

Testimony
before the
Colorado State Uniform Voting System Public Participation Panel

Grand Junction, Colorado

August 14, 2013

Thank you for allowing me to speak to you this afternoon.

I apologize for my late arrival and ask that – if I speak to issues that have already been adequately covered or are beyond the scope of the Panel’s charge – please let me know.

My name is Bill Hugenberg. I am a former Army Intelligence Officer and then corporate executive, but now just another retired attorney residing here in Grand Junction.

I first became interested in voting-related matters in late 2011, when the Mesa County Clerk got herself embroiled in litigation over access to voted ballots under the Open Records Act – which also raised issues regarding the secrecy of ballots in Colorado.

In following the progress of the process mandated by HB 1303, I have been impressed by the intricate level of detail at which the discussion has properly been focused, but struck by the apparent rush to finalize the Request for Proposals (“RFP”) before its detailed specifications can be properly vetted by experts, and by the lack of reference to any “first principles” – except in the preamble to the bill itself -- by which to guide the Colorado Voter Access and Modernized Elections Commission’s development of the RFP.

As you likely already know, the Carter Center’s Democracy Program – which monitors elections in emerging democracies all over the globe – has compiled from observed “best practices” a set of principles which define what a genuinely free and fair “democratic election” is supposed to be. Four of those definitional principles are relevant here:

First, to constitute a genuinely “democratic election” -- “voting must be by secret ballot so that ballots cannot be linked with voters who cast them . . . [and] . . . the secrecy of the ballot must be maintained throughout the entire electoral process.”

Second, truly “democratic elections” should be conducted by “impartial officials”, so that the electorate has no reason to question the integrity of the process and/or the legitimacy of the official results. To do otherwise inevitably leaves some shadow of doubt.

Third, to constitute a genuinely “democratic election”, the entire election process should be completely transparent, so that the press, the public, and any interested organizations can independently verify the integrity of the process and the accuracy of the final results.

Fourth, as suggested by the title of the Commission itself, all eligible voters should have convenient access to the polls – both as to place and time – without fear of intimidation.

I will speak briefly to each of these “first principles” in turn.

1. The Commission Should Reaffirm the Sanctity of the Secret Ballot in Colorado.

While Colorado’s constitution has long been consistent with the common sense principles cited above, it does not expressly guarantee a “secret ballot”.

Rather, Article VII, Section 8 states, “. . .no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it” and “[n]othing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.” There is no exception for election officials, staff, election judges, canvass boards, electronic equipment vendors, or even the courts.

Therefore, in finalizing the Request for Proposal (“RFP”), I would ask the Commission to include language that explicitly states that any and all requirements specified in the RFP presume that no equipment, system, or procedure solicited and/or covered by the RFP will allow the identity of a voter to ever be linked to the contents of his/her voted ballot.

2. The Commission Should Recommend Impartial Supervision of Elections.

Colorado elections are conducted by constitutionally designated officials -- both at the State and County levels – who run as partisan candidates, even in elections they conduct.

Next year, for example, our Republican Secretary of State may well end up running for Governor against the incumbent Democrat in an election to be overseen by that Secretary of State. Such circumstances do not promote voter confidence in election integrity.

Therefore, I would ask the Commission to recommend to the legislature that it be made permanent and renamed as the non-partisan Colorado Elections Commission, charged with providing elections oversight to both the Secretary of State and the County Clerks.

Moreover, while the County Clerks themselves are partisan elected officials, they are nonetheless considered to be the collective repository of local expertise regarding the conduct of elections. The Commission should insure that the Clerks merit such respect.

The Colorado County Clerks Association (“CCCA”) is partially supported by taxpayer dollars derived from dues paid by member counties, but it reportedly garners much of its financial support from equipment vendors and other interested parties – who fund the CCCA’s lobbying efforts before both the state legislature and the Secretary of State.

Therefore, to remove any taint of “conflict of interest” or “undue influence” from any election-related recommendations offered by the CCCA, I would ask the Commission to recommend to the legislature that the CCCA be required by law to fully and publicly disclose its sources of income, contributors, and expenditures – especially for lobbying. Millions of taxpayer dollars are at stake – so, the most rigorous precautions are required.

3. The Commission Should Seek Maximum Transparency Before Certification.

As posited above, to constitute a genuinely free and fair “democratic election”, the entire election process should be completely transparent, so that the press, the public, and any interested parties can independently verify its integrity and the accuracy of final results.

Moreover, transparency can be ineffectual if it is achieved only after election results are certified. Therefore, in my opinion, SB 12-155 was misguided – because it created a “blackout period” during which voted ballots cannot be accessed as public records.

While I understand that practical considerations – as lobbied by the CCCA – may indeed temporarily justify such denial of traditional transparency, I would ask the Commission to work toward an election system in which images of all voted ballots are posted “on-line” expeditiously after the polls close – and certainly before the election is certified.

Similarly, since Colorado elections are not conducted by impartial officials, but rely on the self-interested oversight afforded by representatives of the “major political parties”, I would ask the Commission to recommend against any legislation and/or proposed rule that would effectively abridge the authority of County Canvass Boards to decline to certify dubious elections. Of course, if a non-partisan Colorado Elections Commission were established, such “contests” could be promptly investigated and resolved by that entity, rather than by a partisan local County Clerk or by a partisan Secretary of State.

4. The Commission Should Seek to Deter Both Voter Fraud and Voter Intimidation.

While some partisans cite non-existent evidence of widespread but undetected “voter fraud” to justify draconian restrictions on voter registration and/or discriminatory “i.d.” requirements before-the-fact, every reasonable effort should indeed be made to deter and minimize voter fraud – by detecting and prosecuting it after-the-fact. However, because voting is the fundamental constitutional right of every eligible citizen, voting – rather than being turned away – should always be the default expectation, regardless of “i.d.”.

Therefore, I would ask the Commission to recommend that any “voter identification” requirement more restrictive than that already found in C.R.S. 1-1-104 (19.5) be phased-in over sufficient time to enable most voters to obtain appropriate identification, and that adequate provision (*e.g.*, “provisional ballots”) is made to accommodate those who can’t.

Conversely, systematic abuse by overzealous partisan poll watchers is a potentially much more serious problem than “voter fraud” – because the very purpose and intended effect of such conduct is to intimidate individual voters and thereby suppress the overall vote.

Therefore, I would ask the Commission to recommend that C.R.S. 1-7-108 and Section 62 of HB 1303 – regarding poll watchers’ authority to “challenge ineligible electors” – be clarified to insure that no voter can be denied his/her right to vote by a poll watcher, that any challenge requires a sworn affidavit of personal knowledge and consent to liability, and that abuses by poll watchers are punished with the same severity as “voter fraud”.

Finally, even though the Supreme Court recently struck down Section 4 of the Voting Rights Act of 1965 – effectively eviscerating the “pre-clearance” procedures contained in Section 5 – but in order to avoid future partisan acrimony over voting rights in Colorado, I would ask the Commission to recommend to the legislature that it voluntarily by statute subject itself to Section 5, so that any future changes to Colorado’s election laws would require pre-approval (or at least an advisory opinion) from the Department of Justice.

Colorado is still experiencing the repercussions of investing massive amounts of money in a complex computer system that failed to perform as specified. Therefore, it is now incumbent on the Commission and this Panel to insure that that doesn’t happen again.

In the meantime, I do not envy your daunting task and thank you for your invaluable service to Colorado.

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