

In Re: 2008 United States Senate Election

**SECOND SUPPLEMENTAL
MEMORANDUM OF THE AL
FRANKEN FOR SENATE
COMMITTEE AND AL FRANKEN
REGARDING DUPLICATE BALLOTS
ISSUES**

I. INTRODUCTION

The Franken Committee respectfully submits this *supplemental* memorandum in response to a question raised during this Board's deliberations with respect to the use of original ballots for the purpose of discerning voter intent and the existence of distinguishing marks. This second supplemental memorandum addresses one very narrow point: that the proposed remedy of removing *original* ballots from the count whenever there is a mismatch between the number of original and the number of duplicate ballots would be a cure far worse than the imagined disease. By doing so, this Board would be systematically *disenfranchising* voters who lawfully cast their ballots, all to address the imagined theoretical possibility of double counting. On the record before this Board, such a step is entirely unwarranted and inappropriate. The proposed remedy is not only directly contrary to law, but is starkly inconsistent with the Coleman campaign's own insistence throughout the recount that original ballots be counted even when no corresponding duplicate ballot can be located. Perhaps worse, without calling witnesses and examining the duplicate ballots themselves, all of which are stored at the counties throughout the state, there is no possible way to identify which "excess" original ballots might exist, which should be

discarded, or even whether a problem exists in the first instance. Such issues are plainly a matter appropriate for examination during an election contest; they are entirely *inappropriate* for consideration by this Board.

I. THE COLEMAN CAMPAIGN INSISTED THAT RULE 9 BE ENFORCED AND ARGUED THAT ANY CHALLENGES ARISING OUT OF THE ORIGINAL/DUPLICATE BALLOTS WERE NOT WITHIN THE JURISDICTION OF THE BOARD.

Both candidates understood fully that original ballots would be counted, not duplicates.

On November 20, 2008, early in the recount, counsel for the Coleman campaign, Tony Trimble, in an email to Secretary of State officials Jim Gelbmann and Gary Poser, complained that Anoka County officials were rejecting “clear Coleman originals” because of “lack of a corresponding duplicate.” (Coleman won Anoka County by more than ten percent.) Mr. Gelbmann checked and determined that was not happening; that the original ballots were, in fact, being counted even when a duplicate could not be found. In a follow-up email, Mr. Trimble’s colleague thanked Gelbmann, and stated: “I clarified this yesterday afternoon with Gary Poser and our Anoka County Lead Representative. We understand that Anoka County officials had a telephone conference with Gary Poser on this matter and all proceeded according to the Secretary of State’s original directions.”¹

Now, of course, rather than commending the Secretary of State’s office for enforcing Rule 9 as the Coleman campaign requested, the Coleman side has completely reversed course and is now attacking the Secretary of State’s original directions.

The Coleman campaign has also completely reversed itself on the Board’s jurisdiction to consider the challenges arising out of original/duplicate issues. On November, 19, 2008, again

¹ A copy of the relevant emails are attached to this memorandum. They are, of course, also a matter of public record and are stored on the Secretary of State's email archives.

early in the recount, the issue arose whether duplicate ballots should be counted if no corresponding original could be found. In an email to Mr. Gelbmann, copied to Mr. Poser, Mr. Trimble urged that duplicates be counted and, moreover, that the Franken campaign could not lodge challenges to the contrary. He stated: “A challenge to a duplicate ballot for which no original can be found is a frivolous challenge, because it does not relate to voter intent. *Any challenge to a duplicate ballot should be made within an election contest and is not within the limited jurisdiction of an administrative recount. We will request the Minnesota State Canvassing Board to reject any challenges to duplicate ballots as groundless and frivolous (if the same are brought to the Canvassing Board.)*” Now, of course, in total violation of Rule 9, the Coleman campaign is challenging original ballots when the duplicates cannot be found. Those challenges should be rejected.

II. ABSENT A DETAILED FACT FINDING INVESTIGATION, THERE IS NO WAY TO ADJUDICATE THE ALLEGED "DOUBLE COUNTING" OF BALLOTS

Perhaps more fundamentally, as a practical matter, it is simply impossible at this point to determine whether there were or were not more original ballots than duplicate ballots. Throughout this recount, the counties (and both campaigns) have relied upon the Secretary of State's guidance and have pulled out any identified duplicate ballots and put them aside. Those ballots all remain, physically, at over 87 counties and municipalities throughout the state. As a result, this Board is without any method of identifying whether and/or where more original ballots exist than duplicates, for the simple reason that comparing originals to duplicates was never a part of the recount process.² If the Board were to eliminate all originals at this point, it

² As a result, of course, this Board is without any way to determine *which* of the original ballots before it might possibly relate to which duplicate ballots. Because those ballots are stored at the counties, the Board does not have the evidence before it that might allow a ballot-by-ballot

would – by definition – necessarily disenfranchise all of those voters, which would include *all* of those ballots properly duplicated by counties during the course of the recount in reliance upon the rules adopted by the Secretary of State and this Board. Such a sweeping disenfranchisement would be unprecedented in Minnesota history. To do so on this record, without fact finding adjudicatory power or a complete factual record before it, would be inappropriate, contrary to not only the law of Minnesota but to the overwhelming public policy of this state to enfranchise voters, not to *disenfranchise* them.

There are, moreover, numerous explanations as to numerical disparities other than the theoretical possibility of double counting ballots. For starters, in some instances, it is entirely unclear whether or not a duplicate was ever made of an “original” ballot. It is certainly equally plausible that, in some instances, in the rush of a busy election day, with record voter turnout, the election officials did not end up making duplicates because the ballots needing to be duplicated were set aside until the end of the night. In this case, the forgotten “original” ballots would have been sent, along with all the other election materials, back to the secure location and not seen again until the recount process. Alternatively, it is also possible that election officials failed to make duplicates because the "original" ballots, accepted absentee ballots, were delivered to the wrong precinct. Or, as in Blue Earth County Mankato P-2, there were two clearly different original ballots labeled with the *same* number as a result of an administrative error. In any of these instances, no "double counting" would have occurred, notwithstanding the numerical inconsistencies. Finally, it is possible that the duplicates simply were not processed on election

comparison in order to determine whether there were unmarked duplicates or which duplicates relate to which originals. Doing so would require a painstaking review that was never a part of this recount and for which this Board is – despite the strength of its members – uniquely unsuited to adjudicate when sitting in an administrative capacity. Such issues are best addressed, and

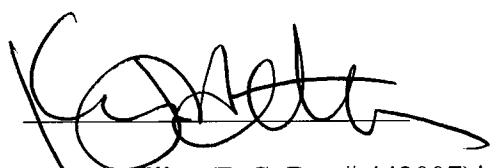
night. Election officials could have properly created duplicates, yet set aside both originals and duplicates on election night and not run them through the machine. In this instance, it would appear as if the hand count totals would not match the election night totals, but that is easily explained by the fact that neither duplicates nor originals were counted on election night.

But this Board, without factfinding adjudicatory authority and without a complete factual record before it, cannot weigh the evidence to determine, as a factual matter, what occurred. It is not the place of this Board to speculate on such theoretical possibilities, much less to disenfranchise voters as a result.

With all due respect, the breathtaking proposal to sustain challenges to all original ballots in the instance in which there are allegations of numerical inconsistencies between the number of original and duplicate ballots should be rejected. It is a cure far worse than the imagined disease as it operates to ensure disenfranchisement as a "remedy" to the theoretical possibility of a duplicate ballot error.

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Respectfully Submitted,



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indeed can *only* be addressed, on a complete factual record in an election contest. That is precisely the purpose of an election contest.