



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:

Regarding the Final Recommendations of the Election Reform Commission's Technology and Audit Subcommittee, we wish to comment on various points, beginning with whether counties with unauditible DREs should be allowed to continue using them in any more elections. **We think the unauditible DREs should never again be used.**

#### **Unauditible DREs:**

We understand why the Subcommittee wants to revise the statute requiring DREs to have VVPATS by 2010 (CRS 1-5-802) because of cost considerations. And there are other reasons not to retrofit DREs with VVPATS.<sup>1</sup>

Once the retrofitting of DREs is abandoned, however, should citizens of Jefferson and Arapahoe County have to suffer the inadequacies of these machines? They should not. It is not right that county officials who wish to continue using unauditible machines be permitted to do so. These machines do not serve the public interest. They put their users at a disadvantage, compared to the voters whose clerks are using paper ballots that can be properly audited and recounted if necessary. **Thus unauditible DREs in some counties are a tool that allows unequal access to a properly conducted election. And if the unauditible DREs should produce inaccurate but unauditible results, this could have consequences even for citizens from counties with auditable machines, if a race is more than countywide.**

---

<sup>1</sup> If the paper used comes in rolls and fades or blackens with heat, it is hard to use for audits and to preserve. The current implementation of VVPAT is unreliable and also does not allow the voter the possibility of verifying the full title of a ballot question. In the case of ballot questions of retention of judges, the judge's name doesn't even appear on the VVPAT. Thus voter verification and any hand count are very difficult. Also, since voters do not always verify their vote by looking at the VVPAT (which may be difficult to compare to a sample ballot even if the voter has one), the electorate cannot gain proper confidence in the election outcome by auditing the VVPAT.

It is possible that at least one unauditible DRE might need to be retained in each polling place for the disabled to vote on, to meet HAVA requirements, but hopefully this will not be necessary. (Surely we all are clear by now that the disinformation so widely disseminated that HAVA requires DREs to serve the disabled is a misstatement of the law.) The goal would be to find another affordable solution, because although many DREs are certified for use by the disabled, they neglect to actually serve many disabled in an important way. None of them allow the blind to verify their votes. (The ballot-marking device AutoMARK does, and should be certified in Colorado, as it has been elsewhere.)

**It is our fervent wish that Colorado law serve the public interest by immediately retiring all machines that can undetectably change legitimate vote counts.** Those administering our laws should make a sincere effort to find a way that Jefferson and Arapahoe counties can go to all paper ballots (perhaps with the exception mentioned above) in a cost-effective way.

**An independent cost analysis** could show how much money would be saved by avoiding expensive contracts with vendors for software and maintenance of so many DREs. Also, Harvie Branscomb has suggested that as a temporary measure, optical scanners previously used as precinct scanners could be moved between counties so that paper ballots could be counted centrally with existing equipment, hence avoiding the necessity of new purchases at the moment. We note that some counties have been moving toward superprecincts and toward central counting recently, though we decry these trends. Nevertheless, they may lead to an excess of precinct scanners in inventory. There may be other creative solutions that would occur to administrators once the public's interest was the top priority in choice of election machinery.

The fact that purchases of unverifiable DREs were made is not a justification for continuing to use this unacceptable equipment. **As we have said, retention of unauditible DREs in two large counties could allow false election results to escape detection even with valid audits of other machines in other counties.** Such retention is inconsistent with the recommendation to improve upon the audit also contained in the advice of the Subcommittee.

#### **Audits:**

The risk limiting audit proposed depends on the product of excellent technical advice by experts who have experience applying statistics to auditing of elections. The legislature must ensure that the Department of State employs this expertise in designing the details of the audit. Furthermore, provision must be made for statewide coordination of audit activities characterized by both expert knowledge and independence of the election officials whose activities are subject to the audit.

**Going Forward:**

Election reform in Colorado seems to proceed only on the basis of rushed efforts to remove pressure that relates to fear of failure and lack of money. Neither of these is a constructive motivation for reform. **We so rarely hear our election officials call for change for reasons of improving the accuracy, transparency, and verifiability of our elections.** Here in the Technology and Audit recommendation, only the proposal for improved audits can be characterized as such a constructive change. The remainder merely consists of cost-motivated efforts to avoid facing up to reality by delaying consideration of improvements until 2013.

There are many much needed constructive changes to Colorado law never discussed by the Subcommittee. We think it is crucial for the Colorado Legislature to put in place a **longer-term strategy** for requesting public proposals and criticism, obtaining expert evaluations and testimony, and discussing at length in public the possible future improvements in law to encourage better voting systems and procedures.

It would make sense at this time for the Legislature to set a schedule for discussion of how to improve upon what we have and to set that schedule to start a few years before the artificial deadline of 2013 is reached. We would suggest starting the constructive discussion soon, before the 2010 legislative session, with the intention of having better systems in place by 2013. What the Technology and Audit Subcommittee has recommended so far is to sit back to wait for improvements, hoping others (other states, vendors, etc.) will decide to put improvements that we can take advantage of in place by 2013 in spite of Colorado's existing statute, which is not yet friendly to constructive improvements.

**We believe that the current system does not have sufficient transparency to permit a good evaluation of the election we now have.** The public needs the Legislature to make provision for quantitative measures of quality, with additional and easily accessible reports, better information sharing, and access to the public for direct oversight of election management as well as planning for election management. For example, the public has heard nothing from the process Mr. Hobbs described would be undertaken by the Secretary of State in December to evaluate the 2008 election.

**Lastly, Colorado law must fully recognize the need for independence between quality control measures and the election officials and processes that are being overseen and reported about.** Besides the very limited statutory oversight of the county Canvass Boards, current law and practice allow the same individuals who manage elections to design and manage tests, audits, and recounts. There is no provision for direct independent oversight of the activities and decisions of the SOS office, so all effective evaluation is left to be self-

imposed. Common sense suggests that audits not be designed and performed by those being audited.

**We ask the Election Reform Commission to recognize its own inherent limitations** and its inability to fully or even adequately address issues with Colorado election law. We hope that the ERC will form a bootstrap to a more complete process of investigation, analysis, and subsequent law-making on behalf of the next several legislative sessions.

Yours truly,

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