

601

FILED
Court Administrator

STATE OF MINNESOTA

JAN 22 2009

DISTRICT COURT

COUNTY OF RAMSEY

By  Deputy

SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL OTHER

In the Matter of the Contest of
General Election held on November 4, 2008,
for the purpose of electing a United States
Senator from the State of Minnesota,

Case No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

AFFIDAVIT OF DAVID L. LILLEHAUG

Al Franken,

Contestee.

David L. Lillehaug, being duly sworn, states and deposes as follows:

1. I am one of the attorneys for Al Franken. I have been representing the Franken for Senate Committee regarding the U.S. Senate election results since midnight on Election Night. I was heavily involved in the recount, especially with respect to the issue of erroneously rejected absentee ballots. This Affidavit is submitted as part of Contestee's opposition to Contestants' motion for partial summary judgment. All information herein regarding the statements of Contestants' representatives is on the public record, and is consistent with what I heard them say in public meetings and hearings.

2. In the first week after the election, the Franken Committee received information that some absentee ballots had been rejected erroneously. On November 10, 2008, I appeared before the Hennepin County Canvassing Board to request that it review rejected absentee ballots to determine if they had been rejected erroneously.

3. The Associated Press quoted Coleman attorney Frederic Knaak that my request was “a hail Mary pass.” “They’re hoping people will look the other way and let these clearly invalid ballots be accepted.” Coleman attorney Matthew Haapoja of Tony Trimble’s firm accused the Franken campaign of making the request to try to “stuff the ballot box.”

4. According to a November 12 Star Tribune article, Coleman attorney Frederic Knaak said that the Coleman campaign found it “somewhat disturbing and mildly amusing” that I had sought to have the Hennepin County Canvassing Board consider the subject of rejected absentee ballots.

5. Our efforts to determine the extent of erroneous rejection of absentee ballot was hindered by some counties’ and cities’ refusal to identify the ballots rejected. Accordingly, the Franken Committee filed suit in Ramsey County to obtain the data. According to the Associated Press, Coleman Campaign Manager Cullen Sheehan responded: “This tactic is simply designed to shove more rejected ballots into the ballot box before the recount takes place next week.” “The legal action filed by the Franken campaign today is a classic scheme to re-write the election laws to rig the system in their favor at the expense of the Minnesota voters.” The Coleman campaign intervened in the case to oppose the motion. By Order dated November 19, 2008, the Court granted the motion.

6. On November 18, 2008, counsel for Coleman, Frederic Knaak and Tony Trimble, submitted a brief to the State Canvassing Board, a copy of which is attached as Exhibit 1. In that brief, the Coleman campaign contended:

- A. The standards for rejection of an absentee ballot are “very objective and clear.”
- B. There is no “evidence of an actual improper rejection.”
- C. “[T]he decisions of local election officials should be presumed to have been accurate and correct”
- D. The “substantial compliance” standard does not apply to absentee ballots. Specifically, unsigned ballots or those with signature mismatches must not be counted because they violate “mandatory” requirements.
- E. The Equal Protection Clause “simply does not apply” to rejected absentee ballots.
- F. Absentee voting is a privilege, not a right. Absentee voters “are treated equally under Minnesota law, and all voters wishing to avail themselves of this privilege must follow the very clear, very simply [sic] and very objective rules.”

7. On November 18, 2008, I appeared before the State Canvassing Board to urge that erroneously rejected absentee ballots be included in the recount and canvass. On behalf of the Coleman campaign, Frederic Knaak testified in opposition to the request.

8. The State Canvassing Board further considered the absentee ballot issue on November 26, 2008. After the hearing, according to the Star Tribune, Coleman attorney Frederic Knaak opined that wrongly disqualified or overlooked absentee ballots comprised “an extraordinarily small number.”

9. On December 12, 2008, in a letter to the State Canvassing Board, Frederic Knaak, on behalf of the Coleman campaign stated: “Minnesota’s absentee voter laws

provide clear standards by which an election judge may accept or reject an absentee ballot. Trained election judges and absentee ballot boards followed these procedures on election night.”

10. On December 12, 2008, the State Canvassing Board passed a resolution urging county canvassing boards to reconvene to identify erroneously rejected absentee ballots and then open and count them.

11. In response, the Coleman campaign filed a petition in the Minnesota Supreme Court urging that no additional absentee ballots be opened and counted and that allowing them to be opened without proper standards would violate *Bush v. Gore*. In its reply brief, submitted on December 16, 2008, the Coleman campaign stated: “Indeed, Petitioners [Coleman] believe many [absentee ballots] were properly rejected and that a contest proceeding, with decisions by one panel after recourse to the rules of civil procedure, would bear this out.” The brief further argued that the absentee ballot requirements were mandatory for voters to have their votes counted.

12. On December 18, 2008, the Supreme Court ruled that erroneously rejected absentee ballots could be counted upon agreement of local officials and the two campaigns. In response, according to the Associated Press, Coleman attorney Tony Trimble said the court ruling would ensure that there are uniform standards for deciding which absentee ballots have been properly rejected. According to the Star Tribune, Coleman attorney Frederic Knaak said, “We’re very happy with the decision.” Coleman Communications Director Mark Drake was quoted in *CQ Politics* as stating that the court had moved “to establish a uniform standard for wrongly rejected absentee ballots.”

13. Thereafter, the Secretary of State's Office, local election officials, and the two campaigns agreed to a process whereby local officials would identify erroneously rejected absentee ballots that, subject to the two campaigns' acceptance, would be opened and counted. The parties were allowed to observe that process and to suggest ballots to be considered.

14. During the week of December 22, 2008, county officials identified 1,346 erroneously-rejected absentee ballots and recommended that they be counted.

15. On December 29, 2008, after the deadline had passed for the campaigns to propose to the local elections officials additional ballots for opening and counting, the Coleman campaign submitted a list of 654 names. This list is the same list as referenced in Paragraph 10 of the Notice of Contest. The bulk of the list was from counties and cities that had delivered sizable margins to Norm Coleman. Election officials properly rejected as untimely Coleman's request to add 654 ballots to the local officials' lists.

16. By contrast, in Franken's Conditional Motion for Partial Summary Judgment on Certain Counterclaims, Franken conditionally seeks summary judgment as to 134 erroneously rejected absentee ballots. The concerns Franken raises with respect to each of those 134 ballots were presented to the State Canvassing Board, local elections officials, or both.

17. In any event, the 1,346 ballots identified by the local elections officials were reviewed by representatives of both campaigns, with the Coleman campaign participating fully in accepting ballots, or objecting to more than 200 particular ballots. Some of the ballots to which Coleman objected are now the subject of his summary judgment motion in the election contest.

18. At the end of the ballot review process pursuant to the Supreme Court Order, 933 of the ballots not objected to by either campaign were opened and counted on January 3, 2009. Al Franken increased his lead over Norm Coleman by 176 votes.

19. On January 5, 2009, the State Canvassing Board formally declared the result of the election. Norm Coleman filed a Notice of Contest the next day.

20. In Paragraph 12(d) of the Notice of Contest, Coleman contended that representatives of the Coleman campaign did not agree to the opening and counting of the 933 erroneously rejected absentee ballots.

21. In Paragraph 10 of the Notice of Contest, Coleman asserted that 650 additional rejected absentee ballots should have been reviewed, opened, and counted.

22. On January 15, 2009, Norm Coleman appeared on the Michael Medved show and stated: "We have 653 ballots that we believe were wrongly rej – that should have been counted because they were rejected originally for the same reasons that ballots in the Franken-leaning counties were kind of put back in the mix. And so, if there was a uniform standard, we think the absentee ballots that haven't been counted, are from overwhelmingly Republican areas, and we firmly believe that when everything is counted fairly and uniformly, we'll be where we were Election Night and that is me being ahead."

23. In an effort to learn more about the 650 rejected absentee votes, interrogatories were posed to Coleman. Interrogatory 7 required him to state the reason each ballot was rejected by local officials, and state the full factual basis of his contention that each ballot was rejected wrongfully and should be counted. By Interrogatory Answers submitted on January 19, 2009, Coleman answered:

Pursuant to Minn. R. Civ. P. 33.05 [sic], Contestants refer Contestee to the list previously provided to them identifying each ballot. Contestants believe each

such ballot was cast by a voter who was alive on election day, who was registered or included a registration card inside the envelope, and who did not otherwise vote on election day, and as such as in complete or substantial compliance with Minn. Stat. § 203B.12, and should be opened and counted (so long as the voters intent can be determined from the face of the ballot).

Coleman's answer to Interrogatory 8 referred to 11,000+ rejected absentee ballots, but did not identify each ballot that should be opened and counted, the reason each ballot was rejected by local officials, and the full factual basis for the contention that the ballot was rejected wrongfully.

24. On the afternoon of January 21, 2009, Coleman filed a motion for summary judgment. In the supporting memorandum, he asserted that "thousands of ballots stand wrongly rejected as a matter of law" and urged that "the Court should order that all rejected absentee ballots cast by registered voters who were living on election day and did not otherwise vote in this election" should be counted. In the alternative, he identified categories amounting to more than 4,000 absentee ballots that he alleges should be opened and counted. The supporting materials filled three boxes.

25. I immediately directed staff to begin review of the supporting materials since our response was due within 24 hours. During the evening and well into the night, staff managed at least a cursory review of the materials. They found that some of the ballots were assigned to the wrong categories and that, in some cases, there were significant disparities between the ballots submitted by Contestants and the materials that had been provided by the local election officials to the two campaigns.

26. In the limited time available, it is not possible to identify all the factual issues with the envelopes that Contestants first identified less than three business days before. Contestants have had access to all or substantially all of these for more than a

month, and claimed that it took them that entire time to determine that more than the 654 were erroneously rejected. Even now, their supporting materials have numerous errors and often do not support the propositions they are alleged to support.

27. By the timing of this motion, Coleman has not given election officials the chance to explain the supposed discrepancies. Pursuant to the Supreme Court Order, local officials reviewed these envelopes against the standards of Minnesota law multiple times in an effort to enfranchise voters who did things right. Contestants have not even suggested that such officials did not act in good faith and diligently.

28. While in a normal lawsuit it might make sense merely to deny the motion under Minn. R. Civ. P. 56.06, that would unfairly interfere with Contestee's trial preparation. If it took Contestants a month to create the brief and boxes they have now deposited with the Court, fairness would require a similar amount of time for Contestee to find all of the factual issues in it. And then the result would simply be a decision that the issues should be tried.

29. Besides Exhibit 1 identified above, attached are the following exhibits:

* Exhibit 2 responds to Coleman Category A-1. Coleman complains that certain ballot envelopes marked as "accepted" were nonetheless rejected by local election officials. I have attached, for two voters identified by Coleman, a true and correct copy of the election materials that the Franken Committee obtained from local election officials. On our copies of the materials submitted by Coleman, a notation that the ballot was "rejected" is immediately evident. For the Court's convenience, a copy of the same ballot envelope, as submitted by Coleman to the Court, follows after.

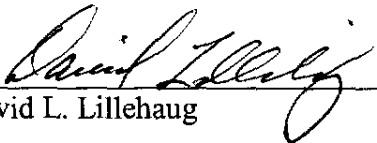
* Exhibit 3 responds to Coleman Category A-2. Coleman complains that certain ballot envelopes that were not marked as "rejected" were nonetheless rejected by local election officials. I have attached, for three voters identified by Coleman, a true and correct copy of the election materials that we obtained from local election officials. On these copies of the identical materials provided to Coleman, a notation that the ballot was "rejected" is immediately evident. For the Court's convenience, the copy of the same ballot envelope, as submitted by Coleman to the Court, follows after.

* Exhibit 4 responds to Coleman Category B. Coleman complains that some ballots were marked "rejected" for no discernible reason. I have attached, for one voter identified by Coleman, a true and correct copy of this voter's absentee ballot envelope that we obtained from local election officials. A notation that this voter was rejected due to "no registration card" is plainly evident. I have also attached, for another "Category B" voter, copies of the ballot envelope and absentee ballot application that Coleman provided to the Court. On the voter's absentee ballot application, the notation that the voter is "non-reg" is plainly evident.

* Exhibits 5 and 6 respond to Coleman Categories D-7 and D-8. Coleman attaches ballot envelopes from voters that he claims were rejected for lack of voter registration even though the voter was, in fact, registered. During our staff's cursory review of the materials submitted, staff noted for several of the "D-7" and "D-8" voters that, in some instances, the Secretary of State's official list of all registered voters in the State of Minnesota shows that no such person is registered to vote at the address provided on the absentee ballot envelope.

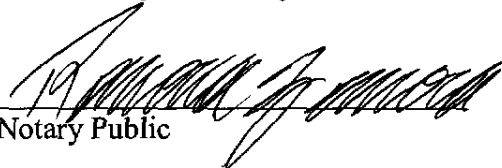
* Exhibit 7 responds to Category D-9. Coleman asserts that election officials erroneously rejected absentee ballots on the grounds that the absentee voter's witness was not registered to vote. During our staff's cursory review of the materials submitted, staff noted, for several of the "D-9" witnesses, that the Secretary of State's official list of all registered voters in the State of Minnesota confirmed that the witness was not registered to vote.

* Exhibit 8 demonstrates that some of the ballots Coleman now claims were rejected in error were on the counties' list of 1,346 wrongfully rejected absentee ballots, and that the Coleman campaign *itself* objected to the ballots being counted. Five examples are attached, along with the rejection form signed by the Coleman campaign representative who rejected each such ballot.



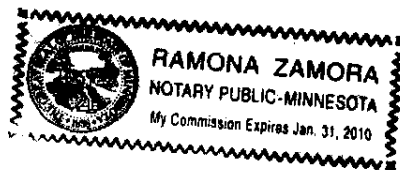
David L. Lillehaug

Subscribed and sworn to before me
this 22nd day of January, 2009.



Notary Public

4497135_1.DOC

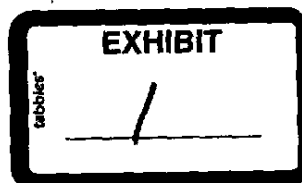


In re: 2008 United States Senate Election

**REPLY OF THE COLEMAN FOR SENATE CAMPAIGN TO THE MEMORANDUM
OF THE AL FRANKEN CAMPAIGN REGARDING "IMPROPERLY" REJECTED
ABSENTEE BALLOTS**

This eleventh-hour request by the Franken for Senate campaign is nothing more than a desperate attack on the efficacy of Minnesota's longstanding voting, canvassing and recount processes. The Minnesota State Canvassing Board ("MSCB") should summarily reject such a wholesale revision of Minnesota law. As stated within our November 14, 2008 correspondence to the MSCB (attached as *Exhibit A* – incorporated herein by reference), as well as in the Minnesota Attorney General opinion dated November 17, 2008 (attached as *Exhibit B* – incorporated herein by reference), the MSCB simply lacks the authority to take the requested action, both at the MSCB's November 18, 2008 meeting or during the administrative recount process. The proper forum for resolving the alleged disputes raised by the Franken campaign is an election contest under Minnesota Statutes Chapter 209 (which is not ripe relative to the United States Senate election in Minnesota until the MSCB certifies the results of such election). The Franken request as to absentee ballot envelopes must be rejected to enable the recount to proceed.

Moreover, even assuming *arguendo* that the MSCB may search for, open, verify and count duly-examined and rejected absentee ballots (either prior to the certification of the election results or during the recount process), the MSCB would nevertheless need to adhere to the same standards under Minnesota law that resulted in rejection of such ballots in the first place, and the Franken campaign has produced no evidence that any such ballots were improperly rejected. Finally, the Franken campaign's constitutional arguments are inapplicable and wholly unpersuasive.



I. The MSCB Lacks the Statutory Authority to Open, Verify, and Count Rejected Absentee Ballots.

Minn. Stat. § 204C.31 explicitly provides:

Subd. 2. State Canvassing Board. The State Canvassing Board shall consist of the secretary of state, two judges of the supreme court, and two judges of the district court selected by the secretary of state. None of the judges shall be a candidate at the election. If a judge fails to appear at the meeting of the canvassing board, the secretary of state shall fill the vacancy in membership by selecting another judge who is not a candidate at the election. Not more than two judges of the Supreme Court shall serve on the canvassing board at one time.

Subd. 3. Duties of canvassing boards. The returns from every election held in this state must be reported to a legally constituted canvassing board. **The duties of each canvassing board are limited to those duties specified in sections 204C.32 to 204C.39.**

Minn. Stat. § 204C.31 (emphasis added). Minn. Stat. § 204C.32 further provides:

Subd. 3. State canvass. The State Canvassing Board shall meet at the secretary of state's office on the second Tuesday following the state general election to **canvass the certified copies of the county canvassing board reports received from the county auditors and shall prepare a report that states:**

- (a) the number of individuals voting in the state and in each county;
- (b) the number of votes received by each of the candidates, specifying the counties in which they were cast; and
- (c) the number of votes counted for and against each constitutional amendment, specifying the counties in which they were cast.

Minn. Stat. § 204C.32 (emphasis added). This exhaustive list of duties obviously does not include an omnibus power to search for, open, verify and recount any ballots, much less ballots that were rejected by local election officials. The statute cite above clearly limits the MSCB's review authority to certified copies of the county canvassing board reports, *not* the actual ballots cast and clearly not extraneous election materials such as rejected absentee ballot envelopes which are not reflected within, referred to or otherwise incorporated within, any county canvassing board reports.

Indeed, such an action would be entirely **unprecedented**; we are aware of *no* occasion in Minnesota history in which the MSCB (or any county canvassing board) has second-guessed the decision of local election officials (*or even been requested to second-guess local election*

officials) relative to rejected absentee ballot envelopes. Moreover, in no administrative recount in Minnesota history are we aware of any occasion in which rejected absentee ballot envelopes were searched for, reviewed, opened and/or counted (including the September 2008 recount of the State Supreme Court primary election involving Deborah Hedlund and Jill Clark).

With respect to the recount process, it is true that the MSCB has jurisdiction to recount “valid ballots” cast in elections for statewide office as part of a statewide administrative recount. *See* Minn. Stat. § 204C.35, subd. 1. Minn. Stat. § 204C.35, subd. 3 states that this jurisdiction is:

limited...to the determination of the number of votes validly cast for the office to be recounted. **Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process** [emphasis added].

Thus, although the MSCB does have authority, during the recount process, to evaluate challenges to valid ballots cast in the election, rejected absentee ballot envelopes are not ballots cast in the election and were not certified by any local election officials. In agreeing with this analysis, the Attorney General’s Office recently explained as follows (*see Exhibit B*)(emphasis added):

[T]he rules of the Secretary of State relating to recounts are directed to the recounting of “ballots cast” (Minn R. 8235.0200) and “voted ballots” (Minn. R. 8235.0300, 8235.0700). Courts that have reviewed this issue have opined that rejected absentee or provisional ballots are **not cast in an election**. . . . This is not to suggest that there is no remedy for the wrongful rejection of absentee ballots. Minn Stat. ch. 209 (2008) sets forth the process for an eligible voter or candidate to commence a judicial election contest to challenge, among other things, “an irregularity in the conduct of an election.”

Letter from Kenneth E. Raschke, Jr., November 17, 2008 (attached) (emphasis added; internal quotations and citations omitted).

The Attorney General’s conclusion would entirely foreclose the Franken campaign’s contention that the MSCB’s statutory duties “grant[] to the [MSCBS] the ability to review rejected absentee ballots,” Franken Response at 8, because rejected absentee ballots do not fall

within the definition of "cast" or "voted" ballots.¹ Indeed, if the Franken interpretation is taken to its logical extreme, the MSCB would be compelled to physically review each and every ballot cast in the 2008 general election, as well as each and every rejected absentee ballot envelope, and then, to verify that each rejection of absentee ballot envelopes was proper, contact each and every voter whose absentee ballot envelope was rejected to attempt to determine whether or not the rejections were improper. Again, this is an unprecedented task which could take weeks or months.

Finally, should the Franken campaign wish to press forward with their arguments, the proper vehicle would be a notice of contest under Minnesota Statutes Chapter 209 - a process that is not ripe until certification has been finalized. (*See Franson v. Carlson*, 137 N.W.2d 835.) Moreover, the recount cannot commence with respect to the United States Senate race in Minnesota until the MSCB certifies the results of such election. Accordingly, the Franken campaign's request is nothing more than an unprecedented and unjustified delaying tactic to put off the recount for several weeks, even though certification of the election results could trigger both the recount and the notice of contest remedy.

II. Minnesota Law Does Not Permit the Counting of Improperly-Cast Absentee Ballots

Even assuming *arguendo* that the MSCB has the authority to undertake the requested activities, the MSCB would be required to follow the standards under Minnesota law, which state that an absentee ballot should be accepted and counted only if each of the following criteria apply:

- (1) The voter's name and address on the return envelope are the same as the information provided on the voter's absentee ballot application;
- (2) The voter's signature on the return envelope is the genuine signature of the individual who made the application for the ballot and the certificate has been completed as

¹ The Franken campaign refers variously to the MSCB's "mandatory" duty to open and count rejected ballots, and its mere "ability" to do so. *See Franken Response* at 8. Neither approach is correct under Minnesota law.

prescribed in the directions, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;

(3) The voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and

(4) The voter has not already voted at that election, either in person or by absentee ballot.

See Minn. Stat. § 203B.12, subd.2.

These standards are very objective and clear. The Franken campaign's public outcry about the application of these standards has not included any evidence of an actual improper rejection. Although the Franken campaign has provided generic declarations/affidavits of voters who think their ballots may have been improperly rejected, they have provided no written documents from counties that any voter had a properly-submitted absentee ballot rejections or any other written evidence that any local election officials acted improperly. Absent any evidence to the contrary, the decisions of local election officials should be presumed to have been accurate and correct; given the dearth of evidence that wrongdoing has occurred, the MSCB should proceed with certification of the results of the 2008 United States Senate election and allow the recount process to proceed.

III. The "Substantial Compliance" Standard Does Not Apply.

We share the Franken campaign's firm belief that "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Franken Response at 1 (internal citations omitted). However, it is also true that casting an absentee ballot is a "privilege" and not a "right." *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 n. 8 (Minn. 2003). In *Wichelmann v. City of Glencoe*, 273 N.W. 638 (Minn. 1937), the Minnesota Supreme Court clearly stated:

While the purpose of the [absentee ballot voting] statute is to extend the privilege of voting, its provisions clearly indicate an intention not to let down the bars necessary for honest elections. Absentee voting is an exception to the general rule and is in the nature of a special right or privilege which enables the absentee voter

to exercise his right to vote in a manner not enjoyed by voters generally. By the terms of the statute, it is purely optional with the absentee voters whether they shall exercise the rights and privileges conferred upon them. If an elector decides to exercise the privilege of absentee voting, he can register and vote, by the terms of the law, *only by complying with the provisions thereof* (emphasis added, citations omitted).

273 N.W. 638, 640.

As the Minnesota Supreme Court explained in *Bell v. Gannaway*, “[s]ince the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.” *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975). Furthermore, “[i]n order to preserve the purity and integrity of elections, then, the absentee voter statutes, so far as the acts and duties of the voter are concerned, must be held to be mandatory in all their substantial requirements.” *Id.* at 803 (emphasis added).² As such:

We hold that the failure of an absentee voter to properly execute his affidavit of residence and eligibility would require that the ballot be rejected if timely challenge is made. The legislature has required all absentee voters to sign and have properly witnessed an oath of residence and eligibility; that oath is little different in substance from the oath required of persons whose voting qualifications are in doubt when they vote in person. Minn.St. 204.17. The requirement of an absentee ballot oath represents an obvious attempt to insure, in a clear and forceful manner, that only properly qualified voters will exercise the privilege of absentee voting.

Id. at 804.

Nothing in *Anderson* or *In re Contest of School District Election* (both cited within the Franken brief) upsets this longstanding precedent. In *Anderson*, the issue was whether *individual county boards* had complied with the law, and not whether rejected absentee ballots should be opened and counted. The case is entirely inapplicable to the facts at issue here. *In re Contest of School District Election*, 431 N.W.2d 911 (Minn. Ct. App. 1989), is similarly inapposite. In that case, the Court of Appeals examined whether 29 “questionable” absentee ballots could be

² Further elaborating on this principle, in *Wichelmann v. City of Glencoe*, 273 N.W. 638 (Minn. 1937), the Minnesota Supreme Court explained that the obligation of an absentee voter to file a verified application for a ballot was a material condition of the absentee voting provisions and was, therefore, a condition precedent to voting. It then proceeded to disallow 26 votes based on the voters’ failure to file their applications.

considered valid despite the fact that the voter certifications were inserted into ballot secrecy envelopes instead of being affixed to the outside of such envelopes. Given the negligible nature of such voter mistake, the court concluded that such ballots should be counted. Importantly, the court *declined* to count those absentee ballots with certificates that were unsigned, or where signatures did not match the signatures on the voter registration applications. *Id.* at 913. While “mere irregularities” such as placing the certification in the wrong place could be “overlooked,” *id.* at 915, “[t]here are some mandatory requirements.” *Id.* Namely,

Absentee voters must file a verified application for a ballot with the city clerk prior to the election, and absentee voters must sign the voter’s certificate. These *statutory requirements* are mandatory because they concern a voter’s affidavit of residence and eligibility to vote, and are designed to ensure that only properly qualified voters will exercise the privilege of absentee voting. The signatures required on the application and voter certification are little different than the oath required of people voting in person, whose voting qualifications are in doubt.

Id. (emphasis added). In contrast, “[t]he school district election laws do not contain specific language making the insertion of the ballot envelope and voter certificate in the mailing envelope a condition precedent to the counting of the ballot. . . . The voting instructions listed in the statute *are merely directory.*” *Id.* (emphasis added). Here, unlike in *School District*, we are faced with clear statutory mandates that have good basis in common sense. As the Supreme Court noted in the context of election rules, “[e]ach is unquestionably relevant to the State’s interest in protecting the integrity and reliability of the electoral process.” *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1617 (2008).

The cited cases from other jurisdictions cited within the Franken brief are likewise inapplicable. In *Washington State Republican Party v. King County Div. of Records*, 103 P.3d 725 (Wash. 2004), the court applied the law of the *State of Washington* to determine that the state canvassing board had the power to re-examine miscoded ballots. The “substantial compliance” standard is not mentioned. *Id.* In *Eubanks v. Hale*, 752 So.2d 1113 (Ala. 1999), the court, applying the law of the *State of Alabama*, simply held that “the Legislature did not intend

that poll workers and election officials would be able to set aside “on-site” absentee ballots just because the voter did not check a box on an ‘on-site’ affidavit envelope when it did not require the checking of a space or box.” *Id.* at 1128. Finally, in *Election of U.S. Representative for Second Congressional Dist.*, 653 A.2d 79 (Conn. 1994), the court applied the law of the State of Connecticut to conclude that valid absentee ballots (not rejected absentee ballot envelopes) not counted during the initial canvass could be counted on recanvass. *Id.* In short, none of these cases are applicable here.

IV. The Equal Protection Clause Does Not Mandate the Franken Request.

The Equal Protection Clause simply does not apply to this matter. It is inappropriate to compare rejected absentee ballot envelopes to a mere “undervote or analogous defect,” and therefore it is simply not true that the state has created a “two-tiered system of review.” Franken Response at 15. Moreover, to the extent a “two-tiered system” exists, it is because, as clearly cited above, absentee voting is a privilege, not a right. Within the “tier” of absentee ballot envelopes, all voters are treated equally under Minnesota law, and all voters wishing to avail themselves of this privilege must follow the very clear, very simply and very objective rules. Accordingly, the Franken campaign’s equal protection arguments are wholly inapplicable.

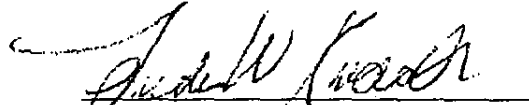
Moreover, it is misleading for the Franken campaign to imply that there is no vehicle for the Franken campaign’s vociferous complaints about the rejection of absentee ballots. As stated above and within our prior correspondence (Exhibit A), the proper forum for such a challenge is an election contest under Minnesota Statutes Chapter 209. Thus, the Franken campaign has adequate remedy under Minnesota law to argue that rejected absentee envelopes were improperly rejected, but such arguments must be raised, if at all, in an election contest.

CONCLUSION

For the aforementioned reasons, we urge the MSCB to summarily reject the Franken campaign's unprecedented request and not delay certification of the results of the 2008 United States Senate election in Minnesota.

Dated: November 18, 2008

KNAAK & KANTRUD, P.A.



Frederic W. Knaak # 56777

Greg T. Kryzer #346512

Jessica A. Johnson #389335

3500 Willow Lake Blvd, Suite 800

Vadnais Heights, MN 55110

(651) 490-9078

TRIMBLE & ASSOCIATES, LTD.

Tony P. Trimble, #122555

Matthew W. Haapoja, #268033

10201 Wayzata Boulevard, Suite 130

Minnetonka, MN 55305

(952) 797-7477

Attorneys for Applicant Coleman for Senate

EXHIBIT A

KNAAK & KANTRUD, P.A.

Attorneys at Law

Frederic W. Knaak*
H. Alan Kantrud**
Greg T. Kryzer**

**Also Licensed in
Wisconsin & Colorado
**Qualified neutral under
Rule 114 of the Minnesota
General Rules of Practice*

3500 Willow Lake Blvd., Suite 800
Vadnais Heights, MN 55110
Telephone: (651) 490-9078
Facsimile: (651) 490-1580

Of Counsel
Donald W. Kohler
Joseph B. Marshall
Thomas M. Dailey, P.A.
Theodore M. "Ted" Thompson

November 14, 2008

Minnesota Secretary of State Mark Ritchie
180 State Office Building
100 Rev. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Minnesota Judicial Center
Associate Justice G. Barry Anderson
25 Rev. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Ramsey County Courthouse
Assistant Chief Judge Edward J. Cleary
15 W Kellogg Blvd. Room 1550
Saint Paul, MN 55102

Minnesota Judicial Center
Chief Justice Eric J. Magnuson
25 Rev. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Ramsey County Courthouse
Chief Judge Kathleen R. Gearin
15 W Kellogg Blvd. Room 1210
Saint Paul, MN 55102

Dear Members of the Minnesota State Canvassing Board:

The undersigned represents Norm Coleman and Coleman for Senate. We are aware of media reports that Mr. David L. Lillehaug and/or other representatives of the Al Franken for Senate campaign intend to request that the Minnesota State Canvassing Board ("MSCB") search for, open and count absentee ballots envelopes which were rejected by local election officials and not counted on November 4, 2008 or included within county canvassing board results.

For the reasons set forth below, we urge you to deny this request if made by the Franken campaign at Tuesday's meeting of the MSCB. Additionally, if Mr. Lillehaug and/or any other representatives of the Franken campaign request or are granted time to address the MSCB at its meeting next Tuesday (whether relative to this or any other matter), we request an equal opportunity to address the MSCB. We also request that you forward to our office copies of any written correspondence received by you from the Franken campaign prior to next Tuesday's meeting (as we are copying Mr. Lillehaug on this correspondence).

As you are likely aware, Mr. Lillehaug made a similar request of the Hennepin County Canvassing Board ("HCCB") on Monday, November 10, 2008, which request was correctly rejected by a unanimous vote (5-0) upon the recommendation of Daniel Rogan, Senior Assistant Hennepin County Attorney. The reasons given by Mr. Rogan for rejecting Mr. Lillehaug's request of the HCCB are equally persuasive and applicable to such a request of the MSCB. We also agree with Minnesota Secretary of State Mark Ritchie's repeated public pronouncements on this matter, which mirror the advice of the Hennepin County Attorney; the opening rejected absentee ballot envelopes

is not within the jurisdiction of the MSCB, either at its meeting on Tuesday, November 18 or as part of the pending statewide recount.

The primary reason for denying the Franken campaign's request is jurisdictional: the MSCB has absolutely no statutory or other legal authority to grant such a request; disputes relative to absentee voters whose absentee ballots were rejected are within the province of an election contest under Minnesota Statutes Chapter 209A. Moreover, the reasons for rejecting an absentee ballot under Minnesota law are objectively clear and unambiguous, and the Franken campaign has provided absolutely no evidence that any absentee ballots anywhere in Minnesota were improperly or incorrectly rejected (in fact, media reports indicate that the one example the Franken campaign has proffered to date of an allegedly improperly-rejected absentee ballot application has proved wholly false and erroneous).

Accordingly, on behalf of the Coleman campaign, we request that the MSCB reject this request and continue with its statutorily-mandated business on Tuesday, November 18: final certification of the results of the 2008 Minnesota United States Senate election.

Duties of Minnesota Canvassing Board

Minn. Stat. § 204C.31 provides (emphasis added):

Subd. 2. State Canvassing Board. The State Canvassing Board shall consist of the secretary of state, two judges of the supreme court, and two judges of the district court selected by the secretary of state. None of the judges shall be a candidate at the election. If a judge fails to appear at the meeting of the canvassing board, the secretary of state shall fill the vacancy in membership by selecting another judge who is not a candidate at the election. Not more than two judges of the Supreme Court shall serve on the canvassing board at one time.

Subd. 3. Duties of canvassing boards. The returns from every election held in this state must be reported to a legally constituted canvassing board. The duties of each canvassing board are limited to those duties specified in sections 204C.32 to 204C.39.

Minn. Stat. § 204C.32 provides (emphasis added):

Subd. 3. State canvass. The State Canvassing Board shall meet at the secretary of state's office on the second Tuesday following the state general election to canvass the certified copies of the county canvassing board reports received from the county auditors and shall prepare a report that states:

- (a) the number of individuals voting in the state and in each county;
- (b) the number of votes received by each of the candidates, specifying the counties in which they were cast; and
- (c) the number of votes counted for and against each constitutional amendment, specifying the counties in which they were cast.

The MSCB also has jurisdiction to recount valid ballots cast in elections for statewide office as part of a statewide administrative recount. (Minn. Stat. § 204C.35, subd. 1.) However, Minn. Stat. § 204C.35, subd. 3 clearly states that the scope of any administrative recount is

limited...to the determination of the number of votes validly cast for the office to be recounted. **Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process [emphasis added].**

Accordingly, even though the MSCB will ultimately have decision-making authority relative to challenged ballots in the recount process, such ballots do not include rejected absentee ballot envelopes (which were not ballots cast in the election and were not certified by any local election officials):

Based on the foregoing, MSCB has no authority to take the course of action requested by the Franken campaign (or jurisdiction to grant the relief requested), whether at Tuesday's MSCB meeting or during the upcoming statewide recount. Minnesota law narrowly circumscribes the duties and authority of the MSCB at next Tuesday's meeting, limiting the same to certifying the number of votes received as certified by local canvassing boards. MSCB's authority during the recount process does not include taking the actions requested by the Franken campaign. There is simply no statutory justification for the Franken campaign's request to expand the scope of the MSCB's authority to include a "search and rescue" mission for allegedly disenfranchised voters.

Additionally, assuming for purposes of argument that MSCB had the authority to grant the Franken campaign's request, no evidence exists of any irregularities which would justify delaying the MSCB's certification of the election results to permit the recount to proceed.

Minnesota Statutes Chapter 203B governs absentee voting in Minnesota and establishes clear procedures for determining whether an absentee ballot constitutes a valid ballot to be counted by Minnesota election officials. On election day, the return envelopes containing all absentee ballots in each precinct are examined by two (2) or more election judges. Minn. Stat. § 203B.12, subd. 2. Each accepted envelope is marked "Accepted" with the initial or signature of an election judge on the envelope below the word "Accepted" *only if all of the following apply*:

- The voter's name and address on the return envelope are the same as the information provided on the voter's absentee ballot application;
- The voter's signature on the return envelope is the genuine signature of the individual who made the application for the ballot *and* the certificate has been completed by that person;
- The voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; **AND**
- The voter has not already voted at that election, either in person or by absentee ballot.

Id. If all of the foregoing apply, the absentee ballot must be accepted; however, if *any* of the foregoing do *not* apply, the ballot must be **rejected**. If all or a majority of the election judges find

that an absent voter has failed to meet one of the above requirements, they shall mark the return envelope "Rejected", initial or sign it below the word "Rejected" and return it to the county auditor.

To date, the Franken campaign has provided absolutely no evidence, other than naked assertions, that any absentee ballot envelopes were improperly rejected by any local election officials. In fact, the Bemidji Pioneer has reported that the only example proffered by the Franken campaign to date of an absentee ballot envelope that was improperly rejected by local election officials was false and erroneous (see attached).

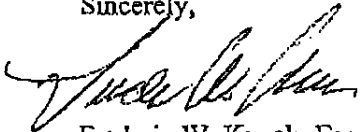
According to the *Bemidji Pioneer*, the Franken campaign called a press conference on Thursday, November 13, 2008 to assert that a Beltrami county woman's "stroke-impaired signature led to her ballot being rejected" purportedly because her absentee ballot envelope signature did not match the signature on her absent ballot application. However, this statement was false. The Beltrami County Auditor stated, "Beltrami County does not have one ballot that was rejected because signatures didn't match and the Franken campaign was clearly told that...I don't know where they are getting that from." (See *Bemidji Pioneer* article attached.)

There simply exists no evidence upon which to justify an expansion of the MSCB's authority beyond the narrow limits specifically circumscribed in Minnesota law. Without such evidence, particularly given the very limited scope of the MSCB's authority in this matter, there is simply no justification for granting the Franken campaign's request. Accordingly, the request must be rejected by the MSCB.

We note as a final matter that the Franken campaign is not without remedy as to the absentee ballot envelopes. Minnesota Statutes Chapter 209 provides that any candidate, after the canvassing board certifies the results of an election, can commence an election contest to determine whether any irregularities occurred during the election¹. Such irregularities would, of course, include improperly-rejected absentee ballots (which matters are not within the authority of the MSCB, *even during the pending manual recount of the United States Senate race.*

Please contact the undersigned with any questions in this matter. Thank you.

Sincerely,



Frederic W. Knaak, Esq.

cc: David L. Lillehaug, Esq. (via email, facsimile and U.S. mail)
Tony P. Trimble, Trimble & Associates, Ltd. (via email only)

¹Under Minn. Stat. § 209.02, an eligible voter, including a candidate, may contest the results of an election of a candidate to the senate or the house of representatives of the United States, or to a statewide, county, legislative, municipal, school, or district court office by filing a notice of contest with the district court in the county in which the contestant resides (and personally serve the notice on the winning candidate). This contest takes the form of a civil lawsuit (with the notice of contest replacing a summons and complaint) and is heard before a district court judge. The notice must be filed within seven (7) days of the certification of the election results by the State Canvassing Board; in the event of an automatic or discretionary recount (discussed above), the deadline for filing a notice of election contest is seven (7) days following certification of the recount results.

The Bemidji Pioneer

Beltrami official disputes Franken campaign over claim

Brad Swenson

Bemidji Pioneer - 11/14/2008

After using an alleged rejected absentee ballot from Beltrami County to file a statewide lawsuit, Al Franken's campaign later backed away.

The Franken campaign, in a lawsuit filed Thursday in Ramsey County District Court, alleged that an 84-year-old woman who lives in a Beltrami County nursing home had her absentee ballot rejected because her signature on the ballot didn't resemble one on file.

The woman apparently told a Franken campaign worker that a stroke prevented her from having a similar signature.

"Beltrami County does not have one ballot that was rejected because signatures didn't match," Beltrami County Auditor-Treasurer Kay Mack told the Bemidji Pioneer in a telephone interview Thursday evening.

"The Franken campaign was clearly told that — I do not know where they're getting that from," Mack said.

The story of the Beltrami woman denied her vote was the focal point of a lawsuit intended to get all 87 counties to release lists of absentee ballots they rejected and who they belonged to. It was the only example.

In a tight race subject to recount next week, incumbent U.S. Sen. Norm Coleman, a Republican, holds a 206-vote edge over Democrat Franken with 2.92 million votes cast.

"We are still investigating, Franken spokesman Andy Barr said Thursday night after asked about the Beltrami County denial by the Pioneer's Capitol Bureau. Barr then said it appears the woman's ballot was rejected because of a problem with a witness' signature.

But Mack doesn't believe that is the case, either.

"I have no idea" who the woman is, Mack said. "That's what I want to find out so I could follow up on it," said Mack, whose calls to the Franken campaign had yet to be returned Thursday evening.

"They asked that we provide a list of rejected absentees and the reason they were rejected," she said. "So we created a spreadsheet, something we never do for a normal election."

Names were listed along with columns to indicate whether the ballot was rejected by no signature from the voter, the witness was not registered to vote, there was no witness signature, that replacement ballots were sent and whether they were returned or if the ballot was returned late. In a couple of cases, the voter died after they voted so the ballot was pulled, she said.

"So there isn't even a column for signatures that don't match," Mack said, adding that a total of 69 absentee ballots were rejected in the county. "When I faxed this list to them, and e-mailed it to them, I put on the cover that Beltrami County did not have any absentees that were rejected because of signatures not matching. I clearly told them we did not have any."

To her knowledge, none on the list are 84 years old although Mack thought one might be 87 who lives in a senior housing unit.

"Regardless of what she might think happened or what she told them, it's not based on anything that actually happened with her ballot," Mack said. "Until I get a name from them, I can't even prove it. For all I know, we accepted her ballot."

In the case of a stroke victim, she said, the voter just needs to make a mark, whether it's an "X" or something else, and it's valid as long as it is witnessed.

Late Thursday night, the Franken campaign told The Associated Press that it was backing away from the Beltrami example, saying the woman's ballot had been rejected for a reason unrelated to her own signature.

The lawsuit asks for the rejected absentee ballot information from all 87 counties, with the campaign's recount theme of counting every ballot.

Mack said the Franken campaign is contacting voters on the rejected absentee list she gave it. A man came into Mack's office to tell of the contact.

"He came in and talked to us about it — they wanted him to sign an affidavit that his was rejected because he did not sign the back of his envelope," Mack said. "The affidavit has ... a statement that the eligibility certificate reflects my name and address and bears my genuine signature. So even though we told them on the spreadsheet it didn't have his signature on there, they're sending him an affidavit and having him sign something that says it did have his signature on it."

No matter what the man does, his ballot will not count because he did not properly sign it, Mack said. "It's the law."

EXHIBIT B



LORI SWANSON
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

November 17, 2008

SUITE 1800
445 MINNESOTA STREET
ST. PAUL, MN 55101-2134
TELEPHONE: (651) 297-2040

The Honorable Mark Ritchie
Secretary of State
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1299

Re: Canvass of Rejected Absentee Ballots

Dear Secretary Ritchie:

You request legal advice as to whether Minnesota law allows returned absentee ballots that were rejected by election judges pursuant to Minn. Stat. § 203B.12, subd. 2 (2008) to be reviewed in connection with the upcoming state-wide recount of the votes cast in the November 4 election for the U.S. Senate.

ABSENTEE BALLOT PROCESS

A person voting by absentee ballot, after marking the ballot in the presence of another registered voter, seals the ballot in a ballot envelope provided with the absentee voting materials. The ballot envelope is then placed into a return envelope, upon which is printed a "certificate of eligibility," to be signed and sworn to by the voter. The return envelope also contains a statement by the voter's witness that the unmarked ballot was displayed to the witness, the voter marked the ballot in the presence of the witness and, if not previously registered, the voter provided proof of residence required by Minn. Stat. § 201.061, subd. 3 (2008). *See* Minn. Stat. §§ 203B.07, 203B.08 (2008). The return envelope is then sealed and mailed or delivered by an agent to the county auditor or municipal clerk. Minn. Stat. § 203B.08 (2008).¹

On election day the unopened return envelopes are delivered to the election judges. Minn. Stat. §§ 203B.08, subd. 3, 203B.12, subd. 1 (2008). Two or more judges examine each return envelope. A return envelope is "Accepted" if a majority of the judges are satisfied that:

- (1) the voter's name and address on the return envelope are the same as the information provided on the absentee ballot application;

¹ Voters may also complete absentee ballots in person during the 30 days preceding the election at the office of the county auditor or other place designated by the auditor. Minn. Stat. § 203B.081 (2008).

- (2) the voter's signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;
- (3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and
- (4) the voter has not already voted at that election, either in person or by absentee ballot.

Minn. Stat. § 203B.12, subd. 2 (2008). The ballot envelopes are removed from the "Accepted" return envelopes and placed unopened in a separate absentee ballot container. *Id.*, subd. 4. After the last election-day mail delivery, each "Accepted" ballot envelope is opened, and the ballot contained therein is initialed by the judges and deposited in the ballot box.

If a majority of the election judges examining a return envelope find that the voter has failed to meet one or more of the above requirements, the return is "Rejected." The "Rejected" return envelopes are returned unopened to the county auditor.²

The procedures applicable to absentee ballots submitted by military personnel and persons residing outside the United States differ in certain respects from that described above. See Minn. Stat. §§ 203B.13-203B.27 (2008).³ However, the ultimate treatment of the "Accepted" and "Rejected" ballot return envelopes is similar.

APPLICABLE LAW

The purpose and scope of an administrative recount pursuant to Minn. Stat. § 204C.35, subd. 3 (2008) is as follows:

Scope of recount. A recount conducted as provided in this section is limited in scope to the determination of the number of votes validly cast for the office to be recounted. Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process.

² The "Accepted" return envelopes from which ballots have been removed are also retained and returned to the county auditor.

³ For example, pursuant to Minn. Stat. § 203B.23, subd. 2 (2008), an absentee ballot board examines all returned ballot envelopes immediately during the thirty days before the election, and a return envelope that is rejected at least five days before the election is treated as a "spoiled" ballot and the voter may submit a replacement in lieu thereof.

The Honorable Mark Ritchie
November 17, 2008
Page 3

Id., subd. 3 (Emphasis added). Likewise, the rules of the Secretary of State relating to recounts are directed to the recounting of "ballots cast" (Minn. R. 8235.0200) and "voted ballots" (Minn. R. 8235.0300, 8235.0700).

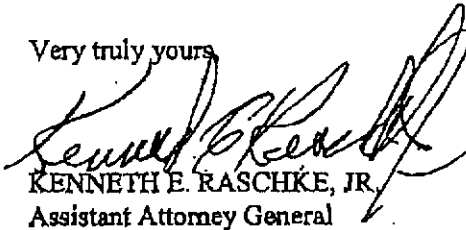
Courts that have reviewed this issue have opined that rejected absentee or provisional ballots are not cast in an election. *McDonald v. Secretary of State*, 153 Wash.2d 201, 204, 103 P3d 722, 723 (2004) (review of rejected absentee ballots not within the scope of statutory recount); *Nguyen v. Nguyen*, 158 Cal. App.4th 1636, 1665, N.27 (Cal. App. 2008) (registrar not permitted by statute to count rejected provisional ballots during recount). The Hand Count Instructions in the 2008 Recount Guide prepared by your office similarly state:

This is an **administrative** recount held pursuant to M.S. 204C.35 and M.R. 8235. It is **not** to determine who was eligible to vote. It is **not** to determine if campaign laws were violated. It is **not** to determine if absentee ballots were properly accepted. It is **not** - except for recounting the ballots - to determine if judges did things right. It is simply to physically recount the ballots for this race!

(Emphasis in original.) Further, your office has not advised us of any previous recount in Minnesota that has included reconsideration of rejected absentee ballot return envelopes.

This is not to suggest that there is no remedy for the wrongful rejection of absentee ballots. Minn. Stat. ch. 209 (2008) sets forth the process for an eligible voter or candidate to commence a judicial election contest to challenge, among other things, "an irregularity in the conduct of an election."

Very truly yours,



KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141 (Voice)
(651) 297-1235 (Fax)