# Letting the Candidates Own the Recount: The 1962 Minnesota Gubernatorial Recount and its Use of Alternative Dispute Resolution*

## I. INTRODUCTION

> The Minnesota Supreme Court's order, declaring Gov. Andersen ... the winner [of the 1962 gubernatorial election] ... has caused a backfire that has echoed all the way to Washington. ... Three of the justices [that decided the case] had been promoted by Gov. Andersen. ... They remained on the panel and helped declare him elected.[1]

The above is an excerpt from an article that appeared in newspapers throughout Minnesota regarding the disputed 1962 Minnesota gubernatorial race. The article was published after the state high court reversed the initial canvass of votes that had declared Karl Rolvaag the winner, and instead issued a decision—split along perceived party lines—to declare Elmer Andersen the winner. While this quote is specific to the Minnesota election, the skepticism expressed towards the judiciary and its ability to resolve a disputed election impartially is nearly universal to all disputed elections.

Despite an inability to produce legitimacy or confidence, election law repeatedly, if not exclusively, turns to the courts to resolve disputed elections. Implicit in these arguments is that no other system, much less one that embraces alternative dispute resolution (ADR) can successfully resolve the such important events. This recent development questions this paradigm and asserts that ADR can be—and has been—successfully implemented to resolve elections.

Specifically, this comment reexamines the 1962 Minnesota gubernatorial election as an unplanned, but highly successful use of ADR to resolve a disputed election. While it may be unusual to consider a 1962 election worthy of a comment, the election holds new importance as the fields of election law and alternative dispute resolution find new synergies. An

---

* This comment was originally conceived during the 2011 *Ohio State Journal on Dispute Resolution* Symposium, "Talking the Vote: Facilitating Disputed Election Processes through ADR" after the election was briefly discused by a panel member. The comment was then first drafted as a seminar paper for class on disputed elections. The class was taught by Professor Edward Foley at The Ohio State University Moritz College of Law. That paper has been revised to its current form as a comment for *JDR*.

[1] Drew Pearson, *Minnesota Supreme Court Comes Under Fire*, THE BELL SYNDICATE, Dec. 7, 1962, *available at* http://dspace.wrlc.org/doc/bitstream/2041/49639/b17f23-1207zdisplay.pdf.

election once viewed as an anomaly[2] now provides insight as to how ADR can be used in disputed elections. In fact, the impetus for this comment began during the 2011 *Ohio State Journal on Dispute Resolution* Symposium, "Talking the Vote: Facilitating Disputed Election Processes through ADR." During the symposium, one of the panelists suggested that the 1962 election may be an example of one time that ADR was used to resolve a disputed election. Despite this passing comment, the election has been ignored by legal scholars generally,[3] and ADR scholars specifically. This recent development seeks to reintroduce the 1962 disputed election as an example of how ADR can be used to resolve a disputed election.

Perhaps contributing to the lack of ADR scholarship on the topic is the fortuitous manner that the ADR techniques were used. The disputed 1962 Minnesota election began with a traditional challenge to the state Supreme Court. When the high court's decision was met with such animosity by Minnesotans, the press, and the parties involved, the candidates and the high court decided the subsequent recount would not be presided by the court. Eschewing the formal court system and legal precedent, the parties *decided* the recount would be officiated by an independent three-judge panel. Even more significantly, the two candidates mutually picked the three judges presiding over the case and determined which ballots would be contested. When the recount case concluded, the three-judge panel unanimously concluded that Rolvaag—not Andersen—won. Andersen did not appeal. The newspapers, which earlier had dismissed the recount as partisan, declared that Minnesota had found a fair way to resolve a disputed election.[4]

To reassess the 1962 Minnesota gubernatorial election, this paper first explores the precedent and circumstances that led the participants to pursue this unusual form of dispute resolution. Next, the article examines the ADR techniques used and how the candidates and public responded to an unusual process. While this comment focuses on how ADR techniques were used, it is beyond the scope of this article to define the ADR techniques used as specific forms of ADR such as arbitration or negotiation. At the time, none of the parties specifically asserted that they were using ADR techniques. Thus,

---

[2] *See* Elizabeth Stawicki, *The Origin of the Three-Judge Panel*, MPR NEWS, Jan. 25, 2009, http://minnesota.publicradio.org/display/web/2009/01/25/threejudge_sidebar/ (last visited Feb. 17, 2012).

[3] The only legal scholarship on the election has been conducted by Professor Edward B. Foley. *See* Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, and Policy*, 18 STAN. L. & POL'Y REV. 350 (2007).

[4] Interview by Marvin Roger Anderson with Oscar R. Knutson, Minnesota State Library Oral History, at 24 (Dec. 18, 1980) (alluding to the newspaper that made this argument).

it would be ahistorical to state that the parties engaged in techniques such as arbitration without fully defining the methods and comparing them to what actually happened in 1962. Such an analysis, however, is important and may warrant additional scholarship on the election.

The article demonstrates that the three-judge panel was not created from statute, legal precedent, or the parties' desires to resolve the dispute fairly. Instead, the two candidates and the Minnesota Supreme Court Chief Justice pursued a three-judge panel based on their own interests. Each candidate believed it would help him win the recount and the Supreme Court wanted to restore confidence in the judicial system. Thus each had a reason to work outside the established legal framework and use ADR techniques. Despite starkly different interests, the parties produced a three-judge panel and a process that fairly and independently oversaw the recount. In fact, the recount succeeded because the parties incorporated ADR into the process. Both candidates were forced to resolve the disputed election themselves. As a result, the candidates and public viewed the decision as fair and no appeal was cast.[5]

## II. BACKGROUND TO THE 1962 ELECTION

Although the 1962 election was resolved creatively through alternative dispute resolution, the 1962 gubernatorial campaign began less ceremoniously. The election started as an uninspired partisan contest

[5] Central to this article is the book *Recount* by Ronald Stinnett and Charles H. Backstrom. RONALD STINNETT AND CHARLES BACKSTROM, RECOUNT (1964). RECOUNT is the definitive work devoted to analyzing the 1962 Minnesota election. Consequently, the book is cited frequently to understand the disputed elections chronology. However, while RECOUNT focuses on telling the recount as it unfolded, this article focuses more on the circumstances that allowed the parties to use alternative dispute resolution processes and reactions the public had to the recount. As a result, Stinnett's book is used in two distinctly different ways. First, RECOUNT is used as a rich source of otherwise unavailable newspaper articles, polls, and interviews. As the election's own archive, RECOUNT provides a rich way to understand the election historically. When possible, other sources are used to corroborate Stinnett's comprehensive objective analysis of the election. The book's second use is more instrumental to this article. Stinnett began researching RECOUNT almost immediately after the election concluded. In fact, the book would be published before Minnesota would elect its next governor. In this regard, Stinnett's own analysis of "fairness" contributes to this article by understanding how Minnesotans—including Stinnett—perceived the election in its immediate aftermath. In these instances, RECOUNT shifts from being an academic account to becoming a primary source itself.

between two career politicians: Elmer Andersen, the Republican, and Karl Rolvaag, the Democratic-Farmer-Labor Party (DFL) candidate.[6]

Andersen, the incumbent, described himself as a "party man" who was committed to advancing the Republican Party's goals.[7] Although he refrained from calling himself a career politician,[8] Andersen represented the party for twenty-six years in roles as a campaign aide, a congressional campaign manager, a presidential campaign manager, and a five-session member of the state senate.[9]

Perhaps because of his extensive bureaucratic background, Andersen's term as governor was often criticized as being more attentive to the processes of passing legislation[10] and to fostering a positive image of public service,[11] than it was to was creating change and providing a more inspirational vision for Minnesota.[12] Andersen, in his autobiography, conceded that his interest in legislative process may have slowed his initiatives and hurt his cross-party appeal.[13] However, to Republicans, he performed competently to earn the nomination as the party's gubernatorial candidate.[14]

Andersen's polarizing effect on voters was made apparent when Minnesotans elected him the state's thirtieth governor in 1960. Out of a total of 1,577,509 votes cast, Andersen had won the governorship by 22,879 votes.[15] Although this election is not the one at issue, it is interesting to note

---

[6] DFL stands for Democratic-Farmer-Labor Party. The DFL is a state party and is considered a part of the Democratic Party.

[7] ELMER L. ANDERSEN, I TRUST TO BE BELIEVED 13 (2004).

[8] ELMER L. ANDERSEN, A MAN'S REACH 111 (2000) ("[Eleanor and I] did not take long to decide we did not want to make a living at politics. we We wanted our political activity to be public service, not a career...when When elected official officials make governmental service a career, they lose a great deal of freedom and flexibility." *But see id.* at 177 (One could not serve five session of the Minnesota Legislature and not stay "attuned to pubic affairs.")

[9] *See id.* at 95–174.

[10] *Id.* at 226–28 (describing his numerous calls to help a girl who had developed a relationship with a bus driver and also his pursuit of several pet projects); *see also* TO BE BELIEVED, *supra* note 7, at 30 (describing the role of government in a campaign speech); STINNETT, *supra* note 5, at 6 (quoting a newspaper article describing Andersen as a slower moving leader that liked to consider and weigh evidence and opinions from a wide variety of people).

[11] *See, e.g.*, A MAN'S REACH, *supra* note 8, at 228–32 (interrupting any meeting to talk to children and seeing his role as a promoter of Minnesota's universities).

[12] STINNETT, *supra* note 5, at 6.

[13] A MAN'S REACH, *supra* note 8, at 235.

[14] *Id.* at 233–34.

[15] STINNETT, *supra* note 5, at 11.

how close it was. In addition, election night was the pinnacle of Andersen's popularity as a governor. For his entire two-year term, Andersen's approval ratings never exceeded 50%.[16] In fact, a poll taken one year before the 1962 election revealed that only 37% of Minnesotans planned to vote for him, 49% planned to vote against him, and 11% had no opinion. Andersen failed to achieve crossover support from DFLers or independents.

The polarizing governor's challenger in 1962 was the DFL candidate Karl Rolvaag. Rolvaag's career reflected his Republican counterpart. A longtime DFL party activist, Rolvaag sought the governorship as the sitting lieutenant governor, a post he had held since 1954.[17] Prior to serving as lieutenant governor, Rolvaag worked as the DFL state party chairman.[18] Rolvaag's stoic and reserved nature caused observers to respect his ability to analyze complex issues, but also criticize his inability to connect with voters.[19]

Thus, when the two candidates entered the 1962 election, it was clear that neither would win the contest convincingly. Both appealed to their bases but did little to attract independent voters.[20] In addition, their backgrounds as party leaders led each to tout issues that related to taxes and government spending instead of sweeping ideological change or government reform.[21] Finally, both men were relatively known commodities in Minnesota. They had each run for statewide office on several occasions and voters already had a developed understanding as to each candidate's values.

For what the campaign lacked in terms of candidate interest, it made up for in perceived closeness as the race tightened. *The New York Times* listed Minnesota's gubernatorial race as one of the five close races to watch[22] and polls taken several months before the election found the race to be in a dead heat.[23] The dead heat even prompted a late campaign visit from President John F. Kennedy, who asserted he traveled 1,500 miles from Boston "not just

---

[16] *Id.* at 13.

[17] *Id.*

[18] *Id.*

[19] *Minnesota Liberal: Karl Fritjof Rolvaag*, N.Y. TIMES, Mar. 26, 1963, at 10.

[20] However, Andersen attracts a majority of the Independent voters. *See* STINNETT, *supra* note 5, at 35.

[21] *Minnesota Liberal: Karl Fritjof Rolvaag, supra* note 19.

[22] Minnesota Historical Society, *1963 Andersen–Rolvaag Election Recount*, Podcast, http://discussions.mnhs.org/collections/2010/11/1963-andersen-rolvaag-election-recount-2/ (last visited April 6, 2011) (containing excerpts from Kennedy's speech).

[23] STINNETT, *supra* note 5, at 35.

for the bean supper but because I want to see this state elect [Rolvaag] the next governor."[24]

Despite claims of a heated campaign,[25] signs of visible antipathy did not develop until the week leading up to the election.[26] Rolvaag accused Andersen of speeding up construction of a highway system so that Andersen could have a ribbon-cutting ceremony several days before the election.[27] Rolvaag claimed, wrongly, that Andersen's insistence on finishing the highway resulted in numerous structural defects.[28] Andersen denied the allegations. However, this end-of-campaign dispute has been credited with ensuring an extremely close election.[29]

This background is significant for several reasons. First, neither candidate was a statesman. Some histories of the election attempt to portray the two men as friendly candidates that worked together in an era where public service was an honor and compromise a necessity.[30] It was because of this commitment to working together that the two candidates were able to compromise and conduct a fair recount. However, this mischaracterizes the two candidates and the campaign. The two men were politicos. Andersen considered Rolvaag a disloyal lieutenant governor who was more consumed with his political career than the state's interests.[31] If Rolvaag held Andersen in any regard, it was diminished by the highway controversy, where Rolvaag personally attacked Andersen's involvement. Nothing in the men's backgrounds or experiences suggested they would work together to resolve the disputed election. As is later argued, the two men were more driven by tactical decisions to win than any background or reverent view of public service.

---

[24] *Id.; see also* STINNETT, *supra* note 5, at 11–37 (characterizing the campaign as more spirited).

[25] *See generally* STINNETT, *supra* note 5.

[26] *A Bitterly Fought Race*, BRAINERD DAILY DISPATCH, Feb. 5, 1963, at 11.

[27] *See, e.g.*, *Looking Back to Another Protracted Minnesota Race: 1962*, MINNPOST.COM (Nov. 11, 2008), http://www.minnpost.com/iricnathanson/2008/11/11/4528/looking_back_to_another_protracted_minnesota_race_19 (last visited Feb. 17, 2012).

[28] A MAN'S REACH, supra note 8, at 241.

[29] *Looking Back to Another Protracted Minnesota Race: 1962*, *supra* note 27.

[30] *See generally* STINNETT, *supra* note 5 (portraying the two men as leaders committed to a fair process).

[31] Elizabeth Stawicki, *The Origin of the Three-Judge Panel*, MPR NEWS (Jan. 25, 2009), http://minnesota.publicradio.org/display/web/2009/01/25/threejudge_sidebar/ (last visited Feb. 17, 2012).

Second, both candidates expected a close race. Each candidate pursued a political campaign that relied on his respective constituents and it was understood that whoever could get out his supporters would win.[32] In addition, each candidate was aware of the close gubernatorial election in 1960 and the polls that showed the race in a dead heat.

## III. ELECTION DAY[33]

On Nov. 6, the election polls closed at eight in the evening, but neither candidate expected the race to be declared that evening. Per Minnesota's election code, after polls closed poll workers immediately canvassed the vote by counting the paper ballots and reporting the results after the initial canvass was completed.[34] However, the canvass results did not come in immediately because many precincts did not have voting machines. As a result, the vote results came in a series of phases resulting in what political scientist Ronald Stinnett describes as a phase[35], or swinging pendulum. Each phase or swing tended to favor one party or the other and as a result the "leading" candidate would change frequently.[36] In the first phase, Minnesota's large cities reported almost immediately, which would tend to show the DFL candidate having a large lead. In the second phase, the rural precinct reports came in the late night and early morning hours, tending to swing the election back to the Republican candidate. In the third phase, the "Iron Range" vote came in from Northern Minnesota, where the DFL candidate got his or her last surge of votes. In the last phase, towns that used paper ballots reported results. These votes tended to vote Republican. In close elections, it was nearly impossible to know the winner until these votes were tabulated.

The same process occurred in 1962, but with even greater swings.[37] Rolvaag emerged with a strong early lead of 29,000 votes buoyed by the city

---

[32] Stinnett makes the same argument. STINNETT, *supra* note 5, at 34 ("[T]he general public looked upon Rolvaag and Andersen impassively and could not get overly excited in either support or opposition of either man ... Each [candidate] was burdened with the problem of presenting a positive picture of himself to a public which continued to voiced disapproval of Andersen's performance during his two years as governor but which demonstrate indifference to Rolvaag.").

[33] This section relies extensively on Stinnett for a recap of the day's events. *See generally* STINNETT, *supra* note 5.

[34] Minn. Rev. Stat. Ann. § 204.19 (West 1962) (since amended).

[35] STINNETT, *supra* note 5, at 60.

[36] *Id.*

[37] *See Four Governor Races may be Hung up Weeks*, CHI. DAILY TRIB., Nov. 10, 1962, at N6.

vote. However, by midnight his lead started to erode as rural votes were counted. By five the next morning, the lead switched and Andersen pulled ahead by 15,000 votes. This lead switch would be the first of six that would occur over the next five days. While the initial swings in the election would be measured by thousands of votes, the subsequent changes would be much smaller. On Wednesday evening, Rolvaag would retake the lead by 115. On Thursday afternoon, Andersen would regain the lead by 609 votes, only to have Rolvaag regain an 89-vote lead two hours later. Friday morning brought Andersen back into the lead by 44 votes. Saturday would see the final lead switch, as Rolvaag won the unofficial canvass by 139 votes. In an election of 1,267,502 votes, Rolvaag had won by the initial canvass .07% of the vote.[38]

Contributing to the delay and greater swings, several precincts had problems tabulating votes. A snowstorm in Northern Minnesota delayed the counting of key DFL votes.[39] Additionally, several districts reported errors in the canvassing. While it is not known if such errors commonly occurred, it is clear that a correction of fifty votes did not usually change the election's outcome, making such final swings unusually critical.[40] Despite these delays, Minnesota was not the only state with a race still undetermined. In fact, Minnesota was one of several prominent races that remained too close to call several days after the election.[41] However, none of the outstanding races would be as close as Minnesota's race, nor would they result in a protracted dispute.

Because both candidates anticipated a long counting process, neither called for the other to concede.[42] In fact, as both parties realized the election would remain close, their attorneys began familiarizing themselves with Minnesota's election codes to consider how they could contest the initial results or ask for a recount. This proved challenging as Minnesota's election statutes had been modified two years earlier. Initially, both parties focused on the authority of the county canvassing boards to challenge the results.[43] Minnesota's election code provided that the board meet within ten days of

---

[38] This provides a summary of the election returns. For a more in-depth discussion, see STINNETT, *supra* note 5, at 57–65.

[39] *Id.* at 63; *Minnesota Race Still in Doubt as Snowstorm Delays Counting; Snow Delays Report*, N.Y. TIMES, Nov. 8, 1962, at 43.

[40] STINNETT, *supra* note 5.

[41] *Four Governor Races may be Hung up Weeks*, CHI. DAILY TRIB., Nov. 10, 1962, at N6.

[42] A MAN'S REACH, *supra* note 8, at 246.

[43] Minn. Rev. Stat. Ann. § 204.29 (West 1962) (describing the role of the county canvassing board).

the general election and publicly canvass the vote.[44] The meeting served as a way to authenticate the initial canvass before certifying the election. However, a 1955 amendment granted the canvassing board authority not only to tabulate the votes, but also to declare errors in the vote counting:

> If, in conducting the canvass of votes at any election...any county canvassing board determines by a four-fifths' vote that an obvious error in the counting and recording of the vote...has been made by the judges in any precincts, then the county canvassing board shall refuse to count the returns of that precinct for that office, and they shall order an inspection of the ballots and the returns of the precinct for the purpose of correcting the *obvious error*.[45]

These provisions essentially gave the canvassing board the power to review the votes before certifying if the board found an "obvious error."[46] If an error was found while reviewing the ballots, the county canvassing board appeared to have the power to correct the error and submit a proper vote total.[47] Such actions did not need to be initiated by either of the candidates. Instead, it was a step in the process to certifying the original election.[48]

However, the statute was relatively new and untested. The statute did not specifically define an "obvious error" and a comment to the statute failed to give much guidance, stating only that if a board found an "obvious error," it could correct errors in the initial count.[49] In practice, the boards did not know what an obvious error was either. Stinnett contends the county boards viewed their role as ceremonial and that few had ever been asked to find an obvious error.[50] An exhaustive search for a source to define the word, as it was understood in 1962, revealed only one authority. An attorney general's opinion from the previous year provided that an obvious error could be "a

---

[44] *Id.*

[45] § 204.30 (West 1962) (statute section resolving "errors in counting, correction") (emphasis added).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* (Interim Commission Comment, 1959) (this comment came from the commission that considered reviewing or amending the statute in 1959. The Commission choose to leave the statute unchanged because the issue had not been regulated.).

[50] STINNETT, *supra* note 5, at 67.

situation where the total votes cast for one office exceeded the total number of voters in the precinct."[51]

Equally unclear is what would happen if an obvious error was discovered. There were no clear remedies to resolve the dispute. For example, if the vote exceeded the total number of ballots cast, how would the parties correct the obvious error? Retabulating the votes may have brought the vote count below the total votes in the precinct. However, if ballot box stuffing had occurred, retabulating the ballots could still have generated a total vote greater than the total number of eligible voters. Although the statute considered this scenario as an obvious error, it did not say how parties should proceed. In this scenario, should the canvassing board submit the vote total or should the canvassing board disqualify all the ballots? The statute provided no guidance for such a scenario.[52]

Despite the statute's lack of clarity, or perhaps because of it, both parties sought to use the canvassing board's power to find "obvious errors" to nudge the vote totals before each county submitted its results.[53] Once all the counties submitted their totals, the State Canvassing Board would certify the count. Because of this unique "obvious error" process, each candidate viewed the county boards as an informal way to challenge the ballot totals without having to actually litigate the election or ask for a recount.[54]

In addition, both candidates assumed that if a vote count could be "corrected" by the board before the vote was certified, the election could be won. Stinnett argues that this favored the certified winner in several ways. First, it would cast the certified winner as the victor. Thus, the losing candidate would have to overcome the public perception of having lost the initial count. Second, by being certified, the candidate would not have to pursue a recount. Because recounts were not automatic in 1962, the losing candidate would have to request such an order. Thus by winning the initial vote—with the help of the county canvassing boards—both candidates had a much clearer path to victory.[55]

Although both candidates sought to find obvious errors, they sought to cast a wide net over what an "obvious" error could be.[56] Stinnett describes

---

[51] Op. Minn. Att'y Gen. 64-b, (1961) (cited to in Minn. Rev. Stat. Ann. § 204.30 (West 1962)). There could be more to this opinion but only this example was provided in the Annotated Statutes. The original version of the attorney general's opinion could not be located.

[52] *See* Minn. § 204.30 (West 1962).

[53] *See, e.g.*, STINNETT, *supra* note 5, at 72–73.

[54] *Id.*

[55] *Id.* at 68–69.

[56] *See generally id.* at 66–79.

that each party collected a variety of materials to create obvious error claims. Both parties took photographs of the results from the initial canvass.[57] The Republicans then used information such as precinct results and the number of spoiled and defective ballots from each precinct to determine if a possible obvious error existed.[58] The Republicans even employed statisticians to examine the results and determine irregular voting pattern to build up a "book" of obvious errors.[59] As a result, they did not challenge blindly or ask counties to find if an error occurred. The candidates took proactive measures to "help" the county boards find errors.

After finding the errors, the candidates proceeded to convince boards that errors existed. Initially, it appears that Rolvaag benefited from finding several early errors. However, as this occurred, Andersen and the Republicans made a second and much more dramatic push to find errors based on the reports from its statisticians. After identifying several key precincts to find errors, the party was able to convince Republican-friendly boards of the need to correct such errors.[60] Thus, unlike the DFLers, who made several initial challenges, the Republicans searched throughout the state to find strategic vote gains.

However, the process become overtly political when the Republicans began appealing to boards that had already certified their votes. Many local boards had certified their elections before the ten-day window had closed. Despite doing this, the Andersen campaign asked the boards to reexamine their ballots and find any "obvious" errors before the ten-day window had closed. In essence, the Republican party asked local boards to decertify their returns, in which they had found no error previously, and now find an obvious error that they had missed. As the trailing candidate, such a tactic made sense for Andersen. Any vote "corrected" now would bring him closer to victory and ensured that he would not have to challenge the votes in a recount. Angered that the Republicans were having boards reopen vote totals, the DFL countered by asserting that asking the boards to reexamine ballots was illegal because the canvassing board already submitted their reports. Despite these accusations, Andersen and the Republicans persuaded eleven precincts to re-examine their certified ballots. Because of these efforts, Andersen netted 200 votes and pulled into the lead.[61]

---

[57] *Id.* at 69.

[58] *Id.*

[59] STINNETT, *supra* note 5, at 69.

[60] *Id.* at 69–71.

[61] *Id.*

This prompted the DFL, whose candidate was now losing, to respond in two ways.[62] With its candidate trailing, the DFL now embraced the Republican "reopening" tactic and pushed canvassing boards to reexamine their results and find ballots for obvious errors. However, in an increasing sign of the election's partisan divide, the Republicans pressured county boards not to find any "obvious error."[63] As a result, the DFL had trouble finding sympathetic boards at this stage of the election and Rolvaag could not regain the lead.

The DFL's next defense was to file for a restraining order in court.[64] This marked the first time either party pursued legal action in the election. The DFL requested a restraining order that would stop—and not count—county board findings of obvious error decisions if the board had previously certified its vote.[65] A series of appeals led the case to the Minnesota Supreme Court, which had the ultimate authority to decide whether the restraining order should be granted. Despite this authority, the state high court did not respond to this question directly. Instead, the court ruled that it would refrain from deciding any election issue until the state board had certified all the results. Since the State Canvassing Board could not meet until all the county boards had submitted their certified results, the high court gave a very indirect but clear answer: the precincts could to continue to find "obvious" errors even after they had already certified their votes. This rejected the DFL's request, let the 200 votes that the Republicans had found through obvious errors could "stand" until the state board met, and gave the lead to Andersen.

In addition to giving Andersen the lead, the decision revealed the high court's ideological split. The ruling came down on strictly partisan lines, with the three conservative justices moving for errors to be counted, while the two liberal justices voted to prohibit such counting.[66]

Because the court allowed the votes to be counted, Andersen regained the lead after all the local boards submitted their results. With this process complete, the candidates now waited for the State Canvassing Board to meet and certify the results. In its meeting, the State Canvassing Board discussed whether it should include the amended results. This decision differed from the Minnesota Supreme Court's ruling, because the State Canvassing Board

---

[62] *Id.* at 71.

[63] *Id.* at 71–73.

[64] *Id.* at 72–73.

[65] STINNETT, *supra* note 5, at 70–75.

[66] Two of the justices, Associate Justice Thomas Gallagher and Associate Justice Martin A. Nelson, recused themselves because they had served on the state canvassing board. *Id.* at 75.

now had to determine if the amended returns should be counted in the certified vote. Unlike the Supreme Court decision, the state board could not punt to another court. The board knew the effects its decision would have. If the board did not count the "obvious errors" Rolvaag would win by 58. If the errors were counted, Andersen would win by 142. The state board choose the latter and certified Andersen the winner and by 142. The decision was based on a 3-2 split decision,[67] with the three Republicans seeking to count included ballots and the board's two DFL members seeking to not count the votes.[68] Although the election was certified, the board's decision was not final. Rolvaag could appeal the decision to include the amended count to the Minnesota Supreme Court. He did this immediately.[69]

Unlike the first time the election came to the state high court, where the Court declined to discuss the issue on how to count the "obvious errors," the Minnesota Supreme Court now had to make a decision on whether to include the votes by upholding or rejecting the State Canvassing Board's decision. Ultimately, the Minnesota Supreme Court affirmed the board's inclusion of the "obvious error" votes and declared Andersen the winner by the same partisan split that the court had issued in its first opinion.[70] The Court's majority held that even though the local boards technically violated the statute by certifying the results and then reopening them to find errors, it was more important to ensure the results were accurate than to disenfranchise voters.[71] From afar, the Court's decision seemed well grounded in the maxim: all votes should be counted. However, a closer analysis of the court's ideological split and logical reasoning reveals a different conclusion.

First, the Court's decision was split based on the political ideologies of its members. The Court ruled 3-2 in favor of counting the ballots and certifying Andersen as the winner. The three justices who voted to count the amended votes—and thus give Andersen the certified victory—were appointed by Andersen.[72] Second, because the provision regarding "obvious

---

[67] STINNETT, *supra* note 5, at 78.

[68] The Boards' DFLers were Secretary of State Joseph L. Donovan and Associate Justice Thomas F. Gallagher. The Board's Republican was Associate Justice Martin A. Nelson, District Judge Albin S. Pearson, and District Judge Luther Sletten. As Stinnett contends, the board was divided ideologically, but they were not usually involved in deciding elections. *Id.* at 77. For a more in-depth discussion of the canvassing board's hearing and decision, see *id.* at 75–79.

[69] STINNETT, *supra* note 5, at 88.

[70] *In Re Application of Andersen*, 119 N.W.2d 1 (Minn. 1962).

[71] *Id.* at 12.

[72] *A MAN'S REACH*, *supra* note 8, at 221–23 (describing the process by which Andersen appointed the three justices to the court); *See also* Drew Pearson, *Minnesota*

error" was new, the holding failed to follow any clear precedent. By default, the majority and minority opinions strayed from drafting convincing arguments and instead rested their decisions on competing norms of vote-counting.[73] Both these election law norms coincidently benefited the candidate that matched the justice's perceived ideology. Third, instead of writing a restrained analysis, the majority opinion and the dissent used the opinion to critique the opposing candidate. The dissent, drafted by a justice that had been appointed by a DFL governor, challenged the result as a "selective" recount that unfairly prejudiced one candidate, the candidate he opposed.[74] The court's majority openly attacked Rolvaag for first trying to stop the canvass, then supporting the canvass, and then trying to litigate it.[75] Far from a unanimous decision, the court's decision revealed a fractured political divide.

Despite this controversy, the court seemed aloof as to how outwardly political its statutory decision would appear and how openly it would be criticized. The court recognized that it had to interpret the statute, but believed it had legal cover because of the statute's vague procedural rules. This is recognized in the majority's conclusion, where Chief Justice Knutson wrote that the statute's complexity was why the State Canvassing Board had been divided: "That there is difficulty in proper construction ... is evidenced ... [in that] the state canvassing board-composed of two district judges, two members of this court, and the secretary of state, four of whom are learned in the law-has been unable to agree on their proper application."[76]

The press reacted differently. National commentators accused the Minnesota Supreme Court of making a politically motivated decision.[77] Stinnett, who otherwise praised the recount in his book, went so far as to say, "[Whether] the individual decisions producing such a result were coincidental or political was and is for each person to determine for himself."[78] Stinnett's account may have been the least critical. Another newspaper wrote an editorial entitled, "Please Say it isn't True."[79] The editorial stated that while it hoped the decision was not political, "[T]he

---

*Supreme Court Under Fire*, THE BELL SYNDICATE, Dec. 7, 1962 (insisting the three justice appointed by Andersen should have recused themselves).

[73] *See generally* in re *Andersen*, *supra* note 70.

[74] *Id.* at 14.

[75] *Id.* at 11.

[76] *Id.* at 6.

[77] *See* STINNETT, *supra* note 5, at 82–83 (describing press reactions).

[78] *Id.* at 81.

[79] *Please Say It Isn't True*, THE SUNDAY TRIB., Dec. 4, 1962, at 4.

political maneuverings of the past month have left [the Minnesotan] in a sort of state of shock, so that now, in spite of which candidate he cast his ballot for, he doesn't care much who is governor."[80] Nationally syndicated columnist Drew Pearson asserted the decision "caused a backfire that has echoed all the way to Washington," and that the decision was particularly abhorrent because the entire three member majority owed their current appointments to Andersen.[81]

Was the issue hotly debated in Washington D.C., as Pearson claimed? It remains unclear if Pearson actually encountered much debate about the decision when he wrote the article. However, if the country was not aware of the split decision before the article, it was after the article ran. Pearson's column was syndicated throughout the country. His portrayal of the decision as "political" was featured in newspapers as far west as California and as far south as Louisiana.[82] As a result, much of the country knew about the election, solely for the high court's partisan decision.

At this stage, the recount became extremely polarizing. This contributed to the perception that each party was interested in winning at all costs.[83] In a letter to the editor, a Minnesotan wrote that he was frustrated that the DFLers were trying to block votes from being counted, then criticized Andersen for trying to stall a recount when he was winning, but pushing for the recount to be publicly funded when he was losing.[84] Neither party was immune from criticism and the state Supreme Court's newest ruling seemed only to escalate tensions. Quickly the election's story devolved from being a unique, extremely close election to an overtly partisan contest to steal the election. One Minnesotan presciently asked the two parties to find a way to work out the election, asking for the "two groups to get together and [decide] on a recount procedure acceptable to both."[85]

---

[80] *Id.*

[81] STINNETT, *supra* note 5, at 92.

[82] Unclear is how many newspapers published Pearson's column. Online searches revealed that newspapers around the country carried his column. However, only newspapers that had digitized their articles and made them available search could be located. *But see* Gerry Nelson, *Court Orders Andersen Certified as Governor: Order Sets stage for Recount*, WINONA DAILY NEWS, Nov. 21, 1962, at 1 (describing how Andersen and Rovlaag both thought the results of the Court were fair).

[83] *Please Say It Isn't True*, THE SUNDAY TRIB., Dec. 4, 1962, at 4.

[84] *For A Speedy Simple Recount*, AUSTIN DAILY HERALD, Dec. 4, 1962, at 4.

[85] *Id.*

## IV. THE RECOUNT

Despite being declared the loser, Rolvaag was not officially eliminated from the race because he could pursue a recount.[86] Every decision thus far had only challenged the original results and did not constitute a formal recounting of the votes. The recount provision was provided for in Section 209.03 of Minnesota's election code: "[a]ny voter, including any candidate, may contest the nomination or election of any person for whom he had the right to vote, who is ... elected to a state ... office."[87] Significantly, the recount had to be requested. Under no grounds would an automatic recount be initiated.[88] The voter could contest the election over three grounds: (1) an irregularity in the conduct of the election, (2) an irregularity in the canvass of the votes or (3) grounds of deliberate; serious; and material violations of the provisions of the Minnesota election law.[89] Any recount had to be requested within ten days of the after the canvass had been completed.[90]

In essence, any challenge to the original results only had to claim an error existed. Perplexingly, the challenger did not need to prove an actual error existed in the original count to justify a recount if he asserted an irregularity in the canvass of the votes. Instead the challenger needed only to assert that such error existed and that the challenger needed to recount the votes to prove the validity of his or her irregular canvass claim. Thus, the physical recounting of the ballots became the evidence on which the challenger would base his claim of an irregular canvass. Following this request, a trial court would permit and oversee a hand recount to collect evidence of an error. Then, based in part of this evidence, a trial court would determine whether the challenger succeeded in proving his claim of an improperly decided election.[91] Thus, by simply claiming a canvassing error existed, the challenger set off a long chain of events—including a statewide hand recount—that could not be stopped until a final decision was made. It is unclear how the opposing party could stop such a process from occurring.

---

[86] Gerry Nelson, *Court Orders Andersen Certified as Governor: Order Sets stage for Recount*, WINONA DAILY NEWS, Nov. 21, 1962, at 1.

[87] Minn. Rev. Stat. Ann. § 209.02 (West 1962).

[88] *See* § 209.02 (West 1962) (not providing terms for an automatic recount).

[89] *Id.* at § 209.02(1) (West 1962).

[90] *Id.* at § 209.02(3) (West 1962).

[91] § 209.02(5) (West 1962) ("If the contest is brought on the grounds of deliberate, serious, and material violation of the provisions of the Minnesota Election Law, the contest shall be commenced in the manner provided in this section."). *See also* STINNETT, *supra* note 5, at 88.

However, with no automatic recount in place, the law gave the challenger latitude to demand and receive a recount.

While Rolvaag had ten days to consider his options, he did not wait long to challenge the canvass's results. On Dec. 3, Rolvaag filed a "notice of contest" that stated his desire to challenge *every* precinct in Minnesota. Essentially Rolvaag, as authorized by statute, demanded a statewide recount.

Stinnett contends the decision to demand a recount in every precinct surprised Minnesotans, who figured Rolvaag would cherry pick contests.[92] Stinnett argued that recounting the entire state gave legitimacy to the recount, prevented the DFL from public backlash, reflected an inability to determine where votes could be found, and, argued least persuasively, reflected Rolvaag's confidence that he won.[93]

One of the Minnesota election code's most interesting sections—and the one that would lead the parties to abandon the statutory litigation process—concerned which court had jurisdiction over the recount. Minnesota law provided: "[t]he *contestant* shall file ... contest ... in *any* district court of the state."[94] As the contestant, Rolvaag sought to find the most favorable district court in the state to oversee the recount and determine him the ultimate winner.[95] Thus, although the recount would occur throughout the state, it would be presided over by one district court and one judge. Rolvaag ultimately chose Freeborn County in the Third District. Stinnett contends Rolvaag chose Freeborn County because it was a Republican-leaning county and the court's judge, Judge Warren Plunkett, had been appointed to the bench by a DFL governor.[96] By picking a DFL-leaning judge, Rolvaag sought to maximize opportunities to gain votes. However, Rolvaag's venue selection was not guaranteed.

Minnesota's election laws also allowed the trial's location to be changed. Section 209.03(3) stated: "the place of trial may be changed as in civil actions."[97] Unsurprisingly, Andersen sought to change venue one day after Rolvaag contested the election.[98] The Republicans sought to change the recount to Ramsey County, home to the state's capital and a Republican-friendly judge. However, this motion to change jurisdictions was denied by

---

[92] STINNETT, *supra* note 5, at 88.

[93] *Id.*

[94] § 209.02 (West 1962) (emphasis added).

[95] While the court oversaw the recount, it also would determine which votes got counted and which were excluded.

[96] STINNETT, *supra* note 5, at 88.

[97] § 209.02(2) (West 1962).

[98] *Please Say It Isn't True*, THE SUNDAY TRIB., Dec. 4, 1962, at 4.

Judge Plunkett, who sought to preserve the contest in his courtroom.[99] With this dispute, the change of jurisdiction claim made its way to the Minnesota Supreme Court. The court decided it would have an oral hearing on December 10 to determine which venue the recount would occur. Despite this order, the hearing would never occur and the court would never choose a venue. In fact, this decision to hear the case would be the last decision the state's high court would make in this disputed election. The parties would choose another way to resolve the dispute and avoid returning to the Minnesota Supreme Court.

## V. THE "THIRD" WAY, EMBRACING ADR

Until this point, both parties sought to resolve the election by working within the election code. However, the events over the weekend of Dec. 7 would signal the parties' and the Minnesota Supreme Court's desire to seek unconventional remedies to oversee the recount challenge and resolve the partisan dispute. Ultimately, Andersen and Rolvaag abandoned their jurisdictional claims and chose a "third" way to resolve their election dispute by using ADR. The state high court never made another ruling. The third way was not based on precedent, but rather on the two candidates' interests, and ultimately restored the public's confidence that the recount would be handled properly.

On Dec. 7, just three days before the candidates were to make oral arguments in front of the Minnesota Supreme Court, the candidate's lawyers and Chief Justice Knutson met to discuss the appeal.[100] While the impetus for the meeting remains unclear, the meeting ended with the Chief Justice cancelling the impending oral arguments and both parties stipulating new procedures to resolve the election.[101] Instead of battling over venue, the new procedures stipulated a three-judge panel to oversee the recount contest in a neutral setting. Even more significantly, the candidates would pick the judges who would decide the validity of the recount claim. The mutually agreed upon three-judge panel was to be picked from a pool of Minnesota's district court justices.[102]

Once all parties agreed to these parameters, the Chief Justice allegedly "locked" Andersen's and Rolvaag's attorneys in a room and forced the two groups to decide which judges would overhear the case. The parties met all

---

[99] STINNETT, *supra* note 5, at 90–91.

[100] *Id.* at 95.

[101] *Id.* at 95–98.

[102] *How the Recount Will be Done*, WINONA DAILY NEWS, Dec. 18, 1962, at 9.

day and whittled a list of fifty-eight prospective district judges to six, then spent several hours reducing the list to three judges with an alternate.[103] As Stinnett candidly asserts, during the meeting, "each district judge had his background bared in the bluntest of fashions."[104]

Although the origins of the idea to pick three judges cannot be determined, every party involved has since laid claim to originating it.[105] Chief Justice Knutson recounts that he was frustrated with the two parties and wanted them to find alternative means to end the dispute.[106] Knutson recalls telling each party, "This thing has just gone haywire. Nobody's going to think any of us any good until you lawyers on both sides agree on [selecting] one judge or three judges."[107] He then told both parties to come up with three candidates and call him when they were done.[108] Andersen, in his autobiography, closely tracks Chief Justice Knutson's recalling of the events. However, Stinnett asserts that Andersen's attorneys had "independently" come across a case from Northern Minnesota that used a three-judge panel.[109] Andersen's attorneys planned on raising the idea at the conference meeting, but were preempted by Rolvaag's attorneys who brought up the idea instead. Finally, Rolvaag's attorneys, as recalled by Stinnett, were told that Chief Justice Knutson had allegedly hoped both parties would avoid the state high court and had wanted the two parties to choose to use a three-judge panel to decide the case. Because of this information, Rolvaag's attorneys raised the idea at the conference.[110] That each party lay claim to the idea represents not only how well regarded the decision is in hindsight, but also how novel the idea was.

The legal precedent for creating a three-party tribunal *and* letting the two parties select the tribunal appears non-existent. While Stinnett asserts Rolvaag's attorney found a "case" that used a three-judge panel, the case, if it existed, did not involve a disputed election and certainly did not give both

---

[103] STINNETT, *supra* note 5, at 95.

[104] *Id.*

[105] Elizabeth Stawicki, *The Origin of the Three Judge Panel*, MPR NEWS (Jan. 25, 2009), http://minnesota.publicradio.org/display/web/2009/01/25/threejudge_sidebar/ (last visited April 15, 2011) (describing the idea's disputed origins).

[106] Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4, at 23. Knutson never wrote an autobiography and this claim could not be independently verified.

[107] *Id.*

[108] *Id.*

[109] STINNETT, *supra* note 5, at 95–96.

[110] *See also Court Names Panel for Minnesota Recount*, CHI. DAILY TRIB., Dec. 11, 1962, at A8 (describing how the decision was reached after a series of conferences).

parties the authority to mutually choose the judges.[111] Additionally, if Knutson had the statutory authority to create a three-judge panel, it did not come from the state's election statutes.[112] A thorough review of Minnesota's 1962 election code does not confer the Chief Justice any authority. A broader argument could be made that Knutson was using his authority to change venue—which the Supreme Court was going to do anyway—to pick a three-judge panel. However, Knutson has not characterized his decision as such. In fact, Knutson has since asserted that he created the three-judge panel even though no law justified it.[113] As a result, it appears that Chief Justice Knutson broke from his reputation as a strict adherent to precedent[114] and established a new method to resolve the disputed election.

A simpler, though unsubstantiated, explanation may show how the parties arrived at the idea of mutually selecting a three-judge panel. The design of the three-judge panel the parties agreed to mimics the statutorily created "three-person teams" created to resolve contested ballots.[115] These teams, akin to the three-person teams that stared at chads in Florida's 2000 recount, were a tool used to help identify disputed ballots.[116] The election code created these three-person teams to review the ballots.[117] To determine who served on the three-person team:

> [O]ne [person shall be] selected by each of the parties and a third by those [two persons selected]. In case either party neglects or refuses to name an inspector, he shall be named by such judge.[118]

Thus, although these three-person review teams served a different purpose from the panel that would officiate and review the recount, the idea of a mutually selected three-person group existed in 1962. In fact, the three-member review teams were commonly used in disputed elections and both

---

[111] This was concluded after searching through a Minnesota's 1962 annotated statutes, Minnesota reporters, and a failure to find any commentary on the case.

[112] *See generally* § 200-212 (West 1962) (no statute refers to this grant of authority).

[113] Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 5, at 24; *Court Names Panel for Minnesota Recount*, CHI. DAILY TRIB., Dec. 11, 1962, at A8 (granting of authority came after "a number of conferences").

[114] Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4, at 24 (discussing his preference for following precedent).

[115] *See infra* Section IX.

[116] *See generally* JULIAN M. PLEASANTS, HANGING CHADS: THE INSIDE STORY OF THE 2000 PRESIDENTIAL RECOUNT IN FLORIDA (2004).

[117] § 209.06(1) (West 1962).

[118] *Id.*

candidates had been preparing potential nominees to serve on them. This points to the idea that the parties conceived of a three-person group to review a recount and a three-judge tribunal was not entirely novel in its structure. However, the tribunal was novel in terms of its application and selection process. Never before had parties opted to forego their venue rights to resolve an election in a more neutral setting.

Why each party pursued the third way provides further insight as to why each party readily agreed to an untested and unpredictable dispute resolution process. The candidate with the least to gain from the tribunal was Andersen, but Andersen still had a reason to pursue a three-judge tribunal. While Andersen did win the initial canvass and did want to mitigate Rolvaag's chances at winning the recount, Stinnett argues that Andersen's team privately doubted its change of venue argument would succeed in the Minnesota Supreme Court.[119] If the Supreme Court did not change the venue, a liberal judge would have overseen the recount, which could have provided an opportunity for Rolvaag to win the recount.

However, should Andersen's team have been worried? Stinnett fails to demonstrate why the change of venue argument would fail. The Supreme Court had ruled in Andersen's favor in every previous decision and had construed vague laws in Andersen's favor. Thus, it was likely the Court would have supported Andersen's claim for changing venue despite the public's growing dissatisfaction with the Court. However, Chief Justice Knutson may have tipped Andersen that such a change of venue would be unlikely.

Even if the Court declined Andersen's weak venue claim and Andersen lost the recount, Andersen would have been able to appeal the recount's unfavorable decision to the Supreme Court.[120] However, for Andersen to succeed at this stage, the high court would have to find clear error.[121] In addition, Andersen would also have to hope that public opinion would not reject a prolonged election by such an appeal. By accepting the panel, Andersen's attorneys pursued a risk adverse strategy. A recount was going to occur because Rolvaag had requested one. Andersen was unable to stop the recount, but could guarantee that the recount would not be presided over by a DFL-leaning judge. By agreeing to a mutually acceptable panel of judges, Andersen would not have to rely on a series of unpredictable scenarios or risk ceding the lead, if only temporarily, to Rolvaag.

---

[119] STINNETT, *supra* note 5, at 93.

[120] § 209.09 (West 1962).

[121] *Id.*

Chief Justice Knutson had much to gain by establishing a tribunal. Chief Justice Knutson admitted to feeling the recount had spun out of control.[122] Despite his insistence that the Court never ruled cases in a partisan manner, the court he presided over had issued two split decisions in the election's aftermath.[123] Every justice that had been appointed by a Democrat sided with Rolvaag and every justice appointed by a Republican sided with Andersen. Furthermore, the justices were widely known to have partisan ideologies, despite being appointed to their positions.[124] As a result, the local and national press accused Knutson's court of trying to determine the election's outcome.[125] All accounts of the election make it clear that Knutson was upset by these claims.[126] By pursuing the three-judge panel, Knutson removed the Supreme Court from the recount process and shifted the burden to the two parties to do what others thought Knutson was incapable of: picking fair judges. Such a decision would likely be important to Knutson, who personally viewed the state's court as an institution that should not be consumed with politics.[127] In addition, it is conceivable that the tribunal would change the public's image of Knutson. By creating the tribunal, he transformed from the being a partisan judge into the election's ultimate mediator.

For Rolvaag, and his attorneys, a three-judge tribunal was most beneficial. It would protect two key interests. First, it would assure Rolvaag that the Minnesota Supreme Court could not change venues to the Republican-friendly Ramsey County. Second, the move ostensibly removed the Minnesota Supreme Court from intervening again. While Minnesota's Election Code allowed the district court's decision on the recount to be

---

[122] Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4, at 23.

[123] *Id.*

[124] *See* Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4.

[125] Drew Pearson, *Minnesota Supreme Court Under Fire*, THE BELL SYNDICATE (Dec. 7, 1962), *available at* http://dspace.wrlc.org/doc/bitstream/2041/49639/b17f23-1207zdisplay.pdf; Adolphe Johnson, *Supreme Court in Spotlight on Vote Recount*, THE SUNDAY TRIB., Dec. 9, 1962, at 1.

[126] *See, e.g.*, Elizabeth Stawicki, *The Origin of the Three Judge Panel*, MPR NEWS (Jan. 25, 2009), http://minnesota.publicradio.org/display/web/2009/01/25/threejudge_sidebar/ (last visited Feb. 17, 2012) (describing Knutson as "incensed.").

[127] Once Knutson was elevated to the Minnesota Supreme Court, he stopped attending Republican gatherings and fundraisers. Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4, at 12.

appealed,[128] it would be conceivably difficult for the Supreme Court to overturn the decision of a tribunal that it authorized and approved. In addition, provided the tribunal did not incorrectly apply the election law, the high court would have to find the recount decision was "clear error" to overturn the district court. If Rolvaag's attorneys thought the court would be reluctant to change the recount decision, they would be correct. After the tribunal declared Rolvaag the winner, Chief Justice Knutson responded to an "informal" query by an Andersen attorney if the Court would consider overturning the tribunal: "'no, I don't think so—not with those judges."[129]

By pursuing a third way, all parties negotiated a dispute resolution process that fulfilled their respective interests. Andersen was assured a moderately fair recount process. Rolvaag removed the Minnesota Supreme Court from making another decision. Chief Justice Knutson removed the high court from the recount and any signs of impropriety, but still helped guide his favored candidate from an unfavorable jurisdictional ruling. A perfect storm of mutually compatible interests led each party to forego its preferred course of action for a less predictable, but assuredly beneficial option. However, this was not done for fairness's sake. Despite history's attempt to canonize the candidates, they chose this path because it worked for them. No evidence suggests the candidates chose the mutually selected, three-judge panel for the sake of creating a fair process.

## VII. PICKING THE TRIBUNAL

The concept's goal: an objective and fair tribunal was achieved counter-intuitively by using a partisan selection process. By design, the tribunal featured three judges, and each party picked one representative from its own party. The more difficult process would be selecting a third, and perceptively, neutral party. In deciding which judges would serve on the panel, Stinnett colorfully describes the parties' selection process: "each district judge had his background bared in the bluntest of fashion during these private conferences."[130] The two parties began with fifty-eight judges and then quickly shortened their prospective list to six judges. While little is known about the process, it can be assumed that both parties eliminated the most partisan judges quickly. Despite this, two of the judges selected still possessed a relatively clear political leaning. One was the Honorable Sidney

---

[128] Minn. Rev. Stat. Ann. § 209.09 (West 1962).

[129] Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4, at 24.

[130] STINNETT, *supra* note 5, at 95.

E. Kaner, who was appointed by a DFL governor, and the other was J. H. Sylvestre, who was appointed by a Republican governor. The third "neutral" pick was the Honorable Leonard Keyes, who was appointed to his current position by a Republican governor, but had been appointed earlier to be a municipal judge by a DFL governor. Thus, it appears Keyes was considered a neutral because governors of both parties appointed him to different positions.

Although both parties appeared preoccupied by the judge's political leanings and appointments, they seemed unconcerned with the judges' knowledge of Minnesota election law or judicial experience. Only one judge, Judge Sylvestre, had experience in overseeing disputed elections.[131] The "neutral" judge, Judge Keyes, had *never* adjudicated an election dispute before. In fact, Keyes stated that after he was appointed, "I began by reading every decision I could find in the State of Minnesota relative to decisions by our Supreme Court in regard to election contests. That was about all I could do at that point. I had no prior experience."[132] Keyes's selection also is confounding in terms of his experience. He was a new and untested district court judge; having been elevated to the bench just two years earlier. Entering the recount, both parties were still motivated by partisanship and tied their candidate's political fate to judges that had little knowledge of the process. This further illuminates the candidates' political interests for the tribunal. They were not concerned about finding experienced judges but wanted ones who could perceivably side with either candidate or, with respect to Keyes, who was no more biased against their own side than the other side.

After the parties had selected the judges, Chief Justice Knutson approved them and made a telephone call to conscript the judges into service.[133] As Knutson recalled, none of the judges wanted the job, as revealed by a conversation with Sylvestre: "'Well Oscar, I don't suppose I have any choice.' [Knutson replying] 'well, no you don't have any choice'"[134] All three of the judges expressed a disinterest in serving because of the perceived partisanship of previous decisions.[135] All three judges further testified that they were committed to perceiving the integrity and fairness of the process.

---

[131] Interview by Ronald Stinnett with Judge J.H. Sylvestre and Judge Leonard J. Keyes, (Aug. 5, 1963) *in* RECOUNT 205 (1963).

[132] *Id.* at 205.

[133] *See, e.g., id.* at 204.

[134] *Id.*

[135] Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4, at 23.

As Keyes recalled, "[T]he preservation of the of the integrity of the judicial process in the State of Minnesota was the most important function that we had; and... if that were maintained by our three-judge panel, a fair result would necessarily follow."[136]

Feeding into this sense of fairness was the public's reaction to the three-person tribunal. Stinnett stated, "For the first time since election day, some orderly, fair, and just procedure for the recount had been pounded out by both parties."[137] Knutson, now removed from the process, stated in a press release, "The task of completing the recount may now proceed expeditiously, as it should, to the end that it *fairly may be determined* which candidate *fairly* received the most legal votes."[138] The local press praised the idea as an amicable decision and expressed hope that the process would proceed fairly.[139] By resorting to unusual means, Minnesota had restored confidence that a fair process could be established. However, few could have predicted how transparently the process would proceed.

## VIII. THE TRIBUNAL

Upon creating the tribunal, Rolvaag's counsel and Andersen's counsel faced a long procedural battle. By law, the judges would not decide if the recount challenge was successful until after the ballots had been reexamined. To reexamine the ballots, the judges were required to appoint three-person teams.[140] These teams would review the ballots, determine if there were any errors, and submit their findings back to the court. The three-judge panel would then review the findings from the teams and hear any independent complaints of an improper election. Once this was completed, the judges would issue their final ruling on the recount. Only at this stage would the court determine if Rolvaag's claim of canvassing irregularities was justified. However, nothing could stop the recount process from occurring.

It is important to note two things. First, Andersen could not contest the validity of Rolvaag's claims once the tribunal was created. The tribunal's role, as the overseer of the recount, was to determine the merits of Rolvaag's

---

[136] Interview by Ronald Stinnett with Judge J.H. Sylvestre and Judge Leonard J. Keyes, (Aug. 5, 1963) *in* RECOUNT 207 (1963).

[137] STINNETT, *supra* note 5, at 97.

[138] *Id.* (emphasis added). No formal order appointing the judges could be found. However, such orders—if they exist—may be available at the Minnesota Historical Society archive.

[139] *Panel of Three Judges to Handle Recount*, FERGUS FALLS DAILY J., Dec. 10, 1962, at 1 ("an amicable agreement has been reached.").

[140] STINNETT, *supra* note 5, at 100–03.

canvassing claim *after* the hand recount was conducted. Only after the recount, could the court grant its final decision. Second, and relatedly, Rolvaag did not have to demonstrate to the tribunal why he wanted a statewide recount, nor did he have to demonstrate the bases for a recount beyond its initial requests.

The parties' first task was to create the three-person review teams that would allow for the hand recount to begin.[141] Like the process to pick the three-judge panel, the standards were created behind closed doors. However, the parties mutually agreed on how they would select teams. The teams would consist of a perceived neutral auditor, a perceived DFLer auditor, and a perceived Republican auditor.[142] In an effort to determine what constituted a real vote, *all* three parties agreed to unified procedural rules overseeing the count. The initial standards did not address what constituted a valid vote, but allowed each team of reviewers to determine if a disputed ballot existed. The parties did establish objective rules for checking the number of ballots cast against the total number of registered person that reportedly voted.[143] This initial physical recount would continue from Dec. 17, 1962 until Jan. 9, 1963.[144]

On Jan. 21, the three-judge panel began its first public hearing. The trial would be divided into two distinct parts. The first part discussed charges of irregularities in the conduct of the election. This involved allegations of fraud or other election irregularities and was independent of the physical recount being conducted. The second part discussed charges of canvassing irregularities and dealt directly with the hand recount.

In the first phase, concerning *only* conduct irregularities, only Rolvaag made any claims of improprieties. As the candidate that was behind, it made sense that Rolvaag sought to challenge as many votes possible by charging irregularities. Rolvaag's five charges asserted that ballots were not sent properly through the mail, that absentee voting requirements were not met, that an election official bribed or coerced thirty voters at a nursing home, and that officials had stuffed votes.[145]

Andersen's failure to make any claims of any fraud and Rolvaag's limited claims of fraud may indicate how free of fraud the original election had been. In fact, if the court accepted all five of Rolvaag's election irregularity claims, Rolvaag would only gain a net 150 votes. While this

---

[141] *Id.* at 117.

[142] *See id.* at 105–06.

[143] *Id.* at 107.

[144] *Id.* at 117.

[145] *Id.*

would be enough to swing the election, it would not create a dramatic reversal of fortune for either party. Because the second phase could involve thousands of ballots, the results from this phase were not viewed as decisive.

Ultimately, the court unanimously rejected four of Rolvaag's five claims.[146] Rolvaag's one successful claim emerged from Elbow Lake Village. Rolvaag successfully persuaded the court that thirty-one votes, which had not been sent by mail, constituted a material irregularity.[147] The judges found an irregularity because the county auditor—who also was running for political office—delivered the votes to the polling place.[148] As a result, Rolvaag netted ten votes after all thirty-one votes had been removed from the vote count.[149] Stinnett argues this decision—the only finding of fraud—was significant because it demonstrated that the election was practically free of fraud.[150] From Stinnett's perspective, only discounting thirty-one votes, based on an isolated irregularity, served to allay concerns that the election had been fixed by either party.[151] However, the decision to reject the thirty-one ballots becomes more significant when considered for other reasons.

By deciding not to count the Elbow Lake Village votes, the court had effectively disagreed the Minnesota Supreme Court's earlier decision to count the same thirty-one votes in the initial count. Thus a *unanimous* three-judge panel—appointed by the Minnesota Supreme Court—had found an irregularity that a split Minnesota Supreme Court ordered to include several months earlier.

By excluding these votes, the tribunal implicitly asserted its independence from a perceptively partisan high court, demonstrated its desire to reach unified decisions, and affirmed its willingness to make a controversial decision. While one could argue that the thirty-one votes did constitute an egregious voting error because they were hand delivered by a candidate for office, the tribunal's decision made a difficult move of distancing itself from the Supreme Court; asserting the tribunal's unique autonomy. Additionally, by deciding the issue unanimously, the judges' decision seemed unaffected by politics and thus gained a sense of legitimacy

---

[146] *See* STINNETT, *supra* note 5, at 131–139 (describing the claims and supesequent results).

[147] *See id.*

[148] *Id.* at 138.

[149] *Id.*

[150] *Id.* at 139.

[151] STINNETT, *supra* note 5, at 137–39.

that the Minnesota Supreme Court's fractured decisions never achieved.[152] The significance of this ruling may have been lost at the time to Stinnett and others, but this decision reflects a unique, if not unparalleled, result in a disputed election. A unanimous three-judge tribunal made a decision that seemed to transcend perceptions of impropriety.

## IX. PHASE TWO: BALLOT IRREGULARITIES

On Feb. 25, 1963, more than three months after the election, the second part of the trial, which would review the recounted ballots, formally began.[153] However, aside from judges wearing black robes, few would be able to describe the trial as a typical courtroom setting. File cabinets, containing thousands of disputed ballots, lined the courtroom's back wall.[154] The judges sat in a jury box because the judge's raised bench could not accommodate all of the judges. This impromptu design removed the judges from their lofty perch and placed them at the same level as the candidates' attorneys. Finally, instead of sitting at two separate tables, the two parties sat across from each other on an elongated table.[155] With the two parties at the same table and the judges sitting across from them, the trial had to appear more like a conference or negotiation than a formal trial. In this sense, the court's appearance matched the form the disputed election had taken.

While phase two formally began on Feb. 25, the two parties had prepared extensively for the case by "collecting evidence" through the hand recount. Each party identified disputed ballots that it wished to contest in front of the three-judge panel.[156] This process—determining whether someone cast a real vote—mirrored the disputed election's evolution: at first, identifying the process was partisan. Each party attempted to contest each ballot. This was replaced, over time, by a collaborative model that placed more responsibility on the parties to resolve the election.

At first, both parties sought to amass as many challenged ballots as possible. Stinnett describes how both parties sought to train workers who could quickly spot a wide variety of irregular markings on a ballot.[157] Both

---

[152] Interview by Ronald Stinnett with Judge J.H. Sylvestre and Judge Leonard J. Keyes, (Aug. 5, 1963) *in* RECOUNT 211 (1963) (discussing how each decision was made unanimously).

[153] STINNETT, *supra* note 5, at 157.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id. at* 122–25.

parties repeated a mantra: Never challenge [your candidate's] ballot. If in doubt—challenge [the opposing candidate's] ballot.[158]

When this process had concluded, the parties had reviewed more than 770,000 paper ballots. The parties contested approximately 98,000 ballots, or more than 12% of the total reviewed. For the recount to be completed, every ballot would have to be analyzed by the three-judge tribunal.

Recognizing the difficulty in reviewing such a large number of ballots, the court issued an order on Dec. 21, 1962 for "Screening of Proposed Evidence."[159] However, aside from making the order, the court played no role in reviewing or screening the evidence. Instead, each party had two representatives act as conciliators to review the ballots at issue. Both parties removed ballots that contained no dispute and kept those that they deemed controversial. The tit-for-tat process succeeded only as much as each party was willing to cooperate. By the end of the process, the parties had reduced the contested ballots by 75,000 votes to 22,000 disputed ballots.[160]

To further reduce the number of contested votes, the tribunal next asked the two parties to categorize the contested ballots into twenty-four categories of possible errors. Examples included double votes, no votes, and incorrect voting standards. By requiring the parties to identify each ballot's problems, the two parties reduced the number of contested ballots to 3,851 ballots. Recognizing the need for a more manageable pool, the two parties again—by their own decision—reduced the number of contested ballots to 1,192.[161]

Stinnett succinctly summarizes the process of reviewing the contested ballots adopted by the panel.[162] For each of the twenty-four categories, both parties would assert the standard they wanted to use and whether each contested ballot should or should not be counted. The judges then decided whether to accept or reject each ballot. For example, Category No. 3 concerned claims that the ballots did not contain a vote for any gubernatorial candidate.[163] On fifty-five ballots, one of the parties claimed a vote existed, while the other claimed no vote existed. Rolvaag asserted 23 "no vote" ballots actually contained a vote for Rolvaag.[164] The court concluded that nine ballots did vote for him, while 14 were truly a "no vote."[165] Andersen

---

[158] *Id.* at 102.

[159] STINNETT, *supra* note 5, at 122.

[160] *Id.* at 130.

[161] *Id.* at 150.

[162] *Id.* at 143–44.

[163] *Id.* at 143.

[164] *See* Appendix I.

[165] STINNETT, *supra* note 5, at 143.

asserted 32 "no vote" ballots actually voted for Andersen.[166] The court counted nine of his ballots, but rejected 23.[167] After the end of this Rolvaag picked up nine contested ballots.[168]

The recount is significant for two interrelated reasons: (1) how the judges transferred control of the process back to the parties and (2) how much the two parties resolved the dispute. When both parties initiated the recount, they sought to maximize the number of disputed ballots. However, the three-judge tribunal repeatedly required the parties to reduce the number of challenged ballots. This in turn required the parties to resolve most of the contested ballots and leave only the most controversial ballots for the judges to review. In the end, the judges reviewed 1.6% of the originally challenged ballots. Again, the judicial system allowed the parties to use an overtly partisan process to focus the recount to its most meaningful core set of contested ballots.

By reducing the number of challenged ballots to such a small number, the three-judge tribunal implicitly made the parties resolve their own disputed election. By the time the judges reviewed the remaining ballots, it became statistically difficult for the court to change the election's results. For Andersen to overcome his deficit, he needed to gain 150 votes from a pool of 1,192 contested ballots. Thus, Andersen had to pick up or Rolvaag had to lose over 12% of the remaining votes. In an election that had been decided by .16%, it required Andersen to overcome an extremely high hurdle. However, Andersen found himself in such a situation because he stipulated that the other ballots were not contestable. Essentially the process, and not the candidates, determined that the winner.

## X. THE DECISION AND REACTION

The three-judge panel issued its decision on March 21, 1963. The court announced that Rolvaag won by 89 votes.[169] In a memo, the court noted that "there was abundant and conclusive evidence that numerous mistakes and inaccuracies existed in the original canvass of the votes," however the court concluded the decision was final and very clear.[170] The court made clear how much the two parties contributed: "Each of the parties fully participated at

---

[166] *Id.*

[167] *Id.*

[168] *Id.* at 153. *See* Appendix I for a breakdown of the twenty-four categories.

[169] *See Andersen Calls Press Conference for 2 P.M*, FERGUS FALLS DAILY J., Mar. 26, 1963, at 1.

[170] STINNETT, *supra* note 5, at 192.

every stage of the entire proceedings and each fully protected his rights."[171] In addition, the court made a point to note that the two parties had selected the inspectors that conducted the recount.[172]

Andersen had the opportunity to appeal. By law, he was granted the opportunity to challenge the recount's results to the Minnesota Supreme Court.[173] In theory, such a decision would seem attractive. The court's previous decisions *all* favored Andersen. In addition, the three-judge tribunal had implicitly overturned one of the high court's decisions in the trial's first phase. Thus it would seem likely that if the court were to review the case, Andersen could recapture votes. More significantly, Andersen had been declared the winner of the first recount and lost the second recount by less than 150 votes. In this way, the tribunal had not affirmed the results of the first election.

However, Andersen chose not to appeal. Publicly, Andersen indicated that he would spend several days considering an appeal. Andersen, in his autobiography, contends that he never really considered such an action. "The ultimate decision was mine. For me it could turn only on one thing: my judgment of what was best for Minnesota," he wrote.[174] Such a remembrance fits well with remembering the disputed election as a shared, nonpartisan process.

Andersen did consider appealing, though. Andersen, in his autobiography, asserted that the tribunal properly decided questions of fact and that his attorneys told him, "there were no errors of law on which to base a Supreme Court appeal."[175] He needed a finding of clear error and this was unlikely. Despite this, several advisors strongly urged him to appeal.[176] In addition, one of Andersen's lawyers called Chief Justice Knutson and asked about the finality of the three-judge tribunal's decision. The Chief Justice replied, "no, I don't think [there is any chance we would reverse the court]—not with those judges. We lost then."[177] This conversation not only reveals Knutson's partisan views of the election, but also his desire to stay out of resolving the election again. Knutson, like others, wanted to see the dispute end and urged his, admittedly preferred candidate, not to contest the issue.

---

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] A MAN'S REACH, *supra* note 8, at 254.

[175] *Id.*

[176] *Id.*; STINNETT, *supra* note 5, at 192–93.

[177] Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4, at 24.

Historians have pointed to several manifest reasons why Andersen—who had won the initial canvass—so easily accepted a recount in which he lost by 142 votes. Stinnett argues that another recount would have been prohibitively costly.[178] However, cost has rarely, if ever, been a reason to avoid conducting a recount. Time might have also been a factor. The election had dragged on for months and the new governor's term was already several months old. Minnesotans wanted the election to be over, regardless of the outcome. As one voter indicated, she did not care who won, but she just wanted to stop hearing about the recount.[179] Finally, a newspaper account attributed the three-judge tribunal's forceful decision as to why he did not pursue a recount: "The strongly worded order of the three-judge recount count ... may have considerable to do with heading off an appeal."[180] While such factors contributed to Andersen's decision, his decision can be explained through more latent circumstances.

Aside from the public reasons to not challenge the results, Andersen had very little reason to do it. He and Rolvaag effectively administered their entire disputed election process, and as a result he had to accept it. In the absence of clear guidelines, both parties picked the judges to oversee the debate, both agreed to a recount process, and, most importantly, both decided which votes to challenge and which votes to accept. In the end, the only thing the three-judge panel decided was whether to count the ballots. The process was uniform and the decisions came from one court: a court they had both agreed upon, and a court that issued unanimous decisions.

In the face of such conditions, the Mayor of St. Paul, a fellow Republican, urged Andersen not to appeal: "An appeal by you to the [Minnesota] Supreme Court would create undue hardship on the people of Minnesota as well as to place our court systems in the political arena."[181] To do so would reawaken memories of a politically motivated court, and any result reached would taint any potential Andersen victory. Finally, to have the court review the decision, Andersen would have to prove the three-judge tribunal's findings constituted clear error. This would be hard considering his involvement in establishing and participating in the recount. With such control over the nonpartisan recount process, Andersen could not fault

---

[178] *Id.* at 106–07; *Recount Costs*, CHI. TRIB. Mar. 25, 1963, at 20.

[179] See Minnesota Historical Society, *1963 Andersen–Rolvaag Election Recount* (Podcast), http://discussions.mnhs.org/collections/2010/11/1963-andersen-rolvaag-election-recount-2/ (last visited April 6, 2011).

[180] *Andersen Calls Press Conference for 2 P.M*, FERGUS FALLS DAILY J. (Mar. 26, 1963), at 1.

[181] *Rolvaag Awaits Order Declaring Him Winner*, AUSTIN DAILY HERALD, Mar. 21, 1963), at 1.

partisan judges, an inability to count invalid votes, or claim election fraud. He implicitly recognized this when he said after conceding:

> When a competent and fair trial, which the district judge panel must certainly has been, renders a judgment that skilled representatives of mine feel cannot be successfully challenged in a higher court, then no one could expect me to appeal in order to gain time or possession to the last possible moment.[182]

There was little reason for him to challenge the outcome.

Finally, public sentiment supported the results as fair and correct. While many complained about the duration of the recount trial, there was a strong sense that the process had been fair. An Ohio newspaper allegedly wrote that Minnesota had figured out a fair way to resolve disputed election.[183] Stinnett characterized the recount as impressive in Minnesota's "unquestioning resort to the judicial processes for a solution to the [election's] impasse."[184] An *Atlanta Journal Constitution* editorial joked that it was the candidates' calm disposition that allowed the courts to do decide the process so fairly. Unlike other disputed elections that turned into metaphorical wars, this process seemed far more civil, shared, and authoritative.[185] An election that had been criticized for months for being partisan and divisive had evolved into a long, but fair, process.

## XI. MEMORY OF THE RECOUNT

Over time, the recount has ebbed and flowed from the memory of Minnesotans. However, the 2008 Minnesota senatorial election between Norm Coleman and Al Franken featured another extremely close race and resulted in a fiercely contested recount.[186] Prior to the Coleman-Franken recount, the 1962 election was remembered for being exceedingly close and exceptionally long. Chief Justice Knutson heralded his "decision" to create a

---

[182] *Gov. Andersen Quits in Favor of Rolvaag*, THE SUNDAY TRIB., Mar. 24, 1963, at 1.

[183] *Id.* (referencing vaguely an Ohio newspaper that stated this). This source could not be located after an extensive search.

[184] STINNETT, *supra* note 5, at 194.

[185] *Id.*; *see also* STINNETT, *supra* note 5, at 198 (referring to the process as "creative, cordial and judicial.")

[186] *See, e.g.*, JAY WEINER, THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA RECOUNT (2010).

three-judge panel as the crowning achievement of his tenure on the bench.[187] As other elections failed to be resolved fairly, Minnesota's 1962 election had been characterized as the civil exception to the rule. Andersen, the loser, has commended the process in his autobiography, although he tries to assert that no candidate ever sought to win by resorting to partisan tactics.[188]

In the wake of the Coleman-Franken election, the 1962 election was re-examined for its results.[189] Most recalled the election as a unique story that produced a close result, but did not explore the process involved.[190] In contrast to this, Ned Foley argued that the 1962 three-judge panel provided a path for Coleman and Franken to follow.[191] However, Minnesotans seemed reluctant to believe their judicial system was incapable of producing an unbiased result. One Minnesotan expressed his disgust that Foley would insinuate that a panel of judges was necessary and that it was ridiculous that a judge could not decide an election fairly and objectively.[192] By the end of the Coleman-Franken recount, the author of the response may have felt differently about not needing a three-judge panel. The Coleman-Franken recount ended acrimoniously.[193]

## XII. CONCLUSION

The 1962 Minnesota recount is significant for two reasons: the process the parties created, and the result it achieved. In regard to the former, it is significant to note that the parties—despite diametrically opposed interests—were able to come together develop their own dispute resolution process.

---

[187] Interview by Marvin Roger Anderson with Oscar R. Knutson, *supra* note 4 (stating his decision to create the three-judge tribunal as one of his most important decision as Chief Justice).

[188] A MAN'S REACH, *supra* note 8, at 254.

[189] *See, e.g.*, Edward B. Foley, *Settling Coleman-Franken Contest: Lessons From the 1962-63 Recount*, MINNPOST.COM (Jan. 8, 2009), http://www.minnpost.com/community_voices/2009/01/08/5684/settling_coleman-franken_contest_lessons_from_1962-63_recount (last visited Feb. 17, 2012).

[190] Elizabeth Stawicki, *The Origin of the Three-Judge Panel*, MPR NEWS (Jan. 25, 2009), http://minnesota.publicradio.org/display/web/2009/01/25/threejudge_sidebar/ (last visited Feb. 17, 2012).

[191] Edward B. Foley, *Settling Coleman-Franken Contest: Lessons from the 1962-63 Recount*, MINNPOST.COM (Jan. 8, 2009), http://www.minnpost.com/community_voices/2009/01/08/5684/settling_coleman-franken_contest_lessons_from_1962-63_recount (last visited Feb. 17, 2012).

[192] *Id.*

[193] *See* WEINER, *supra* note 187.

While it is beyond the scope of this recent development article to classify alternative dispute resolution processes used, it is significant to understand that the parties *created* their own way to resolve the dispute. As has been explained, Rolvaag and Andersen did not pursue the panel for idealistic reasons; they pursued it because they thought they could win.

It is also significant to understand what the 1962 recount achieved. In the end, the candidates, Minnesotans, and the press agreed that the election had ended fairly. This is especially incredible because a different candidate was declared the winner three times. First, Rolvaag won the initial canvass. Second, the State Canvassing Board and the Minnesota Supreme Court certified Andersen the winner. Third, the three-judge tribunal declared Rolvaag the winner of the recount. Because of this, the 1962 election provided a strong opportunity for either candidate or the press to be upset with the process. However, no one voiced concerns. By giving the two parties ownership of the process, the recount achieved a high sense of legitimacy. While the parties may have been unhappy with the results, they picked the judges, oversaw the recounting of ballots, and determined what could or could not be challenged.

The question becomes how *could* such an ADR influenced recount occur again. Rather then making the alternative dispute resolution process available to consenting parties, as was the case in the 1962 Minnesota recount, states would be wise to make the candidate-selecting, three-judge tribunal the primary way to resolve the dispute. A possible statute would involve the following characteristics: In the period before the election, both parties can meet to discuss which judges would oversee the recount or resolve claims of fraud. To ensure the candidates mutually select a three-judge panel, the statute could further stipulate that if the parties fail to select a three-judge panel, the judges would be assigned by lottery. By having the parties select the judges or having a judge assigned randomly, the courts would avoid any appearance of impropriety. Finally, the statute should make the three-judge panel's decision final. By eliminating an appeal, the statute would ensure a partial court would not review the matter.

As was demonstrated in Minnesota, if the process works, the parties should not feel the need to appeal: they appointed their own judges and controlled the recount's course. This fits one of the primary benefits of using ADR to resolve disputes: allowing parties to control the ways in which they resolve their disputes. Such a proposal serves as a starting point to consider new ways for legislatures to create statutes that resolve disputed elections. While such a process would need further research, it supports Minnesota's 1962 lesson: make the candidates own the recount.

*Brian DeSantis*

## **Appendix I:** Recount Categories

*Categories developed by the three-judge panel to review disputed ballots*

| Category | Type of Ballot Issue | Total in Category | Total Stipulated/ Debated | Net votes (from category) |
|---|---|---|---|---|
| 1 | Double Votes | 386 | 363/23 | +10 Rolvaag |
| 2 | Double Votes | 39 | 26/13 | +2 Andersen |
| 3 | "no vote" | 71 | 16/55 | +9 Rolvaag |
| 4 | Equivocal Votes | 165 | 111/54 | +14 Rolvaag |
| 5 | Surplus Voting | 114 | 108/6 | +1 Rolvaag |
| 6 | Attempted Obliteration/Erasure | 152 | 89/63 | +1 Rolvaag |
| 7 | Unusual Voting Marks | 426 | 319/107 | +3 Andersen |
| 8 | Surplus Marks for Governor Alone | 147 | 141/6 | +2 Andersen |
| 9 | Containing Misplaced Marks in Votes for Governor | 28 | 25/3 | +1 Andersen |
| 10 | Non-Uniform Marks | 928 | 0/928 | +36 Rolvaag |
| 11 | Combinations of Complete and Partial Voting Marks | 98 | 54/44 | +4 Andersen |
| 12 | Unusual Voting Marks for Offices Other than Governor | 91 | 73/18 | +2 Rolvaag |
| 13 | Ballots with Unusual but Uniform Voting Marks | 31 | 22/9 | +0 |
| 14 | Inconsistent Arrangement of Voting Marks | 196 | 194/2 | +0 |
| 15 | Surplus or Unnecessary Voting Marks in Candidate Area | 619 | 594/25 | +1 Andersen |
| 16 | Names/Initials on Ballot | 76 | 70/6 | +1 Rolvaag |
| 17 | Possible Write-In Votes that May Be Interpreted as Distinguishing Marks | 34 | 29/5 | +1 Rolvaag |

| | | | | |
|---|---|---|---|---|
| 18 | Other Distinguishing Marks Outside the Candidate Areas | 12 | 0/12 | +0 |
| 19 | Ballots With Numbers On | 1 | 0/1 | +0 |
| 20 | Unusual Obliterations | 1 | 0/1 | +0 |
| 21 | Stipulated Out | - | - | - |
| 22 | Miscellaneous | 31 | 8/23 | +2 Andersen |
| 23 | Holding Miscellaneous | 15 | 6/9 | +3 Rolvaag |
| 24 | Spoiled Ballots | 5 | 5/0 | +2 Rolvaag |
| 25 | Ballots (not Absentee) Claimed to be Valid, but Not in Recount | 64 | 0/65 | +20 Rolvaag |
| 26 | Absentee Ballots Claimed to be Valid, but Not Included | 21 | 0/21 | +5 Rolvaag |
| 27 | Miscellaneous Ballot Included in Recount | 2 | 0/2 | +2 Rolvaag |