



February 9, 2009

The Honorable Ken Gordon, Chair, and Commissioners
 Colorado Election Reform Commission
 200 East Colfax Avenue
 Denver, Colorado 80203

Dear Chairman Gordon and Commissioners:

We offer these comments on the Election Reform Commission Uniformity and Simplicity Subcommittee recommendations received February 6, 2009.

Please note that these comments do not address omissions of the content of the recommendations. We agree that there are many issues with Title 1 that need to be addressed by a process involving experts, election officials, and the public. We hope that the Subcommittee will also advise that such a legislative process be created to function between the legislative sessions. Here are the steps we see in such a process:

1. Start with a broad and inclusive investigation and analysis of current election practices and the relevance of current law.
2. Establish stated and prioritized goals for the election system.
3. Search for alternative practices deemed preferable in achieving stated goals, in an interactive setting including experts, election officials, and the public.
4. Prepare recommendations for constructive changes to law for the consideration of the Legislature.

Mail Ballot Elections:

The Subcommittee recommends a county option to conduct primary and general elections by mail with a "sufficient number of service centers." The Subcommittee is very cognizant of a "need for flexibility" for designated election officials in deciding how to deliver elections. The existing election law provides for maximum flexibility for the Colorado voter, but the recommendation would actually limit the voter to a primarily mail-in election, which is "flexibility" only for the election official and not for the citizen. CFVI writes elsewhere (<http://cfvi.us/?q=node/53>) about the weaknesses and deficiencies of mail-in ballots. We feel that the Subcommittee recommendations should be more honest in characterizing their effort to allow all-mail-in elections despite rejection by Colorado voters who soundly defeated Amendment 28.

The recommendation implies that if 50% of a county's voters are already voting by mail, there is de facto agreement that the remaining 50% will accept to vote by mail as well. This is a stretch of wishful thinking on the part of those who would prefer the simplicity of the centrally counted mail-in ballot instead of a precinct-counted election with its natural inclusion of citizen oversight and full control over ballot inventory.

The "service centers" called for are vote centers. This proposal represents another small step toward centrally controlled, factory-style voting.

There is a provision for a limited form of transparency—a public comment period for determining the mode of operation of these "service centers" in conjunction with party officials. This is at once laudable but also laughable.

The plan to perform primary elections primarily by mail has a defect already noted by the Subcommittee. The current law allows unaffiliated voters to affiliate at the time of voting. This huge benefit to unaffiliated voters would be sacrificed by going to all mail-in voting.

There is also a veiled reference to possible techniques for removing voters from the mailing lists in the mention of national change of address tracking and related capabilities of SCORE. These are other targets of public concern.

The recommendation repeatedly refers to "Election Day" when this proposal changes Election Day as Coloradans know it, actually replacing that day with "a ballot reception deadline."

The current requirement of receipt of ballots at County Clerks offices on the deadline day means that voters who use the mail to return ballots have no guarantee that their ballots will be counted regardless of what day they send in their ballot. To make a policy favorable to the voter would require honoring a postmark date on the ballot envelope as some states do, greatly favoring the convenience of the voter.

Currently, voters must physically return their ballots to ensure meeting the deadline. In current practice, the Postal Service will inevitably disenfranchise some voters by failing to deliver some ballots on hand to election offices by the deadline. Vendors also have a history of negligence in delivering ballots in a timely manner. Election officials have been known to advise postal officials not do to anything special to be sure that ballots in possession of the Postal Service were delivered to election officials. The ballot arrival deadline is an area of current mail-in policy that benefits election officials and not the public.

The recommendation prefers counting of ballots to commence 21 days prior to deadline. This is to the advantage of election officials, but increases the chance that vote tabulations will be leaked, causing unfair effects on those who have not voted yet.

There is a reference to "ballot collection drives." This is obviously an area for concern over voter intimidation.

Training:

Considering the Uniformity Committee's insistence that designated election officials should have the right to end precinct polling in certain counties and not others, it will be difficult for the Secretary of State to provide a consistent training program for election officials and judges.

The Subcommittee recommends consistent instructions for handling ballot "counting" for each approved voting system, implying that procedures for voter-intent interpretation and accumulation of interpretations now differ from system to system. The Subcommittee refers to the "hand-counting method used in some Colorado counties." This wording is curious because hand counting must be performed in all Colorado counties in order to accomplish both the required LAT and the required audit. The recommendations do not suggest that Colorado's hand interpretation and tabulation methods should be studied and improved. Considering the wide variation in Colorado's current hand interpretation and tabulation methods, we feel strongly that only the best methods should be sanctioned. Only some of these methods have a natural ability to converge to an accurate result. Studies exist and have been forwarded to you previously.

The Subcommittee has recognized that there is little uniformity in execution of election procedures around the state, but has not referred to the need to evaluate these different methods to determine which are successful and which are not. Without this, it will be difficult for counties performing with better practices to adopt a uniform but less accurate, less transparent, or less efficient procedure. Before uniform practices are to be written into a manual under the "Seal of the State of Colorado," an open and interactive public process should compare existing practices and determine which will best suit the citizens of Colorado—not just which will best suit the election officials of Colorado. If a designated election official determines that the "Official Election Manual" contains flaws, he or she should have the right to prevent its use within the county. In this respect we are in agreement with Commissioner Stephanie O'Malley.

The recommendation to use video is admirable, and we hope that funds can be found to support it. Any statutory requirement for creation of materials specific to vendors' equipment should not bias any designated election official from using equipment for which the video has not yet been prepared.

Forms:

Uniform forms must not be developed only by the professional experts. The process must be accessible to all affected parties.

Primary Elections:

The elimination of the primary election is of questionable value. The mere fact of a primary election with no contested races is a loud statement to the community that it may have insufficient interest in its government. Removing the primary election itself may save money, but if budgets are changed in anticipation of a no-contest primary, there may be public confrontation or pressure placed on would-be candidates, who then seem to become responsible for adding cost to the county or counties. No candidates should be put at risk to be blamed for costing the government money because they wish to run. This entire section on eliminating the primary has not been properly thought through. The public should remain familiar with the practice of voting in the primary even when no choices are available.

Canvass Board Procedures:

Commissioner Scott Gessler is correct that there is vast inconsistency in the operation of Canvass Boards. We agree that there needs to be sufficient Canvass Board members to complete the work. And there should be an equal number from each party. Unfortunately owing to huge differences in the size of elections between large and small counties, Canvass Boards of large counties may perform their work only through paid election workers, from whom the board members are sometimes kept completely isolated. This isolation curtails the effectiveness of the Canvass Board. In small counties, Canvass Boards may physically do all the work themselves. We hear that there are counties where most of the Canvass Board work is done by the clerk alone and then simply certified by the Canvass Board.

Some county chairs are unaware of their role in the selection of Canvass Boards or have not been permitted to select board members. In some counties, board members are not at all independent of the designated election official. We have also heard reports of at least one county (Morgan County) where a voting system vendor is managing the Canvass Board.

Reports of activities of Canvass Boards must be made and published. Some effort must be made to insure that the Canvass Board is in fact independent from the control of the designated election official and that it is performing its duties in a manner consistent with law and rule.

Decision-Making of the Canvass Board:

It is true that there is no provision in law for decision-making of the Canvass Board. The membership of the county clerk on the board is potentially problematic, as in small counties, the clerk can and does control the Canvass Board (unlike the concern expressed by the Subcommittee). It is also the case that in a small county the clerk is 100% responsible for decisions related to the election and cannot properly provide oversight over his or her own decisions. On the other hand, clerks must be required to provide information to the Canvass Board, and members of Canvass Boards must be clearly included within the definition of "election official" for the purpose of conducting their role.

Duties of the Canvass Board:

The Subcommittee has omitted some statutory responsibilities of the Canvass Board. The Canvass Board also performs/supervises the audit and any recount. (We noted a typo: "case" should be changed to "cast" in one place.) The additional requirement to "to ensure that the number cast in each precinct does not exceed the number of eligible voters in any precinct" seems insufficient in its design, as it is very unlikely that there would be more votes cast than the maximum possible turnout and does not deal with the many other possible errors and omissions that might affect election outcome.

We agree generally with Commissioner O'Malley and suggest that the Canvass Board should "inspect and investigate any case where number of votes counted fails to align with the number of eligible voters who attempted to cast a ballot either at polling places or by mail-in ballot." Another way to say this is "The Canvass Board has responsibility for certifying that every eligible voter who has appeared at the polls and attempted to vote or has returned a mail-in ballot has in fact cast a ballot and that every ballot cast has been counted." Any exceptions from this principle should be investigated by the Canvass Board as part of its statutory role.

Remedies for Improper Certification (probably better named Remedies for Exceptions Found During Canvass):

We agree that there should be an administrative remedy for discovered faults in the election canvass during the operation of the Canvass Board, brought either by Canvass Board members or accredited watchers. A reasonable trigger of such an administrative complaint would include insufficient access of the Canvass Board to election records.

Remedies for Failure to Certify (“Remedy for Decision Not to Certify”):

We agree that there is no provision for a Canvass Board that has decided that the election results remain in question or in error by the end of the canvass process. The potential for the Canvass Board to fail to certify may form the one and only motivation for information to be provided to it, and therefore the power to determine whether or not to certify must remain with the Canvass Board. In case of a discovered failure, the Canvass Board should transmit non-certified results and details of any concern to the Secretary of State while leaving the election officially incomplete. The Secretary of State ought to be made aware of all Canvass Board concerns, and the Canvass Boards must remain protected from any pressure to certify due to any explicit or implicit preference of a local or state election official to certify. To deal with this condition, an administrative process must be established that leads to a correction or amelioration of the offending circumstances of the denial and eventual certification of a revised canvass by the Canvass Board. It must be clear that the Canvass Board may not be overruled by the designated election official even if he or she is a member of the Canvass Board. A court decision should be required to overrule the decision of the Canvass Board.

Similar to the function of county Canvass Boards, there is a need to create a Statewide Canvass Board to perform oversight over election-related duties of the Secretary of State's office. In particular, oversight of certification of voting systems and of certification of the statewide vote auditing and recounting of the multicounty contests is required. This Statewide Canvass Board should primarily consist of citizens appointed by the parties. It should also have expertise in the technical elements of operating the audits of multicounty contests (expertise in statistics and auditing as it relates to elections).

Summary:

More study of the issues raised by the Subcommittee is required. We recommend study before implementation. We strongly caution against promotion or increase in voting systems that are spatially and temporally outside Election Day precinct voting, as these are more vulnerable to election fraud and less able to be monitored by citizens. Start with principles of fair elections then find creative solutions to making those happen at reasonable cost.

Yours truly,

The Board of Directors, Coloradans for Voting Integrity (CFVI)