No. A09-

State of Minnesota

In Supreme Court

Al Franken,

Petitioner,

vs.

Timothy Pawlenty, as Governor, and Mark Ritchie, as Secretary of State,

Respondents,

PETITION OF AL FRANKEN FOR ORDER TO ISSUE CERTIFICATE OF ELECTION

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INTRODUCTION

After a careful statewide hand recount, the State Canvassing Board has certified that Al Franken ("Franken") received the largest number of the votes lawfully cast in the November 4, 2008, election for United States Senator. Despite that determination, and in contravention of their obligation under federal and state law, both Respondents Governor Tim Pawlenty and Secretary of State Mark Ritchie (collectively, "Respondents"), officials charged with duties concerning an election, have refused to issue Franken the certificate of election to which he is now entitled. They contend erroneously that a pending election contest bars issuance of the certificate.

As this Court has long recognized, "each house of Congress is the sole judge of the election returns and qualifications of its members, exclusive of every other tribunal, including the courts." *Odegard v. Olson*, 119 N.W.2d 717, 719 (Minn. 1963) (citing U.S. Const. Art. 1, § 5, Cl. 1). Minnesota's statutory scheme for state election contests relating to congressional offices attempts to honor that foundational principle. In such contests, courts are limited in their adjudications to determining which party received the highest number of votes legally cast and may not adjudicate violations of Minnesota Election Law or other irregularities. Minn. Stat. § 209.12.

In at least partial recognition of these constitutional strictures and fundamental policies, the election contest statute explicitly says that the institution of a contest to the election of a state legislator does *not* stay the issuance of the certificate of election. As to federal legislative races, Franken submits that the statute must be construed to provide that result, both to reconcile conflicting statutory language and because any contrary interpretation would render the statute unconstitutional. And whatever might pass

constitutional muster in the period before a new Senate term commences, Minnesota cannot impose on the Senate a procedure that denies the Senate its full complement of Senators once the term begins on the day specified by the United States Constitution, Art. I, § 4, as amended.

Petitioner Franken states and alleges as follows:

JURISDICTION

1. This Court has jurisdiction under Minn. Stat. § 204B.44, under which any individual may bring a petition to the Court for the correction of "any wrongful act, omission, or error of . . . the secretary of state, or any other individual charged with any duty concerning an election."

2. This action is necessary to correct omissions and errors by Respondents. Contrary to federal and state statutes and federal constitutional law, they have failed to issue Franken the certificate of election to which he is entitled by virtue of the State Canvassing Board's unanimous certification that he received the largest number of votes lawfully cast in the November 4, 2008 election ("General Election") for United States Senator.

PARTIES

3. Al Franken is the Senator-Elect from the State of Minnesota. As certified by the State Canvassing Board on January 5, 2009, Franken received 1,212,431 votes, while opponent Norm Coleman received 1,212,206 votes.

4. Timothy Pawlenty is the Governor.

5. Mark Ritchie is the Secretary of State.

ANALYSIS

6. As the Court is aware, Minnesota held its General Election for United States Senator on November 4, 2008. After the initial canvass of votes, Franken and Coleman were separated by less than 0.0075% of the over 2.9 million votes cast in the United States Senate race. A difference of less than one-half of one percent of the total number of votes triggers an automatic recount under Minn. Stat. § 204C.35. Accordingly, the State Canvassing Board ordered a recount.

7. Upon the completion of the recount, the State Canvassing Board determined that Franken had received the largest number of the votes lawfully cast, receiving 1,212,431 votes to Coleman's 1,212,206 votes. On January 5, 2009, the State Canvassing Board declared that Franken was the winner of the election pursuant to Minn. Stat. § 204C.33, subd. 3 and Minn. R. 8235.1100.

8. As further set forth below, under Minnesota law, the State Canvassing Board's declaration of the result after the completion of the recount entitled Franken to a certificate of election signed by Governor Pawlenty and countersigned by Secretary of State Ritchie formally certifying Franken's entitlement to the seat in question. Minn. Stat. § 204C.40, subd. 1. Federal law imposes the same obligation on Respondents. 2 U.S.C. §§ 1a-1b.

9. Article I, Section 3 and Amendment XVII of the United States Constitution state, "[t]he Senate of the United States *shall* be composed of *two* Senators from each State . . ." (emphasis added). Federal law contemplates that when Minnesota holds an election for United States Senator, the Senator "elected by the people" will commence his or her term

"on the 3d day of January" after the election. U.S. Const., Art. I, § 4, as amended by Amendment XX; 2 U.S.C. § 1. Minnesota, in short, has an obligation to structure and operate its election system so as to certify a Senator in a timely fashion. Petitioner contends that it has done so, but for the refusal of Respondents to perform their mandatory duties, despite demand by Petitioner. Each day of delay is a further breach of Respondents', and Minnesota's, constitutional duty.

A. Under the Minnesota Election Law, a Certificate of Election Must Issue Both Because a Recount has been Completed and Because the Contest Involves a Senate Seat.

10. Pursuant to Minn. Stat. § 204C.40, subd. 1:

> In an election for United States senator, the governor shall prepare an original certificate of election, countersigned by the secretary of state, and deliver it to the secretary of the United States Senate. . . . If a recount is undertaken by a canvassing board pursuant to section 204C.35, no certificate of election shall be prepared or delivered until after the recount is completed. In case of a contest, the court may invalidate and revoke the certificate as provided in chapter 209.

Thus, the language is plain and clear: upon the completion of a recount, the Governor "shall" prepare a certificate of election, which the Secretary of State must countersign, and then deliver to the secretary of the United States Senate. Should an election contest subsequently determine that the "wrong" candidate received the certificate, the court presiding over the contest can revoke the certificate and order it reissued to the contestant.

11. Failure to enforce the mandatory language of the statute due to the filing of an election contest would negate the very specific last sentence of Subdivision 1. Respondents apparently rely on Subdivision 2 in that regard, but that at most creates a tension between provisions. Putting aside federal constitutional obligations, the more specific language as to recount situations resolves that tension here – an election followed by a recount. Moreover,

by its own terms, Subdivision 2 only applies to election contests that can be "finally determined" by "a court of proper jurisdiction." The pending election contest does not qualify.

12. Minn. Stat. § 209.12 specifically governs election contests for federal congressional elections and sets forth the court's limited jurisdiction to decide such contests. The only issue that the court may address is the conduct of a re-recount: "which party to the contest received the highest number of votes legally cast at the election." Minn. Stat. § 209.12. The court must "make findings of fact and conclusions of law upon that question" but cannot decide *any* other issue raised in the contest – in particular, as in the election contest here, allegations of irregularities and violations of Minnesota Election Law. Instead, the court, or a special master, must take and preserve evidence relating to such issues, but may not even make findings or conclusion on those points. *Id.* Upon the conclusion of state court proceedings, and upon application of either party to the contest, the court administrator of the district court must certify and forward the files and records of the proceedings, with all the evidence taken, to the presiding officer of the Senate. *Id.* Section 209.12, in this way, implements a bifurcated proceeding that at least partially acknowledges the exclusive responsibility of the United States Senate to judge the elections and qualifications of its own members. In effect, the Minnesota Legislature has made Minnesota courts agents, albeit unauthorized ones, of the United States Senate. Nothing in Minn. Stat. § 209.12 or Minn. Stat. § 204C.40, subd. 2, allows the *preliminary* issuance of the certificate of election to be delayed while the court resolves one aspect of the question of whether the contestant or the contestee is ultimately "entitled" to keep the certificate.

13. Section 209.12 stands in stark contrast to other portions of chapter 209. In contests involving most non-federal offices, a reviewing court has broader authority to "finally determine" an election contest premised on (1) "an irregularity in the conduct of an election or canvass of votes"; (2) "the question of who received the largest number of votes legally cast"; and (3) "deliberate, serious, and material violations of the Minnesota Election Law." Minn. Stat. § 209.02. Thus, a court presiding over an election contest for a United States Senate seat can resolve only one of the three grounds on which the results of the election can otherwise be challenged. Under § 209.12, the Senate alone has authority to determine whether "an irregularity in the conduct of an election or canvass of votes" or "deliberate, serious, and material violations of the Minnesota Election Law" require the election's result to be overturned. Whether the Legislature may constitutionally impose a judicially-supervised re-recount on the United States Senate has not been decided in the context of § 209.12.

14. The distinction between claims that can be addressed through a court-run re-recanvass, on the one hand, and claims alleging irregularities or election-law violations, on the other, runs consistently throughout Chapter 209. For example, separate rules of appeal apply when a contest notice challenges only which party received the highest number of votes legally cast at the election, Minn. Stat. § 209.12; specific rules exist for the counting and inspection of ballots and the recanvassing of votes cast, *id.* § 209.06; special requirements are triggered when the contest involves an error in the counting of ballots, *id.* § 209.07, subd. 1; and different requirements apply when in the contest "there is no question as to which of the candidates received the highest number of votes cast." *Id.*

15. Thus, for offices where a court of "proper jurisdiction" can hear and "finally determine[] the contest," and where a recount has not already occurred, the certificate of election does not issue until the court presiding over the election contest renders its final judgment. Minn. Stat. § 204C.40, subd. 2. The more specific statutory provisions for elections not subject to final judicial determinations, or where one recount has already occurred, otherwise control. *See Marshall County v. State*, 636 N.W.2d 570, 576 (Minn. Ct. App. 2001) (more specific statute prevails) (citing Minn. Stat. § 645.26, subd. 1).

16. A certificate must issue promptly where, as here, there is no court of proper jurisdiction that can hear and finally determine the contest or where there has already been a recount. As discussed above, a reviewing court lacks the authority to determine finally a U.S. Senate contest. In addition, the Houses of Congress are not "courts" of proper jurisdiction within the meaning of Minn. Stat. § 204C.40, subd. 2. *See Odegard*, 119 N.W. 2d at 721 ("[T]he term 'proper court' . . . does not include the Congress of the United States."). Thus, under the plain language of Minn. Stat. § 209.12, there is no court of proper jurisdiction that can "finally" determine a contest to the election of a United States Senator. Only the Senate has that power. The provision of Minn. Stat. § 204C.40, subd. 2, dealing with stays in the issuance of a certificate, is therefore inapposite on its face.

17. Here, more than seven days have elapsed since the State Canvassing Board determined that Franken received the greatest number of votes lawfully cast in the election. Respondents have refused to sign and countersign Senator-Elect Franken's certificate of service and transmit it to the Senate. Their refusal to perform their duty concerning this election—to issue the certificate—contravenes Minn. Stat. § 204C.40, and the new

Senate term has already begun. Franken respectfully requests that the Court order these omissions and errors corrected pursuant to Minn. Stat. § 204B.44.

B. Any Different Reading of the Election Contest Provisions Governing Congressional Elections Would Render Them Unconstitutional.

18. If the Court were to construe Minn. Stat. § 209.12 and § 204C.40 to preclude the issuance of a certificate of service until the panel presiding over the election contest performs some sort of re-recanvass, serious constitutional problems would result. Under well-established Minnesota law, this Court assumes, when reviewing a statute, "that the legislature does not intend to violate the United States and Minnesota Constitutions." *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). Thus, if the Court can "construe a statute to avoid a constitutional confrontation, [it is] to do so." *In re Civil Commitment of Giem*, 742 N.W.2d 422, 429 (Minn. 2007).

19. Under the United States Constitution, the "meeting" of Congress "*shall* begin at noon on the 3d day of January" unless Congress decides otherwise.[1] Art. I, § 4, as amended. Minnesota has no power to change that date. Further, "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Art. I, § 5, Cl. 1. Implementing these provisions, 2 U.S.C. §§ 1a & 1b impose affirmative federal obligations on Governor Pawlenty and Secretary Ritchie, respectively, to certify the election of any Senator "chosen" to the President of the Senate of the United States and to countersign that certificate. *See, e.g., Phillips v. Rockefeller*, 321 F. Supp. 516, 521 (S.D.N.Y. 1970) ("It is federal law, namely the provisions of 2 U.S.C. §§ 1a and 1b (1964), that impose upon the defendants

[1] By unanimous consent, the Senate did delay swearing-in to January 6, 2009.

the duty of certifying to the President of the Senate the winner of [the] election. Thus, in making this certification the defendants will . . . be acting pursuant . . . to duties imposed by federal statute."). That federal mandate is carried out by Minn. Stat. § 204C.40, subd. 1.

20. In *Odegard*, in the context of issuance of a certificate of election to the United States House of Representatives, this Court recognized the delicate balance between the strict federal constitutional mandates and the services Minnesota provides by conducting elections. Acknowledging the restrictions imposed by Art. I, § 5, Cl. 1, the Court construed the applicable statute as not applying to congressional races. *See Odegard*, 119 N.W. 2d at 720. As this Court recognized in *Odegard*, the authority of the Minnesota Legislature to provide for election contests of congressional offices is circumscribed by Art. I, § 5, Cl.1. Thus, as in *Odegard*, the election contest statute must be construed to avoid intrusions on the Senate's constitutional authority.

21. The *Odegard* decision is in accord with a long line of case law that precludes states from impeding each House's constitutional prerogative to finally determine its own membership. *See, e.g.*, *State ex rel. 25 Voters v. Selvig*, 212 N.W. 604, 604 (Minn. 1927) (state regulations "in so far as they relate to the election of Senators and Representatives in Congress, cannot be given an effect which will interfere with or encroach upon the power vested in the houses of Congress by the Constitution of the United States."); *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); *see also Roudebush v. Hartke*, 405 U.S. 15, 19 (1972) (confirming that a state's election proceedings must not interfere with the exclusive authority of each House to decide whether to seat its

members). This principle is critically important, for if "'[the power to judge elections is] lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed or put into imminent danger.'" *Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986) (Scalia, J.) (quoting Justice Joseph Story, Commentaries on the Constitution § 833, at 605 (5th ed. 1905)).

22. Such a construction does no damage to any affirmative state policy in the Minnesota Election Law. With respect to state legislative election contests under Minn. Stat. § 209.10, the election contest regime explicitly seeks to address the elemental separation-of-powers concerns raised by court administration of election contests to legislative offices. Pursuant to Minn. Stat. §§ 209.40, subd. 2 and 209.07, the Minnesota Legislature has made explicit that the issuance of a certificate of election is not delayed in elections for the Minnesota Legislature. This exclusion is premised on Minn. Const. Art. IV, § 6, which is parallel to the federal language: "Each house shall be the judge of the election returns and eligibility of its own members. The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in either house." The Legislature addressed its constitutional duty by setting forth a procedure—analogous to that contemplated by Minn. Stat. § 209.12—by which it is to be provided with evidence to aid in its ultimate determination of which candidate is to be seated. Minn. Stat. § 209.10. As the Legislature declared, it at least intended that "[t]his chapter does not limit the constitutional power of the house of representatives and the senate to judge the election returns and eligibility of their own members." *Id.* at subd. 6. Thus, an election contest presided over by a court cannot impede

the issuance of the certificate for an election that will ultimately be determined by the Legislature itself.

23. Regardless of the Legislature's care in drafting Minn. Stat. § 209.10, this Court has noted that "the constitutionality of the role assigned the judicial branch with regard to legislative election contests by Minn. Stat. c. 209 is open to question." *Derus v. Higgins*, 555 N.W.2d 515, 518 (Minn. 1996). This Court has previously avoided squarely confronting whether legislative election contests under Minn. Stat. § 209 are unconstitutional, and only by construing the Minnesota statutes as suggested by Petitioner can it avoid that difficult constitutional issue.

24. Like congressional elections, there is no court of proper jurisdiction that can finally determine a contest to an election of a member of the Minnesota Legislature. As with congressional elections, the election contest regime requires a certificate to issue promptly after the State Canvassing Board completes its work. Identical federal and state constitutional provisions impose similar boundaries on the courts' authority to hear election contests. As part of its effort to abide by Minn. Const. Art. IV, § 6, the Legislature did not think it appropriate to suspend the issuance of certificates for its members during the pendency of an election contest. As a matter of legislative intent and constitutional authority, Minn. Stat. §§ 204C.40, subd. 2 and 209.12 cannot reasonably and should not be read to impose such suspensions on the Legislature's federal counterpart in the Senate. *See Fettes v. Mayo Foundation for Medical Educ. and Research*, 547 N.W.2d 423, 425 (Minn. App. 1996) (statutes must be construed to avoid a strained construction or absurd result). Such an absurd result would be reached if it were determined that the Legislature, confronted with

identical federal and state constitutional provisions, chose only to honor one constitution and instituted contradictory interim certificate approaches to parallel state legislative and federal congressional election contests.

25. The continuing refusal by Governor Pawlenty and Secretary Ritchie to issue the certificate has interfered with the Senate's ability to provisionally seat Senator-Elect Franken and tend to the nation's business with a full complement of Senators.

RELIEF REQUESTED

For these reasons, Senator-Elect Franken respectfully requests that this Court issue an Order, pursuant to Minn. Stat. § 204B.44, requiring Governor Pawlenty and Secretary Ritchie to promptly prepare and countersign a certificate of election and deliver the certificate to the President of the United States Senate.

Dated: January 13, 2009

Respectfully submitted,

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