
In Re: 2008 United States Senate Election

**SUPPLEMENTAL MEMORANDUM OF
THE AL FRANKEN FOR SENATE
COMMITTEE AND AL FRANKEN**

Al Franken and the Al Franken for Senate Committee (the “Franken Campaign”) respectfully submit this Supplemental Memorandum to address two critical issues.

First, it has now become clear that a large number of counties have failed, in violation of the unambiguous requirements of state law, to canvass fully the results of the election. As a result, on the record before it, this Board cannot certify the accuracy of the vote totals reported from those counties as if they had done so.

Second, the Attorney General’s November 17, 2008 letter to Secretary of State Ritchie (and through him to this Board) contains significant error. In fact, both state law and key decisions from other states require that improperly rejected absentee ballots be included in the recount in this election. The Board can, and should, make it clear that those ballots can and should be included during the course of this recount.

I. The Board Cannot Certify Any County Canvass Report Submitted Without a Complete Canvass of Every Precinct Within the County.

Pursuant to Minn. Stat. §§ 204C.26, subd. 1 and 2 and § 204C.27, the election officials in each precinct must, within 24 hours after the polls close, furnish to the county auditor two sets of precinct summary statements that report, among other information, the total votes cast for each candidate. In a statewide election, the county canvassing board must then “canvass the general

election returns delivered to the county auditor.” Minn. Stat. § 204C.33, subd. 1. That county canvass report must include, among other information, the number of persons voting, the number of persons registered to vote, and the votes that each candidate received “in each precinct.” Id. (emphasis added.) Consequently, the county canvass must comprehend the complete voting activity within that county, including votes received by each candidate, on a precinct-by-precinct basis.

The Franken Campaign has now become aware that, contrary to state law, at least 49 of the 87 counties in the State in fact failed to canvass every precinct. These unverified and incomplete county canvassing board reports have been presented to the Secretary of State as if they contain a complete canvass of every precinct as required by law. The State canvassing report to be presented to the Board on November 18, 2008, will be based upon these same unverified county canvassing board reports and will therefore materially fail to comply with Minnesota canvassing law requirements designed to ensure that the information this Board is being asked to certify as correct is, in fact, complete and correct. Minn. Stat. § 204C.33, subd. 3.

As a result of these errors, the Board cannot accept the county reports as the basis for its own certification of the accuracy of the voting totals. The Board has the authority, by declining to accept these inaccurate and incomplete reports, to require each county canvassing board that has failed to comply with its obligations to canvass the omitted precincts (as required by law) and submit a fully compliant report to their respective county auditors and the Secretary of State. In the absence of such a record, this Board cannot “certify [the] correctness” of the vote totals. See id.

II. The Attorney General's Letter Misstates the Law Regarding the Recounting of Improperly Rejected Absentee Ballots.

In its November 17, 2008 letter, the Attorney General's Office responded to Secretary Ritchie's request for legal advice concerning whether absentee ballots that were rejected by election judges could be reviewed, and if found valid, included in the votes accorded to the candidates during the recount process. That letter, while recognizing that Minnesota law may well provide a means for reviewing those ballots, incorrectly leaves the distinct impression that the recount cannot include that review and the counting of any absentee ballot wrongly rejected during the election judges' initial counting of the ballots. With all due respect to the Office of the Attorney General, the November 17, letter contains significant errors.

First, the letter premises its advice to Secretary Ritchie on a misreading of Minn. Stat. § 204C.35, subd. 3 which defines the scope of the recount as including a consideration of the (1) the ballots **cast** in the election and (2) the election judges' certified summary statements. "Ballots cast" include all ballots that voters have submitted to election officials for acceptance and counting, and not merely those that the election officials have in fact accepted and counted. See Memorandum of the Al Franken for Senate Campaign Committee and Al Franken Regarding Improperly Rejected Absentee Ballots.

Second, the letter fails even to cite, much less address or distinguish, the two controlling Minnesota cases on the issue of recanvassing and counting rejected ballots, In re Anderson, 119 N.W. 2d 1 (Minn. 1962) and In re Contest of School Dist., 431 N.W. 2d 911 (Minn. App. 1988). Application of these cases is necessary to understand the authority of the canvassing board or recount officials to examine and correct an "obvious error" or any other mistake in counting or recounting ballots validly cast. Likewise, the letter neglects the Equal Protection recount requirements set forth the United States Supreme Court's decision in Bush v. Gore, 531 U.S. 98

(2000), and its prohibition on disparate treatment of ballots cast by voters, and the constitutional implications of the proposed disenfranchisement of qualified voters.

Third, the letter's discussion of McDonald v. Sec. of State, 153 Wash. 2d 201, 103 P.3d. 722, 723 (Wash. 2004), decided on December 14, 2004, is simply misleading. The Washington Supreme Court, in fact, *directly confirmed* that ballots that had been omitted during the original canvass of the election as a result of administrative error *could* be counted during a manual recount. See Washington State Republican Party v. King County Div. of Records, 153 Wash. 2d 220, 103 P. 3d 725 (Wash. 2004) (decided in the same election on December 22, 2004). Contrary to the letter's suggestion, these Washington cases provide support for this Board's ability to review and take into account the impermissibly rejected ballots.

In McDonald, the Washington Supreme Court held that it would not issue a writ of mandamus to compel the canvassing board to re-examine rejected absentee ballots because the Washington statutes governing a recount permitted only a "retabulation" of the ballots previously **counted**. (In contrast, Minnesota law mandates the recounting of all votes **validly cast**.) In Washington State Republican Party, however, the Court held that *it was proper for canvassing boards to re-examine absentee ballots where "there was an apparent discrepancy or an inconsistency in the returns."* The Court then explained the distinction between its ruling in McDonald and its decision in Washington State Republican Party as follows:

In our decision in [McDonald], issued December 14, 2004, we held that under Washington's recount statutes, 'ballots' are to be 'retabulated' only if they have been previously counted or tallied, *subject to the provisions of RCW 29A.60.21* (Emphasis added.) The quoted language, referencing the 're-canvassing' statute, acknowledges that under proper circumstances a canvassing board may decide that ballots should be re-canvassed before certification for a recount...Our prior opinion did not hold that the re-canvassing statute may not be employed by canvassing boards during a recount.

* * * *

The question here is thus whether RCW 29A.60.210 authorized King County Canvassing Board to recanvass 573 ballots in question. RCW 29A.60.210 provides in part:

Whenever the canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any precincts in the county.

* * * *

As noted, the King County Canvassing Board says that these 573 ballots were previously coded by election employees as having 'no signature on file.' The Board has now concluded that this designation may have been in error, since election workers failed to check the signatures against voter records on file, as required by RCW 29A.40.110(3) and King County rules for this election. The board has therefore decided to recanvass the ballots and correct any such errors that it finds.

* * * *

...the King County Canvassing Board properly concluded that it had authority to recanvass the subject ballots pursuant to RCW 29A.60.210.

103 P. 3d at 222-26

The Franken Campaign is not here seeking a judicial writ of mandamus, as in McDonald. Rather, it contends only that Minnesota election law, as interpreted by the courts of this State, and in light of the Equal Protection requirements articulated in Bush v. Gore, permits and requires the re-examination and counting of improperly rejected absentee ballots. The citation of McDonald, without explanation or a discussion of Washington State Republican Party, is misleading.¹

Lastly, the Attorney General's letter cites the Secretary of State's 2008 Recount Guide for the proposition that the recount cannot take account of improperly rejected absentee ballots.

¹ The Nguyen case upon which the Attorney General also relies is inapposite to the matter before this Board. There, the court refused to order the reconsideration of rejected provisional ballots because there was no argument advanced that election officials had erred by counting ballots of ineligible voters. Here, the Franken Campaign has contended that election officials erred with respect to the rejection of validly cast ballots.

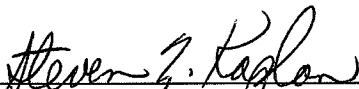
That argument is without merit. The Secretary's Guide is, as it clearly states, merely a "best practices" set of examples and is expressly not intended to override any legal requirements. It was not adopted pursuant to the notice and comment provisions of the state administrative procedures act. It is, at best, an informal guide to the public. Accordingly, it is not an articulation of state law and cannot be relied upon to support the proposition for which it is advanced.

For the reasons stated above and in the Franken Campaign's initial memorandum, the Board should not certify the results of the county canvass boards. Rejected absentee and mailed ballots, if "validly cast," should be counted.

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Respectfully submitted,

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