

In Re: 2008 United States Senate Election

**MEMORANDUM OF THE AL FRANKEN
FOR SENATE COMMITTEE AND AL
FRANKEN REGARDING MISSING BALLOTS**

INTRODUCTION

As the Minnesota Supreme Court has explained, “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.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964))). Yet, by letter of today’s date to the City of Minneapolis, the Coleman campaign has requested that the city (and, presumably, this Board) disregard over one hundred votes that were cast on Election Day in Minneapolis Precinct 3-1, but that have since been lost. Both well-established law and common sense dictate that, if the missing ballots cannot be located, Minneapolis, Hennepin County, and the State Canvassing Board must accept the Election Day return provided by Minneapolis Precinct 3-1 as the proper tally. Any vote count that excludes or disregards the over one hundred missing ballots unlawfully disenfranchises Minnesota voters and undermines the integrity of the election.

Al Franken for Senate (the “Franken Campaign”) and Al Franken therefore respectfully request that the Board accept the precinct’s Election Day return as reflecting the proper tally of votes for purposes of the recount and the Board’s § 204C.33 certification.

FACTUAL BACKGROUND

I. Over One Hundred Ballots in Minneapolis Were Counted on Election Day but Have Since Been Lost.

On Election Day, 2,028 individuals voted in Minneapolis Precinct 3-1. According to Minneapolis reports and the Hennepin County canvass, 1,965 of these individuals cast votes in the U.S. Senate race. Yet only 1,896 ballots were produced for the recount in Minneapolis Precinct 3-1. In short, 133 ballots are now missing.

The figures provided to campaign officials by Minneapolis Director of Elections Cindy Reichert confirm the discrepancy. Ms. Reichert reported that the machine tape at Minneapolis Precinct 3-1 tallied 2,028 ballots. She further reported that the roster at the precinct contained 1,047 signatures; that its in-person new registrants totaled 932; and that it accepted 50 absentee ballots. This constitutes a total of 2,029 ballots. Finally, Ms. Reichert confirmed that the number of ballots actually produced on December 3, 2008 was a mere 1,896.

There is no doubt that the ballots are missing. As Deputy Secretary of State Jim Gelbmann stated during a December 5 interview, "There clearly is an envelope missing. There clearly are 133 ballots missing."¹

Minneapolis officials, including Mayor R.T. Rybak, agree. In a December 4 statement, Mayor Rybak said, "Our goal is to have every properly cast vote counted in the City of Minneapolis. ... In one precinct there were 2,028 ballots cast but only 1,896 ballots currently in our possession, and elections officials are doing everything possible to get to the bottom of these missing ballots."²

¹ The Uptake, *Overseas Ballots Discovered in Minneapolis*, Dec. 5, 2008, available at <http://www.youtube.com/watch?v=JVIXzRACKO0>.

² Rybak Press Release, *Mayor Rybak says Minneapolis will count every vote*, Dec. 4, 2008, available at http://www.ci.minneapolis.mn.us/mayor/news/20081204newsmayor_missingballots.asp (internal quotation marks omitted).

As the Pioneer Press reported on December 4,

During the recount, 1,896 ballots appeared — 133 fewer than on Election Day. On Wednesday, Reichert initially attributed the discrepancy to election workers feeding some ballots through machines twice. But after checking the roster and realizing there should be close to 2,029 ballots, she retracted that theory. On Thursday she said, “We have no explanation.” She said foul play was “highly unlikely,” but “we’re not ruling anything out.” To trace the trail of the envelope, Reichert said investigators interviewed the chief election judge at the polling place, a man she described as “very experienced.” At 12:15 a.m., after all the ballots had been fed through vote-counting machines, he and an assistant election judge drove sealed envelopes containing ballots directly to the warehouse, a short distance away, Reichert said. His precise memory of what transpired was “a little fuzzy,” but she said the election judge recalled a standard double-check with the worker who accepted the ballots at the warehouse. That double-check holds the key to believing a single envelope is missing, Reichert said. Currently, five ballot envelopes are accounted for. One is a different color and contains write-ins. The other four are labeled “2 of 5,” “3 of 5,” “4 of 5” and “5 of 5.” There is no “1 of 5.” “At this point, we believe it’s missing,” she said. She suspects it is “in some odd place in our warehouse.”³

Because of the extraordinary circumstances, the Secretary of State’s office gave the City of Minneapolis until December 16 to locate the lost ballots. According to Ms. Reichert, officials undertook a comprehensive search.⁴

But on December 8, the city announced that the search was complete and the ballots could not be located.⁵ They were simply missing.

ARGUMENT

The recount in this race began automatically, pursuant to Minn. Stat. § 204C.35, after it appeared there was a difference of less than one-hundredth of a percent between the totals for the

³ Pioneer Press, *On last day's eve, envelope with 133 votes is missing*, Dec. 4, 2008, available at http://www.twincities.com/allheadlines/ci_11142337. The initial, and since recanted, explanation that some ballots were run through the machines more than once, and therefore that no ballots are missing, is simply implausible on its face: The number of signatures on the roster, new registrants, and absentee ballots leave no doubt that the ballots are missing.

⁴ See, e.g., CNN, *Missing ballots stall Minnesota Senate recount*, Dec. 4, 2008, available at <http://www.cnn.com/2008/POLITICS/12/04/minnesota.recount/index.html>.

⁵ See, e.g., New York Times, *Search Ends for Ballots in Minnesota*, Dec. 8, 2008, available at <http://www.nytimes.com/2008/12/09/us/politics/09minnesota.html>.

two candidates. It is hard to imagine a situation in which the preservation of each vote could be more vitally important. Yet since Election Day, in Minneapolis Precinct 3-1, over one hundred ballots have been lost. This Board cannot countenance such blatant disenfranchisement. Rather, it must accept the Election Day returns.

I. Clearly Established Law Requires that, when Ballots Are Missing, Election Day Returns Establish the Vote Totals.

Long-standing precedent makes clear that, when missing ballots cannot be found, Election Day returns must be used to establish the vote totals. As the Minnesota Supreme Court has recognized, a ballot serves as the best evidence of a vote. *Moon v. Harris*, 142 N.W. 12, 14 (Minn. 1913). But when ballots are missing, or their integrity is otherwise compromised, election officials must turn to the next best evidence: here, the vote totals provided by election officials on Election Day. *See id.*; *see also Stemper v. Higgins*, 37 N.W. 95 (Minn. 1888) (recognizing that when ballots have not been properly safeguarded, other evidence should be used as indication of vote).

Quite simply, “while the ballots are original evidence, the official results are *prima facie* evidence of the votes cast. Where the original ballots cannot be deemed trustworthy, *or as here, are missing, the official results are the best evidence.*” *McDunn v. Williams*, 620 N.E.2d 385, 402 (Ill. 1993) (emphasis added). This principle is clearly established in both Minnesota and across the country—and has been for well over a century. *See Newton v. Newell*, 6 N.W. 346, 347 (Minn. 1880) (“The ballots cast at an election may . . . be resorted to for the purpose of disputing the returns of the board of canvassers, and of investigating and ascertaining the actual state of the vote. *But to entitle them to be used for these purposes it must affirmatively appear*

that they have, in the language of section 18 of the election law, been “carefully preserved.”) (emphasis added); *Sullivan v. Ebner*, 262 N.W. 574, 576 (Minn. 1935) (citing *Newton* and concluding that trial court was correct to reject recounted ballots as likely subjected to tampering and accepting the canvassed returns of the village canvassing board). *See also Graham v. Reid*, 779 N.E.2d 391, 396 (Ill. App. 2002) (“the returns are prima facie evidence of the results when the ballots in a precinct are missing”); *Henderson v. Maley*, 806 P.2d 626 (Okl. 1991) (where there is reasonable doubt as to the integrity of the ballot boxes “no recount is had and the returns of the precinct officials prevail”); *Thoms v. Andersen*, 235 N.W.2d 898 (S.D. 1975) (holding that, where ballots were missing from recount, the court should have avoided disenfranchising more than 200 electors by using official canvass in place of ballots themselves); *Wilson v. Burridge*, 346 P.2d 282 (Wy. 1959) (“The fact alone that only 505 of 529 ballots were found and recounted impugns the integrity of the ballots to such an extent that the recount cannot prevail.”); *Burke v. Beasley*, 75 So.2d 7 (Fla. 1954) (holding that where integrity of ballot box had been compromised, the ballots lost their probative force and were not admissible to impeach the Election Day return); *Smith v. Kincaid*, 235 S.W.2d 62 (Ky. 1951) (“[W]here the ballots were missing from one of the boxes, they, of course, could not be examined as evidence of the result of the election”; instead, “the original count made by the board of election commissioners [w]as the best evidence of which the case was susceptible.” (citing *Frazier v. Wright*, 228 S.W.2d 424 (Ky. 1950))); *Swift v. Registrars of Voters of Milton*, 183 N.E. 727 (Mass. 1932) (holding that it was proper to accept election figures returned by precinct officers in lieu of missing ballots); *Madrid v. Sandoval*, 13 P.2d 877 (N.M. 1932) (where ballots had not been properly preserved, official returns, rather than recount tally, governed); *State ex rel. Jarrett v. Board of Canvassers*, 128 S.E. 821 (W.Va. 1924) (the board of canvassers erred in holding that the ballots were the

best evidence of the result of the election where there was evidence of compromised ballots); *Brown v. Crosson*, 88 N.W. 366 (Iowa 1901) (holding that that recount totals could not be used from locality in which ballots had been compromised following the election).⁶

Common sense supports the conclusion reached by the overwhelming body of case law. A missing vote simply cannot be recounted. *See Jenkins v. Martin*, 154 S.W.2d 242 (Ky. 1941) (“If the ballots have been tampered with, naturally a recount in no way impeaches the original figures for the same thing is not counted.” (internal quotations omitted)). And an incorrect result indisputably will result if officials attempt to tally remaining votes as though the missing votes did not exist.

The lone Minnesota district court case primarily relied upon by the Coleman campaign is fully in accord with this well-established and common-sense principle. That case, *Purcell v. Sparks*, C5-02-1938 (Minn. Tenth Judicial District 2002), took a similar approach in a situation much more complicated than this one: both the original ballots and the official Election Day results were compromised. On Election Day evening, there were 17 more votes than voters. As

⁶ The list of supporting citations is truly extensive, and not contained in full in this brief. Additional cases include, e.g., *Conley v. Rice*, 67 S.W.2d 478, 480 (Ky. App. 1934) (holding there could be no recount of a precinct after it was discovered after the recount began that 32 ballots were missing from a ballot box); *Talbott v. Thompson*, 182 N.E. 784 (Ill. 1932) (considering “all the attending facts and circumstances” where both the judges and the custodians have failed properly to perform their duties); *Phillips v. Kincaid*, 240 S.W. 737, 738 (Ky. App. 1922) (allowing ballots to be recounted only where the ballot box has been kept as the law requires); *Burd v. Meadows*, 124 S.W.2d 85, 86 (Ky. App. 1917) (trial court denied request for a recount where the integrity of the ballots had clearly been compromised, as recount would have been useless); *Rich v. Young*, 197 S.W. 442, 44 (Ky. App. 1917) (allowing ballots to be recounted only where the ballot box “has been kept as the law requires”); *Ottley v. Herriford*, 170 S.W. 205, 210 (Ky. App. 1914) (holding that, where there was evidence that the ballots had been tampered with, best evidence is the return certified by the election officers); *Browning v. Lovett*, 94 S.W. 661, 663 (Ky. App. 1906) (same, where the ballots had been stolen from one box and those in another had been tampered with); *Bailey v. Hurst*, 68 S.W. 867, 869-70 (Ky. App. 1902) (same, where ballots had been tampered with or lost); *Frazier*, 228 S.W.2d at 425 (same, where ballots to be recounted were missing from ballot box); *Howser v. Pepper*, 79 N.W. 1018, 1019 (N.D. 1899) (indicating that “the preliminary question as to whether the ballots offered to impeach the returns are the original ballots, and in the same condition as when cast by the electors”); *id.* at 1020 (holding that official canvassing results would be controlling where the integrity of the ballot boxes were not maintained between the election and the recount); *see also Behrensmeyer v. Kreitz*, 26 N.E. 704 (Ill. 1891) (allowing extrinsic evidence to determine the vote of a missing ballot); *Stemper v. Higgins*, 37 N.W. 95, 97-98 (Minn. 1888) (allowing parol evidence by judges as to the number of votes actually cast, counted, and publicly declared for the several candidates where the return was not conclusive and the ballots had not been adequately protected).

a result, an election judge (with the apparent agreement of the opposing party's judge) burned 17 ballots in her fireplace, apparently without ever actually counting them.

The State Canvassing Board, on a 4-1 vote, decided to revert to the election night machine tape number for one candidate and to use the recount number for the other candidate. In this way, neither candidate was prejudiced by the ballot burning. The District Court held that the 17 intentionally destroyed ballots could not be counted for either party, because the choice of those 17 voters could not "be imputed, based on a probability, or an evidentiary penalty."

In this case, there is no indication that the official Election Day results were compromised, nor that local officials intentionally destroyed ballots. Here, the Election Day count and the Hennepin County canvass results are based on real, counted ballots, cast by real voters, not on speculation or "probability" as to what might have been on burned ballots. Unlike the Mower County case, to ignore the machine count would reduce each candidate's vote, and disenfranchise more than one hundred voters.

In a bizarre turn, the Coleman campaign attempts to distinguish the enormous volume of case law from Minnesota and other states on the theory that the Election Day count should be used only when *all* of the ballots have been lost. Such a position is absurd and completely ignores the disenfranchised voters. By that reasoning, when 2,000 votes have been cast, and counted by machine, and then 1,999 ballots are lost, the continued existence of a single ballot would require that the Board declare the winner to be the choice of a single voter. Such a result is required neither by the case law nor by fundamental principles of justice.

II. For Purposes of the Recount and the § 204C.33 Certification, Respectively, Minneapolis, Hennepin County, and the State Canvassing Board Must Accept the Election Day Return Provided by Minneapolis Precinct 3-1.

As numerous officials have recognized over the last few weeks, the city, the county, and this Board have the authority and duty under state law to accept the Election Day return.⁷

In this recount, local election units have been recounting the votes cast in their precincts. *See* Minn. Stat. § 204C.35, subd. 1; Minn. R. §§ 8235.0600, 8235.0800.⁸ For the purpose of the recount, therefore, officials in Minneapolis must accept the Election Day return provided by Minneapolis Precinct 3-1 as reflecting the proper tally for the precinct. The purpose and the structure of the recount statute itself make this clear. The recount is designed to determine “the number of votes validly cast for the office to be recounted.” Minn. Stat. § 204C.35, subd. 3. Basing such a determination on a manual recount of the ballots is literally not possible when ballots are unavailable for review and recounting. The next-best evidence, the Election Day return, therefore must be relied upon in the ballots’ absence.

The same is true for purposes of the State Canvassing Board’s certification. The Board must “canvass the certified copies of the county canvassing board reports received from the county auditors.” Minn. Stat. § 204C.33, subd. 3. It “shall prepare a report” that states three things:

- (a) The number of individuals voting in the state and in each county;

⁷ *See, e.g.,* Minnesota Daily, *City acknowledges missing ballots*, Dec. 4, 2008, available at <http://www.mndaily.com/2008/12/03/city-acknowledges-missing-ballots> (reporting that “Gelbmann said the canvassing board, which certifies recount numbers, will still meet as planned on Dec. 16. If the ballots aren’t found by then, the city would likely report totals from the precinct as tallied on Election Day. The discrepancy would be clear, and the board would decide whether to certify the numbers.”); *see also* Pioneer Press, *On last day’s eve, envelope with 133 votes is missing*, Dec. 5, 2008, available at http://www.twincities.com/ci_11142337 (quoting Deputy Secretary of State Gelbmann); Star Tribune, *Minnesota Senate race recounting is done (or not)*, Dec. 6, 2008, available at <http://www.startribune.com/politics/national/senate/35607614.html> (stating that Secretary of State Ritchie explained that “when ballots have gone missing in the past . . . the machine count tabulated on Election Day has been used.”).

⁸ *See also* Statewide Recount Assistance Plan, available at http://www.sos.state.mn.us/docs/statewide_recount_assistance_plan.pdf.

(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.

Id. Finally, it “shall sign the report and certify its correctness.” *Id.* See also *McVeigh v. Spang*, 228 N.W. 155 (Minn. 1929) (“[T]he important function of the [canvassing] board is to canvass the vote and determine the number cast for each candidate. When they have done that and stated and declared the number of votes found cast for each candidate they have declared the result of the election.”).

In the recount, the State Canvassing Board is to consider “the ballots cast in the election,” Minn. Stat. § 204C.35, subd. 3. Were the State Canvassing Board to rely on a manual recount of the ballots now available from Minneapolis Precinct 3-1—notwithstanding the 133 ballots that have been erroneously misplaced and excluded—it would not be considering all of the ballots cast in that precinct. Instead, it would be signing and certifying the correctness of a report that cannot be correct. This is contrary to law. The missing ballots therefore preclude the State Canvassing Board from relying on the manual recount for this particular precinct. Rather, to fulfill its duties, the State Canvassing Board must, if the ballots are not found, accept the Election Day return provided by Minneapolis Precinct 3-1 as reflecting the proper tally.

III. A Contest Is Not the Proper Forum for Addressing Missing Ballots in the First Instance.

An election contest is not the exclusive forum for addressing missing ballots, and it is not the proper forum for addressing them in the first instance. The canvassing process—not the contest—is designed to tally and certify the “correct” number of votes. See Minn. Stat. § 204C.33, subd. 3. Likewise, the recount is designed to determine “the number of votes validly cast for the office to be recounted.” *Id.* § 204C.35, subd. 3. In order to accomplish these

functions, the city, the county, and the Board must address the missing ballots at the canvassing and recount stages—either by finding them or by relying on the Election Day return.

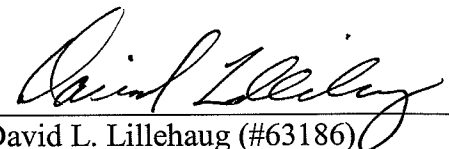
Moreover, Minnesota’s election law is designed to provide several tiers of review, all of which supply an essential safeguard. A contest is not an adequate replacement for the canvass or the recount, but is rather an additional layer of review. Unlike in the initial count, recount, and canvass, the burden of proof in an election contest rests upon the contestants. *See Green v. Independent Consol. School Dist. No. 1*, 89 N.W.2d 12, 16 (Minn. 1958); *Sullivan v. Ebner*, 195 Minn. 232 (1935). Finally, a contest involves delay and litigation and Minnesota precedent makes clear that the statutory framework aims to achieve “a reasonably prompt determination of the election result,” *School District*, 431 N.W.2d at 915 (citing *Bell v. Gannaway*, 227 N.W.2d 797, 802 (1975)), and to “avoid the necessity of an election contest where possible,” *Andersen*, 119 N.W.2d at 5.

CONCLUSION

For the foregoing reasons, the Franken Campaign and Al Franken respectfully submit that (unless the missing ballots are found), Minneapolis, Hennepin County, and the State Canvassing Board accept the Election-Day return provided by Minneapolis Precinct 3-1 as reflecting the proper tally of votes for purposes of the canvass, the recount, and the § 204C.33 certification.

Dated: December 10, 2008

Respectfully submitted,



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** Pro hac vice motions pending.*