



Franken vs. Coleman:

Al Franken's Attempts to be Seated as U.S. Senator for Minnesota —

No Laughing Matter

A White Paper Prepared by Leslie Rutledge*

For the Republican National Lawyers Association

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"[T]he true principle of a republic is that the people should choose whom they please to govern them," according to Alexander Hamilton. 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876) (hereinafter cited as Elliot's Debates).

BACKGROUND

The election results of Minnesota's U.S. Senate race remain undetermined and are now held in the hands of the Minnesota court system—where they should be. Following the statewide administrative recount of the election results from November 4, 2008, the Minnesota State Canvassing Board declared, despite numerous irregularities that give rise to an argument that the determination of the results violates the Equal Protection Clause, that Democrat Al Franken had received the highest number of votes in the election (1,212,431 for Franken and 1,212, 206 for Coleman). On January 6, 2009, Republican incumbent Senator Norm Coleman filed an election contest challenging whether the recount properly included legally cast absentee ballots, whether double-counting of duplicate ballots along with the original ballots occurred, and whether alleged missing ballots were properly accounted for during the recount process. In bringing this suit, Coleman is asking the Contest Court to determine which candidate received the highest number of legally cast ballots.

Al Franken's response has been to try to short-circuit the contest and ignore the question of whether the recount results reflect the will of the voters. First, Franken petitioned Minnesota Governor Tim Pawlenty and Secretary of State Mark Ritchie to issue a certification to the President of the Senate of the United States of the election results determined by the Canvassing Board. This was in such clear violation of Minnesota law that even his fellow Democrat, Secretary of State Mark Ritchie, refused to sign such a certificate. Then, when that failed, Franken went to the Minnesota Supreme Court to petition the court to order the state officials to

issue the election certification. *Franken v. Coleman*, Minn. S.Ct. No. A09-64 (2009). In this case, he is arguing that Minnesota law requires, and also that federal law pre-empts state law and requires, issuance of the certification. Not only is the law in Minnesota clear—the Governor and Secretary of State of Minnesota should not issue an election certificate for the office of United States Senator until the election results are clear and no longer in dispute as determined by the Contest Court—but the federal arguments are specious.

Moreover, whatever the legal authority for election certification, as a practical matter, where there is doubt as to the actual winner of an election, the process to finally determine the winner should proceed until there is no longer reasonable doubt, which is certainly not the case in the Coleman-Franken Senate race. Among other issues, there are approximately 12,000 rejected absentee ballots, approximately 4,800 of which the Contest Court decided on February 3, 2009, should be reviewed. And even two Democrat elections officials conceded under oath in the first week of the contest that there likely are a significant number of valid ballots that were not counted. As Alexander Hamilton said during the debates on the federal constitution, “This great source of free government, popular election, should be perfectly pure.” (Elliot's Debates). It is important that these significant potential errors, along with others that could overturn the recount results, should be settled to ensure that voters are convinced the elections were “pure.” And if Franken, who has been on the record all throughout November and most of December to “count every vote,” was sincere in this sentiment, then he would have been side-by-side with Coleman in asking the Contest Court to ensure that all these rejected absentee ballots were reviewed under a uniform standard. Instead, Franken’s lawyers have resisted this effort of Coleman’s, and Franken is in a different court, akin to a three-ring circus, demanding that the

election be certified and that he be seated, with complete disregard for statutory law stating otherwise.

The Minnesota Supreme Court should allow the Contest Court to continue, without premature or provisional certification of Al Franken, to allow it adequate time to determine if the Canvassing Board was in substantial compliance with the Equal Protection Clause in the treatment of the ballots in question, and correctly determined the winner of the U.S. Senate race. Only after a determination of the contest does the law provide for the Governor and Secretary of State to issue a certification.

ISSUES AND ANALYSIS

The Citizens of Minnesota Are Better Represented By an Open Seat in the U.S. Senate Than One Filled Provisionally, in Case the Seating is in Error

Franken is so anxious to get to the U.S. Senate, whether or not he is the winner, that he even suggests that he could be seated provisionally, subject to the decision of the court in the election contest. But if Franken is seated in the U.S. Senate, and later determined not to be eligible to be seated if he was not the actually elected candidate, then for whatever period he was “provisionally” seated his actions would be in question. If Franken is not seated, provisionally or otherwise, in advance of a final determination and no Senate vote is close, the interests of the citizens of Minnesota are adequately represented by the vacant seat. If Franken is seated, however, and casts the vote that makes the difference in the U.S. Senate on something contentious, then the vote, and Senate action, could later be subject to a legal challenge. In either scenario, Minnesota and the country are better off with a vacant seat until the situation is finally resolved.

Franken Selectively Ignores Clear Statutory Provisions In Order To Make His Plea to Be Seated In the U.S. Senate before the End of the Contest of the Recount Results

In his petition, Franken has asked the court to turn a blind eye to one subdivision of the statute that he relies upon to request provisional certification, which states in part: “In case of a contest, an election certificate shall not be issued until a court of proper jurisdiction has finally determined the contest.” Minn. Stat. § 204C.40 subd. 2 (2008). The language of subdivision 2 is clear and unambiguous, and thus a need to construct its meaning is unnecessary. Courts have long held that when statutory language is precise and unambiguous, the courts are not at liberty to construe it. *Knopp v. Gutterman*, 102 N.W.2d 689 (1960).

In presenting his case, Franken argues that subdivision 1, on which he relies, is “more specific” with regard to certifications being issued in United States Senate races, and, therefore, it is the controlling subdivision of section 204C.40. Thus, Franken boldly asks that the court completely ignore the clear language of subdivision 2 of that statutory provision. While subdivision 1 addresses the preparation and method of delivery for a certificate of election, it does not speak to the time in which the certification must be made. Subdivision 2, entitled “Time of Issuance; certain offices,” specifically addresses not only the amount of time for which a certificate shall be issued, but it clearly states that a certification shall not be issued in the case of a contest until a court of proper jurisdiction has determined the contest. Thus, it is clear a certificate shall not be issued until after the Contest Court has decided this election contest.

Moreover, the Minnesota courts have consistently held that a statute should be interpreted to give effect to all of its provisions and that “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). Furthermore, the courts have long held that various provisions of a statute should be

interpreted in light of each other. *Minn. Equal Access Network Servs. v. Burlington N. & Santa Fe R.R.*, 646 N.W.2d 911 (Minn. Ct. App. 2002).

Franken's argument that Subdivision 1 is controlling fails because there is no means to reconcile the two subdivisions if his interpretation is given credence. If a certification is issued to Franken prior to the court's ruling on the election contest, as Franken asserts should occur under Subdivision 1, both Governor Pawlenty and Secretary of State Ritchie would be in violation of Subdivision 2. Compliance with Subdivision 2, however, does not cause either official to violate Subdivision 1. A reading of the statute in its entirety makes it clear that once an election contest has been filed, as is the case here, the issuance of a certification should be delayed until the case has been determined by the court.

Franken's basic request to the court is that it should require that Governor Pawlenty and Secretary of State Ritchie certify him provisionally, so he can be seated in the United States Senate. He asks for this, while acknowledging that at some later point this may be found to be in error. In recognition of this point, his petition notes that the court would have the authority to unseat him at a later date, should the Contest Court determine different election results than the Canvassing Board, by relying on Minnesota Statute Section 204C.40 subdivision 1, which states in part that "[I]n the case of a contest, the court may invalidate and revoke" a previously issued certificate of election results if the court finds that those results are different from the ones determined by the Canvassing Board. In other words, Franken is asking the Governor and Secretary of State to certify the results so that he may be seated in the U.S. Senate even though he may be unseated shortly thereafter if the Contest Court determines that the results of the Canvassing Board were in error and that Coleman received a majority of the votes cast. Thus,

Franken needs to take a seat, although not in the U.S. Senate, and allow the statutory process as specified to occur, so that each vote legally cast by a valid voter is fairly and accurately counted.

Franken Absurdly Argues that Delaying Certification Encroaches on the U.S. Senate Authority as Set Forth in Article 1, Section 5 of the U.S. Constitution

Franken’s argument that delaying the certification of the Canvassing Board’s election results encroaches on the U.S. Senate’s authority as set forth in Article 1, Section 5 of the United States Constitution is absurd at best. U.S. Constitution Art I, § 5 states in part as follows: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members....”

In implementing Article 1, Section 5, in part, the Congress has adopted federal statutes 2 U.S.C.S. §§1a & 1b, which state as follows:

§ 1a. Election to be certified by governor

It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States.

§ 1b. Countersignature of certificate of election

The certificate mentioned in the preceding section [2 U.S.C.S. §§1a] shall be countersigned by the secretary of state of the state.

To ensure that the statutes worked effectively, Rule II of the U.S. Senate Rules provides the guidelines for the presentation of credentials and question of privilege for the seating of a senator.¹ The reason why there is a federal statute and a Senate Rule is because the United

¹ Standing Rules of the Senate, Rule II, Presentation Of Credentials And Questions Of Privilege 1. The presentation of the credentials of Senators elect or of Senators designate and other questions of privilege shall always be in order, except during the reading and correction of the

States Senate, in its wisdom, does not desire to trudge into each state to count every ballot to determine the election results. Rather, the Senate has adopted a statute and rule so that it may instead rely upon the appropriate state officials, i.e., the Governor and Secretary of State, to provide the Senate with the certified election returns.

Franken's assertion that the U.S. Senate's authority has been encroached upon by delaying the certification is nothing more than a politically motivated attempt to pressure Members of the United States Senate to grant him, not Minnesota, a seat at the table. Such drastic measures are not necessary, however. The Senate's authority has been protected by its own adoption of 2 U.S.C.S. §1a & §1b coupled with Senate Rule II, which outlines the procedure for the presentation of the credentials, and the Senate's longstanding tradition of requiring certification of election results by appropriate state officials prior to it determining whether to seat a newly elected Member. As a matter of fact, Assistant Majority Leader and Democrat Senator Dick Durbin earlier this year regarding the certification of Senator Burriss stated on the subject of election certification: "Of course, he has to have a governor and secretary of state certify his credentials. . . . This has been a rule in the United States Senate since 1884. . .

Journal, while a question of order or a motion to adjourn is pending, or while the Senate is voting or ascertaining the presence of a quorum; and all questions and motions arising or made upon the presentation of such credentials shall be proceeded with until disposed of.

2. The Secretary shall keep a record of the certificates of election and certificates of appointment of Senators by entering in a wellbound book kept for that purpose the date of the election or appointment, the name of the person elected or appointed, the date of the certificate, the name of the governor and the secretary of state signing and countersigning the same, and the State from which such Senator is elected or appointed.

3. The Secretary of the Senate shall send copies of the following recommended forms to the governor and secretary of state of each State wherein an election is about to take place or an appointment is to be made so that they may use such forms if they see fit.

.We have never, ever waived the rule for any election or appointment. . . .So it's an important rule, and one not easily challenged or waived.”

Therefore, the Senate looks to the Governor and Secretary of State to provide it with the certification. As set forth repeatedly, Minnesota’s Governor and Secretary of State have followed the letter of the law by not certifying the election results until the Contest Court has determined the election contest. The case before the Minnesota Supreme Court is governed by Minnesota Statute §204C.40 subdivision 2, which clearly states that when there is an election contest, the certificate shall not be issued until a court of proper jurisdiction has made a determination.

CONCLUSION

There is no reason for the Minnesota Supreme Court to force Governor Pawlenty and Secretary of State Ritchie to issue an election certification at this point. Governor Pawlenty and Secretary of State Ritchie were correct in proceeding as the law dictates by not certifying the results of the Canvassing Board once the Notice of Contest had been filed by Coleman. Both of these elected officials recognized that this contest is an integral part of accurately determining who the people of Minnesota have chosen to represent them in the United States Senate. Issuing a certification and allowing Franken to be seated—even provisionally—would not usurp the authority of the U.S. Senate to determine its members, as Franken suggests, but would instead usurp the will of the citizens of Minnesota to follow the statutory procedure outlined in Minn. Stat. § 204C.40 subd. 2, and would potentially undermine the actual will of the citizens of Minnesota, as will be eventually decided by the Contest Court. The representation of the citizens

of Minnesota is too important for the potential of musical chairs being played with one of their U.S. Senate seats.

** Leslie Rutledge is a member of the Republican National Lawyers Association and the former Deputy Counsel to the National Republican Congressional Committee.*

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