

NO LONGER A NATIONAL MODEL

Fifteen Recommendations for Fixing Minnesota Election Law and Practice



Kent Kaiser, Ph.D.

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KENT KAISER, PH.D., SENIOR FELLOW

Executive Summary

The recount that followed the 2008 U.S. Senate election in Minnesota brought to light several weaknesses in the state's election systems. Many observers have suggested that improvements are needed, but few have proposed anything more than small refinements. Based on observations and experiences of many experts from not only Minnesota but also from across the nation, we believe that some significant changes are needed.

Guided by the voters' rights principles of access, accuracy, privacy, and integrity, this report sets forth fifteen recommendations in three areas: general election operations, absentee balloting, and recounts. The recommendations are summarized here, with rationales in the full report.

(I) General Election Operations

Recommendation One. Require voters to present a photo ID to access their ballots.

Recommendation Two. Eliminate partisanship and do away with political appointments in the Office of the Secretary of State

Recommendation Three. Eliminate partisanship from and increase effectiveness of the State Canvassing Board by changing its composition.

Recommendation Four. Check for interstate double voting.

(II) Absentee Balloting

Recommendation Five. Move the primary to an earlier date and extend the absentee ballot season.

Recommendation Six. Institute centralized administration of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) as it pertains to absentee ballots.

Recommendation Seven. Institute systems of barcoding and central processing of absentee ballots.

Recommendation Eight. Institute "no-excuse" absentee voting (but not so-called "early voting").

Recommendation Nine. Make ballot-checking technology available to "in-person" absentee voters.

Recommendation Ten. Institute a provisional ballot system.

(III) Recounts

Recommendation Eleven. Require recounts to be done in a central location.

Recommendation Twelve. Recount only ballots counted on Election Day.

Recommendation Thirteen. In the case of "duplicate" ballots, count the duplicates, not the originals.

Recommendation Fourteen. Follow laws currently on the books and formally increase uniformity and specificity of procedures.

Recommendation Fifteen. Institute a run-off election for extremely close elections (but not so-called "instant run-off voting").



Foreword

This prescriptive analysis of Minnesota’s electoral system by my colleague Dr. Kent Kaiser is the most comprehensive as well as most productively imaginative examination of the subject since Senate candidates Al Franken and Norm Coleman essentially tied last November, leaving the state tied up in recounting knots until the summer. Different individuals and interests, needless to say, have different views about exactly how procedurally coherent, legally sound, and ultimately accurate the recount was. Nevertheless, and with inevitable blips understood, it’s probably fair to say that most people have judged the process to have been conducted reasonably well; as fairly as was feasible. Not only is this a quite large state (likely goes the implicit thinking), and not only were a lot of votes cast (nearly three million), but this is Minnesota, after all, where we do civically important things not only well but *really* well.

No, I’m afraid that wasn’t true this time around.

Here’s just one of Kent’s findings, though I admit it’s the most remarkable and disturbing. Angering, too, it’s fair to say.

“[L]ocal officials were 16 times more likely to reject military absentee ballots than they were to reject other absentee ballots.” This was the case, in part, because of a too-short absentee voting window – as reflected by the fact that, “Many potential military absentee voters actually received their ballots *after* Election Day.”

Kent’s fifteen recommendations are listed in the Executive Summary nearby, so there’s no need to cite them here, albeit with two exceptions. When I noted the study’s productive imagination, I was thinking especially of Numbers One and Three, pertaining to requiring photo IDs to access ballots and changing the composition of the State Canvassing Board, respectively.

The first is noteworthy not just because simple safety and integrity demand it (not that this is a

new argument in any way), but also because it will streamline and modernize the entire system in multiple ways. You’ll be surprised by how it can upgrade almost everything.

As for the canvassing board, Kent proposes that it be composed exclusively of administrative law judges for several compelling reasons, including forever precluding the need for supreme court justices to disqualify themselves in critical recount cases because of earlier participation in canvassing board deliberations (as two members of the high court were obliged to do in the Coleman-Franken episode).

Readers may recall the *Minnesota Policy Blueprint*, an occasional Center series, kicking off in 1998, in which we have critiqued virtually every major state agency and other key state activities. This study is in that spirit, save for two major exceptions. Most importantly, while the explicit purpose of most of the previous investigations was to apply conservative and free market tests to what government does, the explicit purpose this time around has been to have nothing to do whatsoever with anything ideological – be it right, left, or sideways – as conducting elections which command the trust of citizens is of an entirely different order. This project also differs from previous *Blueprint* exercises in that, while they invariably were the work of task forces, Kent is the principal investigator and author of *No Longer a National Model*. He obviously has consulted widely and has profited from the help of many, but he’s the one scholar who deserves to have his name affixed.

Kent Kaiser – who, not incidentally, worked on the original 400-page *Blueprint* back in the late 1990s – is an American Experiment senior fellow and an assistant professor of communication at Northwestern College in Roseville, Minnesota. Of vital pertinence to this project, he served in the Office of the Minnesota Secretary of State for over eight years, mostly during the tenure of Republican Mary Kiffmeyer but also for nearly a year during DFLer Mark Ritchie’s current term. A regular contributor to *The Boundary Waters Journal* and chairman of the Lutheran Association of Missionaries and

Pilots, he holds an undergraduate degree from Carleton College, master's degrees from both Smith College and the University of Minnesota Duluth, and a doctorate in mass communication from the University of Minnesota in the Twin Cities.

I am particularly proud of this publication as there is little doubt that it will prove a significant contribution to how Minnesota goes about its most sacred secular work. My great thanks to Dr. Kaiser, and as with everything American Experiment does, I very much welcome your comments.

Mitch Pearlstein, Ph.D.
Founder & President

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Introduction

Historically, Minnesota has had a reputation for excellence in election administration in addition to having a track record of high voter participation.

Beginning in 2000, election administration systems across the nation came under scrutiny because of the presidential election recount in Florida that revealed so many deficiencies with the election system in that state. In that same year, we experienced a lower-profile recount in Minnesota's second congressional district; through this exercise, the strength of our election system was affirmed.

In a more high-profile, highly scrutinized election in 2002, our election system was again proven strong. Despite a major-party U.S. Senate candidate being killed in a plane crash less than two weeks prior to Election Day, Minnesota administered a nearly flawless election. As a result, our election system received accolades from across the country, and it became a national model for reforms being considered elsewhere.

All of this changed with the election of 2008 and the U.S. Senate recount that ensued. From

comments voiced privately by secretaries of state (all chief election officials in their states) at the July 2009 summer conference of the National Association of Secretaries of State, coincidentally held in Minneapolis, it was clear that Minnesota's reputation for excellence in election administration had been tarnished.

Just as the 2000 presidential recount in Florida brought to light many weaknesses in the election system there, the 2008 senate recount in Minnesota has brought to light weaknesses in our election system, too.

As a result, legislators, interest groups, the media, and others have sought to put forth election reform proposals for Minnesota. Yet none have been bold, most have suggested only refinements to the current system, and few have addressed core problems. Understandably, Minnesotans seem reluctant to criticize a system that they have been programmed to believe is the best in the nation.

We believe a gap remains to be filled, and we are not alone. The editorial board of the *Pioneer Press* has written that it would like to see bolder reforms suggested and implemented, especially in the case of super-close elections.

Through thoughtful discussion and careful consideration, this report seeks to provide just that.

Guiding Principles and Method

Our deliberations have included in-person meetings and social network communications. All have been guided by the following voters' rights principles that many others have used nationally, in whole or in part, in discussions of election systems.

- Access: Legitimate voters should have easy access to a ballot.
- Accuracy: Voters should know that their ballots are being counted accurately.
- Privacy: Voters have the right to a secret ballot.



- Integrity: Voters should be confident that their election systems deter and detect fraud.

We believe that these principles are timeless and that all four must be in balance for our election system to be as strong as it can be.

We gathered input from a wide array of election administration experts from within Minnesota and from across the nation. These include polling place workers, local election officials, members of the state legislature, members of the state judiciary, current and former secretary of state staff members, past and present secretaries of state from Minnesota and other states, reporters, campaign activists and attorneys, national military voting experts, public policy group officials, and others.

We chose at the outset not to mention specific names of the people providing input for this report because we wanted to gather the very best recommendations—political and monetary concerns and special interests notwithstanding. This approach allowed contributors to participate candidly. We believed this was the best approach, in any case, because we wanted this report to be not about the esteem or celebrity of its contributors but rather about the substance and merits of its recommendations.

The recommendations made here arose from hours of deliberation, research, and consideration. We attempted to think in terms of broad system reform and did not go into great detail about the specifics of implementation; we are confident that legislators and policymakers can better work out the details of implementing our recommendations. There were many issues considered in our deliberations, yet we chose not to try to produce a comprehensive review of the state's election system. Instead, we focused on what we believe are some of the most compelling issues stemming from our observations during and experiences with the 2008 senate recount.

Recommendations

In this section, we offer our recommendations for election reforms and improvements. For each recommendation, we provide rationales, in many cases hearkening back to the 2008 senate recount, because it was in the process of conducting the recount that so many inconsistencies and failures to follow established procedures came to the fore. In some instances, episodes from the recount served to chip away at Minnesota's reputation for excellence in election administration; in some instances, these episodes directly undermined principles of access, accuracy, privacy, and integrity, as will become evident in our rationales for recommendations.

Our review revealed that three main areas of concern arose during the course of the 2008 senate recount: general election operations, absentee balloting, and recounts. Therefore, we have divided our recommendations into three sections corresponding to these areas of concern.

(I) General Election Operations

Recommendation One: Require voters to present a photo ID to access their ballots.

We present this recommendation first, because it is such an obviously needed election reform in Minnesota and also because we want to get it out of the way and move on to recommendations for more interesting reforms that perhaps haven't been proposed before. In poll after poll, the overwhelming majority of people support this measure, including 78 percent of people polled by the Pew Research Center for the People and the Press in 2006 and 75 percent of people polled at the Minnesota State Fair by the state legislature in 2001. Furthermore, support for this measure is bipartisan: In the Pew poll, 71 percent of Democrats, 77 percent of Independents, and 86 percent of Republicans supported this measure.

We believe that election fraud is rare in Minnesota. Yet our belief is not enough. Whether fraud is rare or commonplace in our state is, in fact, unknowable.

We are highly suspicious of liberals' resistance to injecting this modest measure of integrity into our election system. We are especially suspicious of their reluctance to alter our state's system of allowing people to register by showing up at the polls with no proof of identity or residence at all and using only another person to vouch for them. Most Minnesotans are unaware that the vouching system does not even require that the people doing the vouching actually know the identity of the persons for whom they are vouching; the system requires the people doing the vouching to attest only to the registrant's residence in the precinct.

In Minnesota, we are lagging behind other states because of our antiquated laws against requiring photo ID for gaining access to a ballot.

Ballot access should have the same degree of integrity and accuracy that ballot counting does. A simple count is not enough to prove that integrity and accuracy exist in the ballot counting system, so we have a recount procedure to prove it. Similarly, there should be safeguards in the system to prove that there is integrity and accuracy in our ballot access procedures. Indeed, the accuracy and integrity of the count and recount procedures are valid only if the first step in the process—distributing ballots—has accuracy and integrity, as well.

We believe we must have high rates of precision and security in our election system especially in light of the degree to which non-Minnesotans have become involved in our state's elections in recent years. Doves of out-of-state activists came here to participate in both pre- and post-2008 election activities, and great attention was paid to Minnesota possibly providing the Democratic Party with its "60th vote" in the U.S. Senate. There has also been growing attention to Minnesota's potentially pivotal significance in presidential election years. We fear that a system with inadequate safeguards could become overwhelmed by over-exuberant and less-than-scrupulous partisan activists from outside our state.

Moreover, in making this recommendation, we want to emphasize that we do so not as much for

the usual politically conservative reason of injecting additional integrity into our election system—which, it no doubt would—but also for the purpose of allowing election processes to be streamlined and modernized.

Election technology now exists, and is being used in other states, that allows for swift and accurate election registration, Election Day check-in, and post-election administration. Such technology relies on interface with driver's license or state-issued photo ID. (Some of this technology is even made by Minnesota-based companies; see, for example, <http://www.datacard.com/>). It is similar to technology that Minnesotans are accustomed to seeing when they go to purchase fishing and hunting licenses. Just as card readers have eliminated the need for bait shop clerks to write out paper fishing licenses, a card reader installed at a polling place could be employed in voter registration and check-in on Election Day.

A quick swipe of a photo ID through a card reader could fill in the data fields in the state's voter registration system, thereby eliminating common data-entry mistakes that take place with the current pen-and-paper registration system. A quick swipe of such ID at the sign-in table in the polling place on Election Day would eliminate the need to line up by parts of the alphabet, would conserve thousands of pounds of paper currently used to print voter rosters in every election, and would greatly speed up the lines in the polling places. It would also eliminate the need for post-Election Day data entry of voter participation history, which after the 2008 election took several months and cost county governments tens of thousands of dollars to complete.

The U.S. Supreme Court has approved photo ID law language from other states. Consequently, the Minnesota Legislature has the rare opportunity to pass a law that has effectively already been ruled constitutional. In addition, we are confident that Minnesota lawmakers can find ways to eliminate potential barriers that an exceedingly small percentage of citizens who want to vote might have in producing a photo ID.



Recommendation Two: Eliminate partisanship and do away with political appointments in the Office of the Secretary of State

We recognize that political appointees are nothing new in the secretary of state’s office – indeed, the writer of this report was once one of them, albeit not in a policymaking role. The critique over the past 30 years has been that the Office of the Secretary of State has grown increasingly partisan, regardless of administration and whether headed by a Democrat or a Republican.

Regrettably, it is clear that several current secretary of state staff members were hired solely because of their past partisan political activities and not because they have any particular managerial acumen or public policy expertise. This includes the deputy secretary of state, the secretary’s administrative assistant, and the director of intergovernmental affairs. All of these appointees have very thin professional qualifications and very thick political connections and were, unfortunately, very visible participants in recount activities. Moreover, there appeared to be no party balance among the most prominent secretary of state staff members working on the recount, as there had been in the previous administration.

Even the secretary of state’s director of elections—arguably qualified for and competent in the job—is a political appointee, which cast suspicion on activities and decisions coming from the office’s elections division during the 2008 senate recount.

We were saddened to hear some people involved with the recount point to instructions and decisions made at key points that benefited the Democratic candidate in the senate recount. It is clear that pervasive, deep Democratic partisanship among secretary of state staff members cast suspicion on these instructions and decisions. Further, some current secretary of state staff members suggest that suspicions of collaboration of the secretary’s political appointees with agents and allies of the Democratic senate candidate during the recount were not unwarranted.

We recognize that there is a constructive place for partisanship in the election administration system: To wit, we believe it is beneficial to have explicit partisan balance among polling place workers (election judges) so there is a check-and-balance feature to Election Day operations, with poll workers of each party looking over one another’s shoulders, in a sense, and maintaining an unbiased atmosphere.

Still, one-sided partisanship, as critics say was displayed in the Office of the Secretary of State during the 2008 senate recount, led to impressions of mischief and feelings of mistrust among recount participants. We believe the people of Minnesota would be better served by unbiased secretary of state staff.

We found it distressing that members of the secretary of state’s political party expressed glee that “their guy” was in office during the recount, and we think it was equally disturbing that members of the other party lamented no longer having one of their own in that office.

Consequently, we believe, beginning immediately, there should be no political appointments for positions in the Office of the Secretary of State. Further, we believe that the Office of the Secretary of State and, by extension, the people of Minnesota, would benefit from the experience and professionalism of managers already situated in state government agencies and already known for their excellence in running state agencies.

Therefore, we recommend that “unclassified” managerial positions, such as deputy secretary of state and elections director currently held by political appointees in the secretary of state’s office, be filled pursuant to *Minnesota Statutes 43A.07, subdivision 5*, from the existing professional management class of employees in state government. We also recommend that non-managerial positions, such as administrative assistant and intergovernmental affairs director currently held by political appointees in the secretary of state’s office, be converted to “classified” status to be filled by career civil servants

rather than by the secretary of state's own political party loyalists.

Recommendation Three: Eliminate partisanship from and increase effectiveness of the State Canvassing Board by changing its composition.

The law provides for the State Canvassing Board to be composed of the secretary of state and four members of the state judiciary. The problem with this is that the secretary of state is a partisan elected official, and the state judiciary consists of gubernatorial political appointees who periodically stand for reelection.

As soon as the State Canvassing Board was announced after the 2008 election, the focus turned to the political background and leanings of its members. We believe this was detrimental to the process.

Moreover, during State Canvassing Board proceedings, it became apparent that members of the board had little familiarity with election procedures. Also, the two members of the State Canvassing Board who also were members of the State Supreme Court were later forced to recuse themselves from hearing appeals in the senate recount case.

Therefore, we recommend that the law be changed so that the State Canvassing Board is composed entirely of administrative law judges, under the oversight of the chief administrative law judge in the Office of Administrative Hearings (OAH).

This recommendation has several strengths.

First, administrative law judges are classified civil servants, not partisan political appointees; they are hired by the chief administrative law judge, through an open, competitive process, and they don't stand for election themselves. The chief is appointed by the governor, with the advice and consent of the state senate, which serves as a check on potential partisanship or cronyism; moreover, the position of chief has a six-year term, which means that the

term of a person in that position extends from one gubernatorial term into another.

Second, like other members of the judiciary in Minnesota, administrative law judges are subject to the state's Code of Judicial Conduct, which means they are barred from participating in partisan activities, endorsing candidates for elective office, or contributing to political campaigns.

Third, the OAH already has jurisdiction over the substantive elements of our state's election law, as the tribunal of first resort under the Fair Campaign Practices Act (found in Minnesota Statutes Chapters 211A and 211B). The caseload statistics since jurisdiction in this area was transferred in 2004 demonstrate that OAH has resolved a series of contentious and highly politicized matters in a way that is neutral, prompt, thorough, transparent, and very cost-effective. Indeed, the combination of a sturdy and accessible body of law, and a practice of rendering decisions quickly, has had a downward pressure on the total number of such disputes that have been filed in the most recent election cycles. In short, administrative law judges have proven their value in resolving (and eliminating) disputes arising under the election laws.

Fourth, OAH's work in fair campaign practice cases shows that OAH judges work well as part of a "panel system," like that which characterizes the State Canvassing Board, and render thoughtful decisions that are, in the main, sustained on appeal.

Finally, a State Canvassing Board consisting of administrative law judges would have the advantage of not including members of the judiciary who would later have to recuse themselves in the event of an appeal.

Recommendation Four: Check for interstate double voting.

With the 2008 senate election being as close as it was, there were suspicions of double voting significant enough to make a difference. Whereas

double voting within the state can be detected easily and this fact is widely known because of a few cases that have been prosecuted in recent years, double voting across state lines goes unmonitored. This fact, too, is widely known.

Whether an election is close or not, we support computerized checking for double voting across state lines. Double voting amounts to stealing another person's vote, and the act is unconscionable.

We hope that interstate double voting is rare, but we want to know for certain, and we believe that every instance of it should be prosecuted. The combination of a highly mobile society and the high stakes involved in recent Minnesota elections make it necessary and justifiable to institute a higher degree of precision and security than in the past.

It is technologically possible, with Minnesota's modern statewide voter registration system, to conduct efficient and relatively inexpensive checks for interstate double voting. This should be done after each election, with as many states as possible, but especially with our neighboring states. We believe the results of these checks should be certified by the secretaries of state of all states checked and that the results should be publicized widely to instill public confidence in our election system.

(II) Absentee Voting

Recommendation Five: Move the primary to an earlier date and extend the absentee ballot season.

Whereas the short absentee voting window is obviously detrimental to voter participation in general, we must mention that the voters most notably ill served are Minnesotans serving in the military. According to the U.S. Department of Defense, there were approximately 23,000 overseas military members and dependents eligible to vote in Minnesota in 2008 (over 13,000 Uniformed Service members, and about 10,000 family members). According to statistics from the

Minnesota Secretary of State's Office, only about 14.4 percent were able to cast a vote that counted in the presidential election.

To make matters worse, Minnesota state data indicate that ***local election officials were 16 times more likely to reject military absentee ballots than they were to reject other absentee ballots, and most of these ballots were rejected because they were received after Election Day.*** Many potential military absentee voters actually *received* their absentee ballots *after* Election Day. This is shameful.

We have not found anyone who suggests that an extended absentee voting calendar would not help ameliorate this problem.

This commonsense recommendation has been suggested by many people and has been proposed in legislation.

We understand the politics involved in this issue, with legislators fearing the prospect of possibly having to fight primary battles sooner after the end of a legislative session and having to start their post-primary activities earlier, as well. Yet the people of Minnesota are ill served by the current primary and general election calendar. It is time to get this recommendation passed into law.

Therefore, we support moving the primary to an earlier date—any earlier date that would allow for extension of the absentee voting window to *at least* 45 days, and preferably 90 days, from the current mere 30 days.

Recommendation Six: Institute centralized administration of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) as it pertains to absentee ballots.

Again, in 2008, local election officials rejected military absentee ballots at a rate 16 times higher than the rejection rate for nonmilitary ballots, and the vast majority of these rejected ballots were rejected because they were received after the

election deadline.

Military absentee ballots are an anomaly for many smaller-population counties and present challenges that regular absentee ballots do not. Administering these ballots requires some specialized knowledge. We believe that administration of these ballots should be streamlined to serve the affected voters better, and we understand that the state's computerized election administration system is already designed to allow this.

Therefore, we recommend creating a centralized system of UOCAVA absentee ballot administration to be administered by civil servants in the Office of the Secretary of State.

Recommendation Seven: Institute systems of barcoding and central processing of absentee ballots.

Currently, absentee ballot administration is not tracked closely enough to identify where problems in the system exist, though there is broad agreement that problems do exist, especially in terms of the timing of mailing and receiving the ballots. Moreover, the current system of administering absentee ballots does not take advantage of efficiencies that could be realized through the use of technology.

We recommend instituting a system of barcoding all absentee ballots that will allow election administrators to track the timing of sending and receiving ballots, to track acceptance and rejection of absentee ballots (including specific reasons for rejection, where applicable), and to report absentee ballot statistics after each election. This would allow election administrators to track better when ballots arrived so that, if an absentee ballot were received close to the deadline, its barcode could be scanned to verify its on-time arrival and to guarantee its inclusion in election tallies.

Our understanding is that the current election administration system overseen by the secretary

of state basically would allow for this, while also maintaining voters' privacy, as barcoding is already conducted for UOCAVA absentee ballots and some counties use barcoding in the administration of all absentee ballots.

We also support requiring all areas to be served by absentee ballot boards organized at county, rather than precinct, levels. This would reduce variances and deviations that occur in the acceptance and rejection standards when administered by election judges who often have already worked long hours by the time, on election night, when they are looking at and processing absentee ballots for the first time. We believe centralized processing of absentee ballots could reduce both the improper acceptance and improper rejection of absentee ballots.

We believe that our election system needs (a) more training in regard to standards for accepting and rejecting absentee ballots; and (b) more uniform communication, by the secretary of state through a global interpretive instruction to election officials in all counties and cities, of standards for accepting and rejecting absentee ballots.

Recommendation Eight: Institute "no-excuse" absentee voting (but not so-called "early voting").

Currently, Minnesota law allows absentee voting supposedly only for people who claim one of the following reasons for needing an absentee ballot:

- Absence from their precinct on Election Day
- Illness or disability
- Service as an election judge in another precinct on Election Day
- Religious discipline or religious holiday or observance
- Eligible emergency declared by the governor or quarantine declared by the federal or state government.

This law is unenforced and unenforceable.



Nevertheless, citizens do not necessarily recognize this fact, and, consequently, we believe that this law may have deterred some people from voting in the 2008 election (and other elections prior to that).

Therefore, we believe the law should be changed to allow absentee voting without an excuse. We believe this will ease access to voting and will encourage more people to participate.

Furthermore, we believe a no-excuse absentee voting system would be superior to the various “early voting” schemes that some people have suggested.

The main problem with so-called early voting is that it does not allow voters to change their minds after casting their ballots like the current absentee voting system does. Many more voters change their minds than most people recognize—and not just for dramatic reasons such as a candidate dying in a plane crash, as happened in 2002, or an alleged sex scandal taking a candidate out of the running, as happened in 1990. A great deal of new information becomes available about candidates in the days just prior to Election Day, and we believe that voters should have the ability to change their votes based on new information.

Early voting systems do not allow this: Once their votes are cast, voters in such systems do not have the ability to change their votes, because their ballots have already been placed in the ballot box and separated from the identity of the voters.

Moreover, the system of “in-person” absentee voting that currently exists in Minnesota is sufficiently superior to “early voting” systems that we do not see a need for early voting.

We specifically recommend *against* coupling an early voting system with our current in-person absentee voting system. We believe there would be great distress caused for people who participated in “early voting” and were later told they *could not* change their votes while others who voted by absentee ballot were told they *could* change their votes. Indeed, we

believe there would be absolute pandemonium if this were to happen upon a sudden change in candidates, as occurred in 2002 or in 1990.

Recommendation Nine: Make ballot-checking technology available to “in-person” absentee voters.

Currently, people who vote by absentee ballot in person do not have the benefit of technology to check for technical errors on their ballots (such as over-voting) like their fellow citizens who vote on Election Day have.

After the 2008 election, it became apparent that some people who voted by absentee ballot might have benefited from such technology, as there were many absentee ballots rejected for technical errors. Therefore, we believe that local election officials who offer in-person absentee voting should make available the same ballot-scanning technology that is available to Election Day voters, but only for checking for errors on ballots, not for counting the ballots (because, again, we want to preserve absentee voters’ ability to re-vote if they change their minds).

Recommendation Ten: Institute a provisional ballot system.

Currently, local election officials must make on-the-spot judgments about the acceptability of absentee ballots. It was clear during the 2008 election that there were varying standards for acceptance and rejection of absentee ballots from county to county.

We believe that local election officials should be spared from having to make hasty judgments about the validity of ballots (for example, in the case of possibly mismatched signatures on absentee ballot request forms and absentee ballot envelopes) and that, when in doubt, local election officials should be able to put questionable ballots into a “provisional” status that would allow them to verify the legitimacy

of ballots before finalizing their acceptance through placement in the ballot box, possibly even a day or two after Election Day.

Moreover, the institution of a provisional ballot system would allow also for the provisional acceptance of ballots cast by voters who did not have photo ID to register. This would be especially helpful in the case of voters who had only another person to vouch for them to allow their voter registration, should Minnesota maintain the vouching system whose elimination we recommended earlier.

(III) Recounts

Recommendation Eleven: Require recounts to be done in a central location.

Experience from 2000 to 2007 showed that centralized recounts were superior to decentralized recounts, and detailed plans, including budgets, had been developed by the secretary of state's office to prepare for centralized recounts. Regrettably, these plans were not followed for the 2008 senate recount.

We understand the reluctance to invest the money required to conduct a centralized recount after the 2008 election and the preference to push the costs of recounts onto local governments. Yet we believe that the benefits of a centralized recount outweigh the costs, and, after the 2008 election, we saw with great clarity the downsides of decentralization. Therefore, we recommend requiring multi-county recounts to be conducted in a central location.

A centralized recount would offer the following benefits.

First, training of recount officials could be standardized, thereby increasing the consistency of standards and procedures. The 2008 senate recount was marred by varying standards and procedures from county to county. Two former secretaries of state, Mary Kiffmeyer (Republican) and Joan Growe (Democrat), were both quoted in the media

saying that a centralized recount could have offered this benefit.

Second, a centralized recount could be monitored more closely. Media, political operatives, and the public could more easily observe recount operations taking place in a centralized location and could detect whether inconsistencies existed.

Third, a centralized recount could be done more quickly than a decentralized recount. The plans that were established by the secretary of state in 2004 called for a statewide recount to be completed in just one week, instead of two or three weeks as was the case in 2008, using two shifts per day. During the 2008 senate recount, county officials did not institute multiple full-time shifts.

Fourth, a centralized recount could rely on the work of career civil servants—specifically, state employees—rather than volunteer election judges. We believe adopting this plan would increase the professionalism of the operations and would provide greater accountability.

Fifth, a centralized recount using state employees would bring about a measure of impartiality in making determinations on ballots. Under the procedures employed in the 2008 senate recount, county officials, who had previously dealt with the ballots, were responsible for checking their own work. We believe it would be better for a disinterested third party to check the work.

Recommendation Twelve: Recount only ballots counted on Election Day.

The 2008 senate recount was fatally flawed from the moment that, for the first time in state history, ballots that were not included in the initial count on Election Day were introduced into the recount. This included, specifically, absentee ballots that later were deemed “improperly rejected.” We were especially dismayed when the secretary of state reversed his decision that these ballots should not be included in the recount—his initial gut reaction,



that those ballots should have been the subject not of a recount but of a court contest, was correct.

The inclusion of new ballots was especially problematic because there were no statutes telling how to deal with them—or even allowing for them. Consequently, varying standards were employed among counties, which resulted in unequal treatment of voters across the state.

Some counties followed the letter of the law and rejected absentee ballots on every minute technicality; other counties followed looser standards and accepted ballots that would have been rejected in another county. Election officials in the City of Minneapolis, for example, did not check the registration of absentee ballot witnesses for the absentee ballots cast there; Carver County officials, by contrast, checked every single one of them and rejected the ballots of people whose witnesses were not registered. To give some concreteness to the problem: In total, election officials in Saint Louis County, Ramsey County, and the City of Minneapolis rejected an aggregate total of only seven absentee ballots; by contrast, election officials in Carver County, which is much smaller in population than any one of those other three entities, rejected 188 absentee ballots. Therefore, voters, in effect, were enfranchised or disenfranchised depending on their residence.

Moreover, if one agrees that there were *improperly rejected* ballots, then, given the varying standards for acceptance and rejection among counties, then one must believe that there were *improperly accepted* ballots. This further exacerbates the problem of introducing new, previously rejected absentee ballots into the mix.

We believe that including some improperly rejected absentee ballots, but not all rejected absentee ballots, was especially problematic because the State Canvassing Board never seemed to take a global look at the absentee ballot system. We believe that if the board was going to consider new absentee ballots, then it should have started by establishing standards on how to deal with all absentee ballots.

The piecemeal inclusion of some new absentee ballots, without clearly established standards, was a backward way of handling the ballots. It led to unacceptable processing inconsistencies among ballots—that is, to unacceptable inequality among voters.

Because of the difficulties in determining exactly what ballots might have been either rejected or accepted erroneously, any disputed ballots that were not in the original count should have been the subject for a possible court contest, not a subject for the recount. Bringing only some of the disputed ballots into the recount process was highly problematic. This was especially true because of the fact that the process by which new ballots were allowed into the recount was seen as partisan: The overwhelming majority of originally rejected absentee ballots that were introduced into the recount, and the majority of absentee ballots that were possibly accepted improperly but ignored in the recount, came from Democratic strongholds; the overwhelming majority of originally rejected absentee ballots that continued to be ignored in the recount came from Republican-leaning areas.

In addition, there were votes counted in the City of Minneapolis for which there were no ballots in existence to back up the numbers. These “missing” ballots should have been the subject of a court contest, not a recount. The recount should have considered only the ballots that had been counted on Election Day—and only ballots that could be physically recounted. Again, the drama involved in getting these “missing” ballots counted, in spite of their apparent nonexistence, was viewed as partisan. This suspicion was fueled by the fact that the director of elections in Minneapolis at first explained how there might never have been ballots to back up the numbers indicated on the ballot scanner from the precinct in question. Later, we were distressed to witness the City of Minneapolis director of elections seeming to buckle under partisan influence and, along with the deputy secretary of state and the Democratic mayor of Minneapolis, to backtrack and declare that ballots must have simply gone missing. Again, these possible votes

should have been a subject for a court contest, not a recount.

Consequently, we support the development and passage of legislation that would require recounts to consider only ballots counted on Election Day (plus provisional ballots cast on Election Day and subsequently found to be validly cast, if a provisional ballot system is adopted, as we recommended earlier). Recounts also should consider only ballots that physically exist at the time of the recount.

Recommendation Thirteen: In the case of “duplicate” ballots, count the duplicates, not the originals.

In any election, some absentee ballots arrive in such condition that they are not able to be fed successfully into the precinct ballot scanners. In such cases, poll workers make “duplicate” ballots by copying all marks from the original onto a new ballot. That new ballot is supposed to be marked “duplicate.” Once that duplicate ballot is created, it becomes *the legal ballot*, and the original ballot becomes void.

During the 2008 senate recount, a procedure was instituted that provided for trying to count original ballots. In theory, trying to understand a voter’s original intent sounds like a good idea. The problem with this procedure is that poll workers, in the flurry of activity on Election Day and possibly not understanding the potential future ramifications of not following established procedures, often forget to mark “duplicate” on the duplicate ballots. Therefore, when trying to match original ballots to duplicate ballots after the 2008 election, officials found extra original ballots and were unable to find all of the duplicate ballots. This led to double counting of some people’s votes (to wit, some people’s original ballots *and* duplicate ballots were *both* counted).

Therefore, we support legislation that would require duplicate ballots—not original ballots—to be considered in a recount in which duplicate ballots have been created.

Recommendation Fourteen: Follow laws currently on the books and formally increase uniformity and specificity of procedures.

The U.S. Senate election recount made very clear the fact that standards and procedures vary widely from one county to another across our state. This should not be the case.

Furthermore, we were distressed when the secretary of state referred to the recount process as “chaotic.” Elections are not chaotic; they are orderly, if laws and procedures are followed as they should be.

Fraud thrives in chaos. Consequently, we believe that election procedures and standards should be rigorous, uniform, and specific—and followed at all levels, from election judges, to city clerks, to county auditors, to state election administrators.

Therefore, we support measures to increase training of local election officials, to increase oversight of local election processes, and to hold the secretary of state accountable for ensuring statewide uniformity. After all, if the secretary of state is going to have the title of “chief election official” in Minnesota, then the secretary must “own” the responsibilities and the duties that accompany it.

We especially support the adoption of uniform and comprehensive recount rules that are promulgated by the secretary of state and published in *Minnesota Rules* that include a requirement to reconcile the number of ballots to be recounted with the number of persons voting on Election Day. It appears that the 2008 senate recount was the first recount in Minnesota history that did not have a reconciliation process, the lack of which enabled “sticky fingers” ballots to disappear and allowed “mystery ballots” to appear and get counted after Election Day during the recount.

Recommendation Fifteen: Institute a run-off election for extremely close elections (but not so-called “instant run-off voting”).

We believe that, if election laws and procedures are followed as closely as they should be followed, then



our state's election officials should be able accurately and efficiently to determine outcomes of elections to a very small margin of difference.

However, if it is deemed impossible to follow election laws and procedures as closely as we would like to see, as the 2008 senate recount indicates it might be, then we support the institution of a run-off election.

Such a run-off election should take place after a recount triggered (as stipulated by current law) by an election resulting in a margin of difference of one-half of one percent between the top candidates. We recommend that the trigger for a run-off election be an extremely small margin in the range of five one-hundredths of one percent and that the run-off be between only the candidates in that margin. We recommend that such run-off elections take place in the month of December to facilitate the installation of elected officials in a timely fashion that prevents gaps in representation.

We must note that we do not want a run-off election to be a substitute for increased accuracy and continual improvement in election administration. Indeed, we believe a run-off election could eventually be rendered unnecessary as we gain confidence in the system.

Also to be clear: For a variety of reasons, not the least of which is its violation of the principle of one-person-one-vote, we do not support what has been coined "instant run-off voting."

We believe that a run-off election would provide greater satisfaction for voters and would allow Minnesotans to be more quickly and more properly represented, even after a close election. We also believe that a run-off election would be worth the cost to taxpayers, especially considering the direct and indirect costs of the 2008 senate recount and considering the estimated \$14 to \$15 million spent by the two campaigns during the 2008 senate recount.

There are strong doubts about whether the actual top vote-getting candidate in the 2008 senate election was ultimately declared the winner, which calls into question the legitimacy not only of the current officeholder but also of the system that allowed him to be seated. A run-off election like the one we advocate would almost certainly eliminate doubts about and lend legitimacy to our state's election system. ■

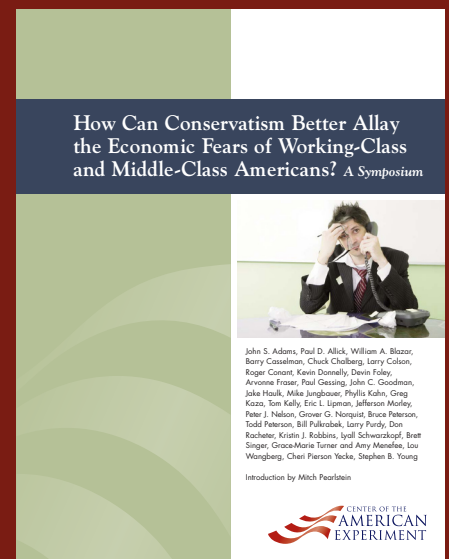
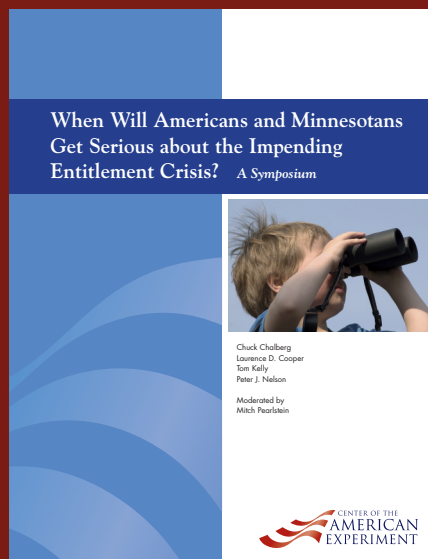
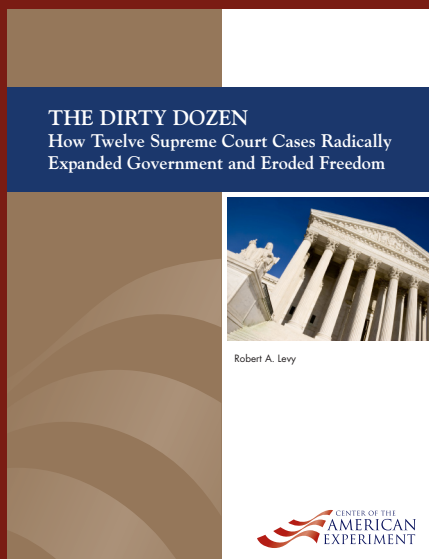


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