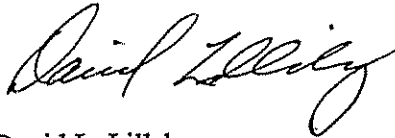
Further, even if state law controlled, the certificate should issue, for two reasons. First, while Minn. Stat. § 204C.40, subd. 2, provides that the certificate shall not be issued "until a court of proper jurisdiction has finally determined the contest," in a federal or state legislative contest there can be no such "proper court." *See Odegard*, 119 N.W.2d at 721.

Second, the more specific subdivision 1 of § 204C.40 expressly provides that, in any race, in the event there is a recount the certificate shall issue after the recount has been completed, subject only to later invalidation or revocation. The effect of that language when read in conjunction with the rest of § 204C.40 is clear: In non-legislative races, where the court can have a constitutional and determinative role, if there is no recount the certificate should be withheld while an expedited election contest is heard. If there has been a recount, it is time to certify and at least provisionally seat the declared winner, subject to the result of the contest.

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The Minnesota statutes allow time for a recount between the election and the start of the new term of Congress. Now that the recount is complete and the new Congress has convened, state law does not provide for further delay, and federal law requires that the certificate issue. Accordingly, we request respectfully that Mr. Franken's election be certified by the close of business today.

Sincerely,



David L. Lillehaug
Attorney
Direct Dial: 612.492.7321
Email: dlillehaug@fredlaw.com

4490366_1.DOC/058501.0003

cc: Senator-Elect Al Franken
Deputy Attorney General Jim Gelbmann (via email)
Attorney General Lori Swanson (via messenger)
Deputy Attorney General Christie Eller (via email)
Marc E. Elias, Esq. (via email)
Tony Trimble, Esq. (via email)
Frederic Knaak, Esq. (via email)
Roger Magnuson, Esq. (via email)



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Governor's Office

Media Center

A STATEMENT FROM THE GOVERNOR -- January 12, 2009

Press Releases

Saint Paul – The following is a statement from Governor Tim Pawlenty regarding the request from AI F attorney to issue a certificate of election.

Appointments

Commission on Judicial Selection

"I have a duty to follow state law and our statutes are clear on this issue. I am prohibited from is certificate of election until the election contest in the courts has been resolved."

Podcasts

Please see Minnesota Statutes 204C.40, Subdivision 2:

Photo Gallery

204C.40 CERTIFICATES OF ELECTION.
Subdivision 2. **Time of issuance; certain offices.**

"Good Morning, Minnesota"

No certificate of election shall be issued until seven days after the canvassing board has declared the n election. In case of a contest, an election certificate shall not be issued until a court of proper jurisdiction determined the contest. This subdivision shall not apply to candidates elected to the office of state senz representative.

Online at <https://www.revisor.leg.state.mn.us/statutes/?id=204C.40&year=2008>

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