

Public Comment for the Colorado Secretary of State, 7/17/2015, by Harvie Branscomb

Election watching is a crucial mechanism for maintaining and improving the quality of Colorado elections. It is also a primary means for developing trust based on evidence rather than simple promotion or lack of complaint. Watching is the only truly independent oversight mechanism that our elections have.

Elections that are run by the citizens (precinct polling place elections) are naturally overseen by citizens. Elections that are run by elected officials using elaborate technology and central count are only overseen by citizens when two things are true: 1) policy makers go out of their way to ensure that this opportunity exists, and 2) members of the public and campaigns go out of their way to take the opportunity.

In Colorado, citizens in several counties have gone out of their way to attempt to exercise the statutory opportunity to witness and verify every step in the conduct of the election and to assist in the correction of discrepancies. They have experienced limited success in obtaining access, but in many cases when access is provided, improvements in quality have resulted.

The Election Watcher Advisory Panel, now disbanded, has discussed a specific agenda presented by the Dept. of State that contains some good concepts for reforming the regulatory regime around watching. Ideas discussed and presumably to be pursued include watcher training, watcher credentialing, background checks prior to full access to confidential information as defined in CORA, a mechanism for challenging signature verification decisions, a formula for watcher access that accounts for the number of election judges per activity, etc. Some of these measures will make watching more effective and constructive. Extending the temporal scope of watching without interruption through the end of any recount certification will be a constructive improvement to statute. Likewise the earliest point of watching should be revised to a point at which election materials are first created.

However, the Panel also discussed and voted on a recommendation that would reinterpret statute in a rule that would curtail the basic access already provided for watchers in current law by limiting the scope of watching to both the physical presence and exclusively the current activity of election judges.

To implement such a decision would drastically damage the public's opportunity to oversee elections and will allow more potential errors and omissions, if not fraud, to occur with less chance for discovery or remedy. One or more members of the Panel voiced their opinion that the watcher role is not "investigative" and does not resemble an "audit role." I strongly disagree with that opinion. A literal reading of the existing statute with its clear "right" to "verify each step in the conduct of the election" and its reference to correcting discrepancies supports my case.

Some members also expressed the opinion that watchers might substitute in the election judges' role if statute were interpreted in what I see as its literal meaning, but this is an extreme case of straw man argument. Watchers clearly may—according to law—witness, verify, and assist in correction (by communicating the result of their verification to the appropriate authority). Watchers of course do not have any authority to reverse the decisions of election officials.

First, I will treat the issue of physical presence of the judges as a limitation of the scope of watching.

I have heard some members argue that election judges themselves might satisfy the need for independent oversight, but this is proved false on two accounts: 1) the judges at best represent only two or in rare cases three major parties, but fail to represent at least 1/3 of the electorate, and 2) the judges are acting as paid employees (if they are not in fact permanent employees) of the elected designated election official, thus corroding the potential for them to act with independent reference to rule and statute.

Many election judges in the Colorado Modernized Election are not often treated in a manner consistent with the original meaning of their title of “judge” except to the very limited extent to which they are allowed to make a decision such as a signature verification or ballot mark adjudication. Election judges tend to be instructed to refer any questions to staff or to the DEO for a decision. They do not constitute independent decision-making or oversight of our elections. And the bipartisan offset that is often (but not always) in place in election judge activities does not necessarily serve third parties or unaffiliated voters.

Numerous steps in the conduct of the election occur in the absence of election judges in the modernized Colorado model. Ballot design, testing, printing, fulfillment, and transport in many instances occur without election judges’ presence. Many central count functions—such as scanning of undeliverable envelopes—occur without election judges’ presence, while staff and vendors are likely present. Counties’ policies regarding the use of election judges for various steps actually vary widely; some counties mainly or exclusively use county staff for roles intended to be performed by party-appointed citizen judges.

Thus it is very problematic to create a rule that restricts watching to the presence of election judges. One hopes and expects the Secretary to reconsider this advice.

But the Panel apparently voted to further restrict the opportunity for watching by requiring that the process and materials to be watched be what election judges are actively doing and seeing.

What this restriction means is that watchers would have no general right to witness or verify relevant election documents other than access via CORA—a process that contains deliberate obstructions for access during time-sensitive activities and numerous means to prevent or delay public access. Some members expressed an opinion that watchers ought only to object to the general appearance of the apparent process being undertaken rather than specific decisions made, errors made, or specific data that is inconsistent. That is an opinion that will prevent watchers from obtaining information that makes statutory verification possible. Furthermore, such a restriction also invalidates the potential for technology to time-separate the watcher function from the judge function so that watchers need not distract from the judges’ decisions in real time. New systems provide opportunities for watchers as well as staff or judges to conduct reviews of verified signatures and adjudicated marks on ballots.

Watcher regulations need to attend to at least four pressing needs:

- 1) Minimum standards for sufficient access to perform the statutory role for every eventuality and concern that might be raised,
- 2) Means to fairly determine who gets access when an excess of watchers desire to be present,
- 3) Means to receive and adjudicate watcher input on an effective and timely basis, and
- 4) Means to recognize and remedy watcher abuse of the process.

The Panel has perhaps spent too much time relying upon arguments related to the fourth goal—one for which adequate remedies already exist although few real problems have been reported. Functional reforms are recommended by the Panel that are good, but the overall scope of watching may be disastrously cut back if the majority view of the Panel becomes the guidance that the Secretary follows.

It is my concern that the recorded vote by the Panel on the topic of watching scope reflects the same cross-partisan lines present in the coalition that brought Colorado the HB13-1303 and the “Colorado Modernized Election” with its end of precinct polling. Election officials and Democrats support curtailing the watching scope to activities of election judges, while election quality activists, watchers, and Republicans on the Panel appear to defend a broad view of the statutory watcher role. One hopes the Secretary will recognize this now-familiar political alignment and make his decisions with full recognition of the impact of the relevant agendas.

Harvie Branscomb

Supporter of the minority position: Senator Laura Woods

Co-signer: Lisa Cyriacks

Co-signer: Marilyn Marks (supplemental comments will be offered in the near future and can be accessed by the public in an Open Records request.)

Co-signer: Mary Eberle

Co-signer: Al Kolwicz for Colorado Voter Group whose text follows:

Harvie,

Thank you for writing this much needed advice to the Secretary.

Please include Colorado Voter Group as a cosigner that strongly supports the requests and recommendations.

We don't ask that you hold up this letter, but we do include for your consideration the following:

1. Watcher training must be delivered from a syllabus developed and approved by a team that is strongly influenced by experienced voter integrity advocates.

2. When you say parenthetically, “(by communicating the result...), should you also include “and, actively participate in the decision making process”?
3. Should it not be said that complete specifications of all election data and processes must be documented and available to watchers for planning their activities? Boulder has refused, for example, to provide a list of (VOTER_ID, BALLOT_STYLE) needed to verify that voters are casting the correct ballot.
4. Should it not be said that certain watching activities cannot be achieved by watching unit operations, and only by watching the aggregate can one discover a problem. A simplistic example would be: one watcher may see Mr. Brown’s ballot be accepted into the ballot box, and a second watcher on a different time and place may separately see Mr. Brown’s ballot be accepted into the ballot box. One needs election data to discover this anomaly.
5. And finally, regarding the list of four needs. Should we not mention that standards need to be negotiated that ensure that processes, applications, and reports must be designed to achieve maximum transparency and maximum verifiability?

Al Kolwicz