

January 12, 2009

VIA MESSENGER

The Hon. Tim Pawlenty
Governor, State of Minnesota
State Capitol
Saint Paul, MN 55155

The Hon. Mark Ritchie
Secretary of State, State of Minnesota
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55101

Re: **2008 United States Senate Election**

Dear Governor Pawlenty and Secretary of State Ritchie:

We represent Al Franken. On January 3, 2009, after a meticulous hand recount of the ballots, the State Canvassing Board declared the result of the General Election held on November 4, 2008. The Board certified that Mr. Franken was chosen by Minnesota voters to serve as United States Senator for the term that commenced January 3, 2009.

The interests of the State, its constituents, and the Nation are best served when Minnesota is fully represented in Washington, D.C. As the United States Constitution states, at Article I, Section 3, and Amendment XVII, "The Senate of the United States *shall* be composed of two Senators from each State . . ." (emphasis added). Now that the State Canvassing Board has acted and the 111th Congress has convened, it is time for Minnesota to have two Senators working for us.

Pursuant to the United States Constitution, Article I, Section 5, and federal statute, 2 U.S.C. §§ 1, 1a, 1b & 7, it is now the duty of the Governor to certify Mr. Franken's election, under the Seal of the State of Minnesota, to the President of the United States Senate, and it is the duty of the Secretary of State to countersign the certificate.

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Former Senator Norm Coleman has, of course, initiated an election contest in an attempt to overturn the State Canvassing Board's declaration and certification that Al Franken received the most votes in the election. Neither state law nor a lawsuit in state court may excuse, suspend or operate to delay the issuance of the certificate of election.

As held by the Minnesota Supreme Court, under the United States Constitution and federal statute the sole power and jurisdiction to "be the Judge of the Elections, Returns and Qualifications of its own Members" rests in the United States Senate, not in any state statute or court. *See Odegard v. Olson*, 119 N.W.2d 717, 720 (Minn. 1963) (House of Representatives is "final and exclusive judge of the legality of election"); *In re Williams' Contest*, 270 N.W. 586, 587 (Minn. 1936) (after canvassing board has declared result, Congress has exclusive jurisdiction as to who received the greater number of votes); *25 Voters v. Selvig*, 212 N.W. 604 (Minn. 1927) (once election result declared, state court judgment "would be both officious and nugatory").

The idea that a certificate of election should be issued before a legislative election contest is concluded is hardly novel. Indeed, Minnesota law provides that a contest will not delay a certificate for a candidate elected to the Minnesota Legislature, *see* Minn. Stat. § 204C.40, subd. 2, precisely because, under Minnesota Constitution, Article IV, Section 6, each house is "the judge of the election returns and eligibility of its own members." This recognizes the constitutional authority of those bodies and the importance of full representation. The same result is required under the United States Constitution and federal law for precisely the same reasons.

Further, even if state law controlled, the certificate should issue, for two reasons. First, while Minn. Stat. § 204C.40, subd. 2, provides that the certificate shall not be issued "until a court of proper jurisdiction has finally determined the contest," in a federal or state legislative contest there can be no such "proper court." *See Odegard*, 119 N.W.2d at 721.

Second, the more specific subdivision 1 of § 204C.40 expressly provides that, in any race, in the event there is a recount the certificate shall issue after the recount has been completed, subject only to later invalidation or revocation. The effect of that language when read in conjunction with the rest of § 204C.40 is clear: In non-legislative races, where the court can have a constitutional and determinative role, if there is no recount the certificate should be withheld while an expedited election contest is heard. If there has been a recount, it is time to certify and at least provisionally seat the declared winner, subject to the result of the contest.

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The Minnesota statutes allow time for a recount between the election and the start of the new term of Congress. Now that the recount is complete and the new Congress has convened, state law does not provide for further delay, and federal law requires that the certificate issue. Accordingly, we request respectfully that Mr. Franken's election be certified by the close of business today.

Sincerely,



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cc: Senator-Elect Al Franken
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