



League of Women Voters Minnesota Election Law: Absentee Ballots Briefing Paper

LEAGUE OF WOMEN VOTERS MINNESOTA

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The League of Women Voters Minnesota (LWVMN) position on election law is “Support improvements in election laws regulating election procedures, voting and school district elections.” The drama generated by Minnesota’s 2008 U.S. Senate race demonstrated that LWVMN should closely examine the operation of Minnesota election laws governing absentee ballots.

I. MINNESOTA’S 2008 U.S. SENATE ELECTION

It is the law in Minnesota that during the week following Election Day, corrections to the official vote totals are made by county election officials after proofing their work and noting errors such as improper data entry or transposition of numbers.¹ This possibility of corrections is the reason results are deemed official only after county auditors present final tallies to the State Canvassing Board and it approves these tallies.²

Minnesota U.S. Senate race results were officially reported on November 18, 2008, as Norm Coleman, 1,211,565; Al Franken, 1,211,359; and Dean Barkley, 437,389.³ The difference of 206 votes between Coleman and Franken amounted to one one-hundredth of one percent (0.01 %). State law mandates an automatic manual recount for any federal or state race in which the difference between votes cast for the winning candidate and the runner-up is less than one-half of one percent (0.5%) of the total number of votes cast for that office.⁴

The required recount began on November 19, 2008, and ended on January 5, 2009, after the Canvassing Board had reviewed contested ballots, watched closely by both campaigns and the public. The official results then stood at Coleman, 1,212,206 and Franken, 1,212,431—a 225-vote difference in favor of Franken.

The Coleman campaign filed a lawsuit in District Court (hereafter referred to as the Appeal Panel) contesting the recount results.⁵ After weeks of trial and testimony, the Appeal Panel determined that an additional 351 absentee ballots had been improperly rejected and should be counted.⁶ Accordingly, the Secretary of State’s office opened those ballots on April 7, 2009. The results were Coleman, 111; Franken, 198; other or no vote, 42. The addition of these ballots increased Franken’s lead to 312 votes. At this point, the Panel ruled that Franken had received the highest number of legally cast votes in the election.

Coleman then filed an appeal to the Minnesota Supreme Court. Finally, at the end of June 2009, the Supreme Court issued its unanimous ruling, affirming the Appeal Panel’s finding and declaring Franken the winner of the election.⁷ Coleman decided against an appeal to the U. S. Supreme Court.

It is noteworthy that there was no contention of fraud in the election by either campaign.⁸

II. THE RECOUNT

The recount that began November 19 involved hand counting every ballot by a review panel. Generally, the recounts for Minnesota's 2008 election were conducted at the county level. In addition to the review panel, observers from each campaign were present to oversee the count and to challenge determinations by the panel. The public and third party observers, including those from LWVMN, also were permitted.

Challenges are meant to address questions as to voter intent, including stray markings on or damage to the ballot. In this close election, however, challenges were raised when even the smallest pencil mark was noticed. Between the two campaigns, over 6000 ballots were challenged. However, by December 16, 2008, over 5,500 of these challenges were withdrawn by the campaigns, prior to review by the State Canvassing Board.⁹

With a 225-vote margin, as of January 5, 2009, and more than 10,600 rejected absentee ballots remaining in their unopened envelopes, workers from both campaigns were working hard to get all of "their" votes counted. Here it is worthwhile to note that the political parties collect canvassing data on voters and frequently have a good idea of how an individual may vote. Thus during the appeal, the campaigns focused on certain absentee ballots, which are identified on an outer envelope with the voter's name and address. Hearing testimony about these ballots and reviewing these ballots constituted much of the work of the Appeal Panel.¹⁰

III. THE ABSENTEE BALLOTS

There were 2.92 million voters in Minnesota's 2008 election.¹¹ Of these, 293,830 voters (10.06%) cast absentee ballots. Approximately 12,000 of these absentee ballots were deemed rejected/ineligible. During the recount, county election officials reviewed rejected absentee ballots and ultimately determined that 1,346 had been improperly rejected. These ballots were reviewed by both campaigns, which agreed that 933 of them should be counted. These were then opened, counted by the Secretary of State's office, and included in the January 5, 2009, recount totals.

Most ballots in Minnesota are marked by the voter and read by optical scanners at the polls on Election Day. Absentee voting commences 30 days before Election Day, typically at county or city government offices. The ballots are held until Election Day and sent to their proper precincts that afternoon. It is up to election judges in each precinct to verify and count their absentee ballots by using the precinct's optical scanning machine. "Verify" means confirming that the absentee ballots meet all requirements as to voter registration, signature, and witness signature. Typically the absentee ballots are held until the end of Election Day, at which time they are cross-checked with the voter rolls to make sure a voter did not vote in person. (Note that Minnesota law permits voting in person on Election Day even if the voter has submitted an absentee ballot. Such second voting is allowable only if the absentee ballot has not yet been counted; it permits the voter to change his/her mind or to correct an error.)

Because of the emphasis on absentee ballots during the recount and appeal processes, one may get the impression that there was something unusual about the number of absentee ballots in 2008, and there was. The 2008 absentee ballot rate of 10.06% was an increase of almost 2% over the last comparable presidential election in 2004, and an almost 3.5% increase over the number of absentee ballots cast in 2006.¹² While a 10% rate seems high in a state which encourages voter presence at the polls, much politicking in 2008 was devoted to encouraging people to vote absentee in order to avoid long lines on Election Day. Although this suggestion ran counter to Minnesota election law, which requires a legitimate absence from one's precinct on Election Day, people nevertheless appeared to like the idea of using the absentee ballot process to vote early.

Data on ineligible/rejected absentee ballots in past elections have not been recorded. However, the 2008 rejection rate of 4% certainly seems high. There was no recourse for voters with rejected absentee ballots. But for the recount and appeal processes in 2008, they probably would never have known their ballots had been rejected. Currently, absentee ballots are not consistently or automatically examined for eligibility prior to Election Day, an apparently significant flaw in the system.

IV. ABSENTEE BALLOT ERRORS

The rejection of almost 4% of absentee ballots suggests that either requirements for absentee voting are not well understood by election judges or the explanation of the requirements printed on the envelope is confusing to the voter. Fatal errors observed on absentee ballots rejected in the 2008 election included the following:

- Signature Issues
 - Signatures on ballot envelope and application did not match.
- Witness Issues
 - Signed witnesses were not registered voters at their current addresses.
 - Minnesota law does not require in-depth checking of witnesses, only that the election judges “be satisfied.” Most precincts have no access to the Statewide Voter Registration System (SVRS) which they need in order to check witness registrations. Some apparently deemed it sufficient for a witness to self-certify that he/she was a registered voter. These difficulties led to a discrepancy in the level of rigor used to approve or reject ballots in different counties.
- Mistakes made by Election Officials
 - Registration materials were sent to some registered voters and some voters who needed registration materials did not receive them.
 - Clerical mistakes were made while entering names and addresses into the SVRS with the result that voter names and/or addresses did not match those entered.
- Mistakes made by Voters/Election Judges
 - Some absentee voters placed registration materials inside the secrecy envelopes instead of inside the absentee ballot return envelopes. Some judges opened the outer envelope, noted that the person was not registered and correctly did not open the secrecy envelope. In other cases judges opened the secrecy envelope anyway, found the registration materials and then counted the vote.
 - Some of the required information (including full name, address, witness signature, etc.) was not provided.
- Overseas ballots were not always received in time.

V. PROPOSED SOLUTIONS

Legislative Initiatives

Prior to the November 2008 election, in response to Department of Defense directive 1000.04, the Minnesota Legislature passed bipartisan legislation to improve the voting experience for Minnesotans living and working overseas. The Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) permits county election officials to deliver blank ballots electronically by email or fax, effectively reducing the time necessary to receive and return a ballot by half. The law also eliminates the requirement for a U.S. citizen or notary to witness the voter's signature on the ballot, a major handicap to overseas voters. It addresses security concerns by enacting a new "identification number match" that guarantees ballots will be returned by the voters to whom they were sent. Finally, every county is required to establish a UOCAVA board charged with issuing, collecting, and reviewing absentee ballots, as well as with accepting or rejecting them. As a result of this legislation, the November 2008 election had three times as many overseas absentee ballots cast as in 2006, and the rejection rate dropped from 14.8% to 6.4%.¹³

A continuing problem, however, is the fact that Minnesota holds primary elections on the second Tuesday after the first Monday in September. This timing has made it difficult for overseas voters to receive ballots and return them in time to be counted. In October 2009, Congress passed the Military and Overseas Voter Empowerment Act (MOVEA) which requires that states provide military and other overseas voters with ballots at least 45 days ahead of an election.¹⁴ The Minnesota Legislature is expected to pass a bill moving the primary from September to mid-August, thereby fulfilling the MOVEA requirement. Governor Tim Pawlenty is expected to sign this bill.

State legislative attempts to correct other voting problems have not been successful. The Omnibus Elections and Campaign Finance Provisions Bill that passed in 2009 (SF1331/HF1351)¹⁵ contained a number of important provisions, including the following: (1) It would centralize absentee ballot processing by a ballot board in each jurisdiction. (2) All rejected ballots would be reviewed by the entire ballot board. (3) Absentee ballot status as accepted or rejected would be posted on the statewide registration system which voters could check. (4) Absentee voters with rejected ballots would be notified and sent replacement ballots or otherwise allowed to cast another ballot. (5) The current practice of comparing signatures to validate a ballot would be replaced by the voter's date of birth, last four social security number digits, and driver's license/ID card number. (6) If a voter's absentee ballot were accepted, the SVRS would be so marked and the voter would not be allowed to vote on Election Day. (7) After the polls close on Election Day, the ballot board would count the absentee ballots and add the totals to the appropriate precinct totals.

This legislation was passed by both houses on May 18, 2009. It was vetoed by the governor on May 22, 2009.¹⁶

In the 2010 legislative session LWVMN plans to support an absentee ballot reform bill with provisions similar to those outlined above. In addition, LWVMN will support an early voting bill which would require counties to provide one or more polling places where voters may cast an early ballot, i.e., fill out the ballot and feed it into a machine. The vote would not be counted at that point, but if the voter had made an error on the ballot, the machine would reject it and the voter would be given a new ballot. These ballots would be counted after the polls closed on Election Day.

Administrative Proposals

In November 2009, MN Secretary of State Mark Ritchie announced proposed changes to the rules governing absentee ballots.¹⁷ The new absentee ballot would include better instructions, a listing of materials voters need in order to complete their absentee ballots, clear labels, step-by-step illustrations, visual cues, and additional instructions for people with disabilities. A hearing was held before an administrative law judge on December 18, 2009, at which time LWVMN submitted comments supporting these changes. Should the proposed changes be approved, they will be effective in March 2010.

Citizens Jury Recommendations for the Future

In June and July 2009, a citizens jury was convened in Minneapolis by Promoting Healthy Democracy and The Jefferson Center, two Minnesota-based non-partisan, non-profit organizations. They charged the jury of 24 randomly selected citizens from throughout the state with making recommendations for conducting future election recounts.¹⁸

After hearing testimony, the citizens jury, co-sponsored by Representative Laura Brod and Secretary of State Mark Ritchie, developed a list of what went well, including the following:

- The paper ballot recount by hand was very accurate and effective.
- The voting machines were very accurate.
- Having a paper trail was key to the success of the process.
- The recount laws and statutes worked well.
- The recount was well organized.
- The canvassing board functioned well.
- The process had good security measures and there was no fraud.
- The process was transparent to the public.

The same jury decided that some aspects merited further study and made recommendations as follows:

Needing Further Study	Citizens Jury Recommendations
Role of political parties	Establish “Rules of Conduct” and allow fewer candidates’ representatives to be involved in the recount process.
Complexity of absentee ballots	Simplify application and ballot. Allow for self-certification instead of requiring a witness’s signature.
Absentee ballot processing	Centralize at the county level.
Timing of absentee voting	Allow some type of early voting.
Timing of recounts	Set time limits for the various stages of the recount process.
Primary Election date	Move primaries to an earlier date.
Ballot review process	Standardize.
Recount trigger threshold	Lower from “less than one-half of one percent” to “less than one-quarter of one percent.”

References

1. Minnesota Government Statutes, <https://www.revisor.mn.gov/statutes/?id=204C.33>
2. According to the Minnesota Constitution Article VII, Section 8, the State Canvassing Board consists of the Secretary of State as its chair, plus two Supreme Court Justices and two District Court Justices. <http://www.sos.state.mn.us/index.aspx?page=1408> In 2008, the members were Secretary of State Mark Ritchie, Chair; Chief Justice Eric J. Magnuson, Minnesota Supreme Court; Associate Justice G. Barry Anderson, Minnesota Supreme Court; Judge Kathleen Gearin, District Court Judge and Chief Judge, Second Judicial District; and Judge Edward J. Cleary, District Court Judge and Assistant Chief Judge, Second Judicial District.
3. Canvassing Board Meeting November 18, 2008, Item 4 <http://www.sos.state.mn.us/index.aspx?page=1408>
4. Minnesota Statute § 204C.35, Subdivision 1(b) (1) (2008). For more information, go to <http://www.sos.state.mn.us/index.aspx?page=588> - Statutes, which lists Minnesota election statutes.
5. The Appeal panel is usually appointed by the Chief Justice. However, Chief Justice Magnuson recused himself because he was on the State Canvassing Board. The longest serving member of the Supreme Court, Justice Alan Page, chose three appellate judges from the Second District, Judge Elizabeth Hayden, Judge Kurt Marben, and Judge Denise Reilly. Minnesota Statute 209.201, Subdivision 2; Duchscehere, Kevin, "Franken-Coleman Senate race goes to trial," StarTribune, January 26, 2009. <http://www.startribune.com/politics/national/senate/38303479.html?elr=KArksUUUoDEy3LGDiO7aiU>
6. A link to the Notice of Entry of Judgment (by the trial court), April 14, 2009, Court File Number 62-CV-09-56 is: <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNElectionContest-Notice2-4-20-09.pdf>
7. The Minnesota Supreme Court ruling A09-697, June 30, 2009, is available as a PDF file at: <http://www.sos.state.mn.us/index.aspx?page=1405> under "MN Supreme Court Ruling."
8. *Ibid.*, pages 4 and 5: "No claim of fraud in the election or during the recount was made by either party."
9. A list of withdrawn challenges: <http://www.sos.state.mn.us/index.aspx?page=1444>.
10. The Minnesota District Judges Foundation presented its Community Service Award to the three-judge panel in September 2009, stating that the panel displayed "the highest levels of professionalism, public service, and judicial independence and integrity." <http://minnesota.publicradio.org/display/web/2009/09/14/judicial-award/>
11. The estimate of eligible voters in 2008 was 3,741,514. Thus, the voting rate in Minnesota was about 78%.
12. The most recent comparable election (that is, a presidential election year) was 2004, in which there were 2.84 million voters, 231,771 of whom cast absentee ballots. This is an 8.16% absentee ballot rate. For the 2006 general election, there were 2.21 million Minnesota voters, 146,529 casting absentee ballots, a 6.63% absentee ballot rate.
13. Case Study: Minnesota Takes The Lead in 2008: www.overseasvotefoundation.org/files/OVF-CS-MN09.pdf
14. S.1415, the Military and Overseas Voter Empowerment Act: http://www.senate.gov/general/search/search_cfm.cfm?q=s.+1415&x=0&y=0&site=default_collection&num=10&filter=0
15. SF1331, Conference Committee Report-86th Legislative Session (2009-2010): <https://www.revisor.mn.gov/bin/bldbill.php?bill=ccrsf1331.html&session=ls86>
16. Veto Letter 5-22-09: http://www.governor.state.mn.us/stellent/groups/public/documents/web_content/prod009549.pdf
17. Von Sternberg, Bob, "Designing ballots that won't be rejected," StarTribune, Nov. 14, 2009: A1.
18. Citizens Jury Report July 2009: http://www.minnpost.com/client_files/pdfs/CitizensJuryReport.pdf

Who's Who in this Paper:

Norm Coleman, Incumbent Republican United States Senate Candidate, 2008 Election
Al Franken, Democratic Candidate for United States Senate, 2008 Election
Dean Barkley, Independence Party Candidate for United States Senate, 2008 Election
Tim Pawlenty, Minnesota Governor, Republican
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