

March 8, 2023

To: Sen. Jim Carlson, Chair, Senate Elections Committee
Sen. Mark W. Koran, Ranking Member
Sen. Kelly Morrison, Chief Author (SF 2270)
Sen. Lindsey Port, co-author
Sen. John Marty
Sen. Ann Rest
Sen. John Hoffman, Chief Author (SF 538)

Re: SF 2270, Morrison, Mohamed, Port, Hauschild (Protect and Defend Democracy Act, comprehensive ranked choice voting bill)

Statement of support, with suggested amendment regarding presidential elections

Dear Chair Carlson, Ranking Member Koran, Chief Author Morrison, Members Port (co-author), Marty and Rest, and Senator Hoffman (chief author, SF 538):

I am writing as an independent researcher/author.¹ I strongly support SF 2270, which will help assure that the full range of preferences of the voters in state-wide elections will be accurately reflected in the results of those elections.

My particular interest, and point of concern, is presidential elections. I have been studying and writing about presidential elections for over six years. For four years, I have been following the national discussion about how ranked choice voting results might be incorporated into a national popular vote election.

Minnesota has a unique opportunity to inform the national discussion about how alternative voting systems can help assure the integrity and accuracy of presidential elections. This is also a golden opportunity to demonstrate how the results of a state presidential election conducted under one or more alternative voting methods can be integrated effectively into a national popular vote for president. These opportunities arise from the fact that Minnesota is the first state in the nation to take up both adoption of the National Popular Vote Interstate Compact (SF 538) and implementation of Ranked Choice Voting in presidential elections (SF 2270) at the same time.

¹ I am a retired public sector attorney (16 years, So. Minn. Regional Legal Services; 24 years, U. of Minnesota Office of the General Counsel). I am lead author of two recent law review articles—one on presidential election reform (Lewis & Clark Law Review, Summer 2022) and one on the gross errors in the Independent State Legislature Doctrine history (published last month in Mitchell Hamline Law Review). I am coauthor with St. Olaf History Professor Michael W. Fitzgerald of an article, under peer review at a history journal, about racial violence and the electoral college during Reconstruction.

Core Recommendation: Minnesota Should Study the Best Method for Holding Presidential Elections

Minnesota's gradual embrace of Ranked Choice Voting has been grounded in both study and experience. In 2004, the League of Women Voters Minnesota conducted a superb, in depth study of a range of alternative voting methods.² The two most prominent were Instant Runoff/Ranked Choice Voting and approval voting. The study concluded, accurately, that no voting system is perfect, and it identified strengths and weaknesses of each. Over the years, policy makers, civil society and advocates have settled on ranked choice voting as Minnesota's preferred method, and we now have some 13-14 years of experience with ranked choice voting in municipal elections. The system works.

Yet, the 2004 study did not consider application of alternative voting systems in presidential elections. Presidential elections are unique among all elections, and they were designed for a special purpose—to choose a consensus president who could govern effectively and with authority across a vast nation with a great diversity of peoples, economies, and local traditions.

Presidential elections also feature a unique history of consideration and implementation of alternative voting systems. On July 25, 1787, James Madison and two other leading members of the Constitutional Convention³ discussed using approval voting in a popular election of the president. One proposal was that each voter would vote for 3 candidates; another proposal was to vote for 2 candidates, at least one of whom must be from another state. Under either proposal, the votes would be accumulated, and the candidate with the most votes would win. This describes approval voting in a national popular vote election. The method guarantees that the candidate with the greatest overall support will win; spoiler candidates have no effect. In September 1787, the 2-candidate idea was incorporated into the original electoral college, and the nation's first four elections for president featured approval voting. Each elector cast undifferentiated votes for two candidates, at least one of whom was from a different state.

RCV is also an excellent method for preventing spoiler candidates from distorting the preferences of the electorate as a whole for leading candidates. Yet, RCV can produce odd results in a close 3-way election.⁴ Further, in a national popular vote

²LWV MN 2004 Study.

<https://drive.google.com/file/d/1lVMbF1jDVZ0qiB7EuqoEMBrEV1sOrqsw/view>

³ The three (including Gouverneur Morris and Hugh Williamson) were on the committee that wrote the first draft of the electoral college. (Madison is said to have written it). Madison and Morris were on the committee that wrote the final draft of the Constitution. (Madison said Morris wrote most of it.) Addendum No. 2 sets out the July 25 colloquy.

⁴ The LWV MN 2004 study noted this "special circumstance" and described some of these unexpected results. Id., 12, 17. Alaska's unique RCV system, which effectively forces party

election conducted under RCV, a major party candidate might receive zero popular votes if a strong third party came in first or second. In living memory, third parties came in first or second in 1992 (Ross Perot) and 1968 (George Wallace). This question has been discussed for four years but not yet resolved. I believe it can be easily solved. A rigorous study could identify how.

I respectfully suggest that Minnesota can lead the nation on these issues by rigorously studying the questions and taking action after the legislature has been fully informed. Given the history of the electoral college and the purpose of presidential elections, approval voting should at least be studied and considered. On the surface, it seems reasonable. It is simple. It was used at the Founding (it is still used by the Catholic Church). It would work exactly the same as RCV in preventing spoilers from affecting the results. In situations involving strong third parties, it might work better than RCV in assuring that all the votes for both of the major contenders for the presidency are counted.

I respectfully invite the Committee's consideration of the draft amendment to SF 2270 set out in Addendum No. 1. The amendment would not change the default position of SF 2270. In the absence of intervening legislation, presidential elections will be conducted under RCV, beginning in 2028. The amendment contemplates that an objective study will be conducted and empowers the task force to recommend that a method other than RCV be used for presidential elections.

If approval voting were recommended, it might be implemented in 2024 rather than 2028. The method is simple. In 1788, it could have been implemented for a national popular vote for president using quill, parchment and abacus technology; it would appear to require no significant new technology or training today. The amendment allows for implementation of a non-RCV voting method in 2024.

Potential Legal Objection

The only cogent objection to approval voting for president is based on a 1915 Minnesota Supreme Court case involving municipal elections in Duluth that concluded that cumulative voting is unconstitutional.⁵ The case did not involve presidential elections, and it interpreted language from the 1858 constitution that is no longer part of the constitution. The 1858 constitution itself may not have been intended to apply to presidential elections—at the time, there was an erroneous impression in some quarters that state constitutions generally did not apply to federal elections—an assertion this is made even today. *See Moore v. Harper*.

splits in the final round of 3 candidates, can create similar special circumstances, in which the strongest candidate overall can be eliminated. Scholars are considering solutions to that problem. It should be emphasized that this is NOT a feature of SF 2270. Rather than forcing party splits in the general election, SF 2270 uses RCV in party primaries to winnow the field before the general election.

⁵ *Brown v. Smallwood*, 130 Minn. 492, 153 N.W. 953 (1915).

As applied to presidential elections, the 1915 case’s understanding of history and political philosophy is profoundly mistaken. The court said:

It was never thought that with four candidates one elector could vote for the candidate of his choice, and another elector could vote for three candidates against him.⁶

Yet, that is exactly what was thought when leading Founders were thinking through what would ultimately become the electoral college.

He [Hugh Williamson] suggested as a cure for this difficulty that each voter should vote for three candidates.⁷

Clearly, the Founders did not think that approval voting is inconsistent with fundamental understandings of representative democracy. For the Founders, after all, “consent of the governed” meant majority rule.

Second Recommendation: Provide for Prompt Judicial Review; Consider Implementation of Approval Voting Now, in Parallel with a Rigorous Study.

Although the 1915 case is not binding precedent, it is likely to cast a cloud over the approval voting option—even though that method may be best for assuring majority rule. If the task force recommends approval voting, it might recommend legislation that will facilitate judicial review. Given the timing, however, there is some doubt whether a definitive decision would be rendered prior to the 2024 election.

To facilitate prompt resolution of legal issues, the Committee may wish to consider implementing approval voting now and providing for prompt judicial review now. The rigorous study that will ultimately help inform the Legislature’s final resolution could (and should, in my view) continue; one might revert to RCV. Yet, there is ample justification for preferring the Founders’ alternative voting system for presidential elections, at least as an initial matter. Doing so would allow the Supreme Court to settle the issue well in advance of the 2024 presidential election.

Thank you for the opportunity to submit these comments.

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⁶ 153 N.W. 957.

⁷ Alan E. Johnson, The Electoral College: Failures of Original Intent and a Proposed Constitutional Amendment for Direct Popular Vote (Pittsburgh, Philosophia: 2018) 193 (emphasis supplied)(from a useful, detailed chronology of the debates in the Constitutional Convention regarding the presidency, at 161-232).

Addendum No. 1:

Proposed amendments to SF 2270

I. Specifying additional task force duties regarding presidential elections, based on results of an independent study.

line 3.21: Insert new subsections (2) and (3).
Renumber former subsection (2) as subsection (4) and revise.
All as follows:

(2) results of an independent study of use of Minnesota election returns in computing the national popular vote for president and, more generally, of the comparative advantages of implementing various voting methods in presidential elections;

(3) recommendations regarding the voting method to be used for election of presidential electors and recommendations on standards and rules to implement the recommended method for voting for presidential electors; and, if the recommended voting method is other than ranked choice voting, a recommendation in the February 15, 2024 report regarding the feasibility of implementing that method for the 2024 presidential election;

~~(2)~~ (4) draft legislation to implement statewide ranked choice voting, to provide for the method of using Minnesota election returns in computing the national popular vote for president, and to implement the method for election of presidential electors recommended under subsection (3);

Lines 3.22 - 3.28, renumber subsections (3) - (5) as subsections (5) - (7).

II. Clarifying that SF 2270 applies to election of presidential electors.

Line 6.29, add clarifying language, as follows:

Subd. 1. **Application to federal and state offices.** The ranked choice voting procedure established in this chapter must be the method used to nominate and elect candidates for federal offices, presidential electors, state constitutional offices, and the legislature at every regular or special primary or general election conducted in the state effective 2026.

Addendum No. 2:

Discussion in the Constitutional Convention Regarding use of Approval Voting in a Popular Election of the President:

The principal objection agst. an election by the people seemed to be, the disadvantage under which it would place the smaller States.” He [Hugh Williamson] suggested as a cure for this difficulty that each voter should vote for three candidates. One of these, he observed, would be probably of his own state, the other two of some other states, and as probably of a small state as a large one. Gouverneur Morris “liked the idea, suggesting as an amendment that each man should vote for two persons one of whom at least should not be of his own state.”

James Madison now weighed in, saying that something valuable might be made of Williamson’s suggestion with Morris’ amendment. A person from a small state would likely vote for from his state, as his first choice, and a more generally known person from another state as his second. Aggregating the votes from all the states would probably result in “the second best man” being the “first in fact.”⁸

⁸ Johnson, *supra* note 7, The Electoral College, 193-194 (emphasis supplied).