Comments on the 8/14 elections rulemaking by Harvie Branscomb 8/20/2014

Part 1- Response related to the ACLU form letter

At the outset I would like to express my distaste for the following boilerplate sent out by a public interest non-profit to a likely very large audience in Colorado with the suggestion that every recipient send a copy of it to this rulemaking proceeding. This is from the ACLU - a presumably responsible organization that I would have expected to support the highest integrity in elections. Judging from the letter that I include below, I think that something other than election integrity is now a goal of the ACLU.

> *"As a Colorado voter it is important to me that voting is convenient and secure.*
>
> *I am in favor of delivering a mail ballot to every registered voter in the state. Every voter should be able to return their ballot in the way that we choose, including giving my ballot to someone to return for me. I should not be required to disclose to anyone else the name of the person to whom I give my ballot for return. It is an invasion of my privacy and a burden, since Colorado law allows me to have someone return my ballot for me.*
>
> *Our elections have safeguards to protect my vote. My signature is checked by qualified and trained election judges when my ballot is processed to be sure no one has forged my signature. These protections have been in place and worked for many years. There is no reason to require me to disclose who I gave my ballot to if I ask someone to return it for me.*
>
> *I am also concerned about having to swear that I have marked my ballot in private and have not allowed any person to observe my ballot. I am entitled to exercise my fundamental right to vote as I choose. If I want to get together with trusted friends and mark my ballot, which would not be in private, I should be able to do so."*

Here is my opinion about the above proposed letter based on facts and extensive experience in pursuit of election integrity:

1) I am not in favor of sending a mail-in ballot to every eligible elector in the state. The potential for misuse and fraud is multiplied manifold over the in person precinct polling place model of voting used by a majority of states and once used by Colorado until recently. Furthermore the individual citizen loses many if not most of his or her opportunities to personally verify the integrity of the election when voting at home. Colorado municipal law recently revisited in 2014 beneficially requires capture of the identity of a third party carrier of a voted ballot packet. This is not a new idea. The much bragged about new Colorado mail ballot system has far fewer safeguards for chain of custody of mail ballots (in fact almost none), voter identity determination (signature only), and eligibility confirmation (incomprehensible affidavit signed remotely).

2) Colorado law offers no effective opportunity for challenge of voter eligibility when mail ballots are used to vote and the voter is not present to answer the challenge questions. Furthermore with online (up to 8 days before E-D and on E-D in person) "same day" registration and voting with ballots sent to voters well before election day and also returned and tabulated up to two weeks before election day, roughly between 2% and 6% of the people who move in any year will move at a time when all or portions of a ballot are in districts where the voter is no longer eligible. Some of these ballots will already have been counted when some or all contests on the ballot are no longer for the district where the voter resides. The 30 day advance requirement to register, providing for stable eligibility status for 30 days prior to election day of pre-HB 13-1303 statute was a very sensible solution against the risk of sending ballots out and tabulating them in case a voter moves just prior to election day. The current system does not facilitate any oversight of eligibility and leaves the system at risk. What the ACLU should be saying is that all voters have the right to the proper counting of each contest on each ballot legally cast and the right to verify that this is the case. The effect of their letter is in an opposite direction.

3) Our elections as originally designed - as precinct polling place in person elections - did have "safeguards to protect the vote." Unfortunately most of those original safeguards do not apply to mail-in ballots and do not apply to "same day" voter registration. Our laws and rules have not yet responded to the many increased risks of error and fraud that come from election "modernizations" such as heavily centralized ballot processing and tabulation, computer vote capture and tabulation, high percentage of voting in unsecured locations easily subject to intimidation, risks of loss of voter privacy during the separation of identifiable envelope from anonymous ballot, no time allowed for review and challenge of late arriving voter eligibility information, etc. Signature checks widely vary from county to county but are nowhere a reliable means to discover forgery of a signature as stated by the ACLU. As designed in many counties they are unable to detect even a relatively easy to accomplish computer printed signature. If in addition the elector agrees to allow someone else to vote for them, our signature checking system is simply unable to discover this fraudulent use. The current mailed in affidavit used to deny that a signature is discrepant after being deemed so by election judges simply requires any signature at all on it and no authentication. A family member or house mate can trivially respond by signing the affidavit that is used to force election judges to count a ballot in an envelope that has already been deemed discrepant perhaps because it was signed by the same housemate and not the elector. Unregulated ballot harvesting can also easily lead to voter intimidation or interference with delivery of the ballot as well as fraudulently marked ballots. Our current mail ballot system has no effective safeguards against this, while the precinct polling place does have many such protections.

4) If ballot marking were allowed in public as proposed by the ACLU we would likely see more insincere voter intent and a return to a milieu under which everyone votes by raising their hand in a public meeting. Current law makes it illegal to show how you vote. The ages old precinct polling place enforced the privacy of the voting process in order to inoculate the election system against direct intimidation. The intention of the new rule is to make it clear that while voter intent is identifiable it is very personal and not public. There is no and there should be no right to vote in public or in a

group. The fact that mail-in ballots make this easy is not one of the benefits of a new "universal" voting method.

For those reasons I am in opposition to the ACLU letter and its many clones. And I support the intention of the SOS in attempting to obtain some control over chain of custody of returned mail ballots. I also strongly encourage the next legislature to change the law to provide for additional security and means of resistance to forms of intifimation.

From this point I will address some letters posted to the SOS website concerning the rulemaking:

Responses to input from Sheila Reiner, Clerk and Recorder Mesa County
Concerning Rule 7.2.6

Clerk Sheila Reiner has thanked the SOS for delaying the effective date for rules till after the 2014 election. I am aware that election officials re-use envelopes from previous elections and may have printed their envelopes early and in fact already for the upcoming November election. Yet it is not impossible to print the text of a new message for the ballot packet onto a pressure sensitive label that allows existing envelope stock to be used. It makes sense for the federal and state elections such as November 2014 to have the benefit of an affirmation that the ballot is marked in private. Also the fact that in some counties there are unattended ballot drop-off opportunities is not something to be proud of. Far better to check the identity of the person dropping off one or more third party ballots even if this means that we may no longer allow 24-hours-open unattended drop off boxes. The details of existing implementation in a few counties should not be allowed to drive policy that is fundamental to integrity.

Sheila Reiner's expectation that the signature checking process confirms "that the ballot inside each envelope was voted by the correct voter" is beyond hopeful. It is simply untrue. The signature check and use of a follow-up affidavit do not confirm that the original signature on the ballot envelope was made by the eligible voter. It only attests that "I returned my voted ballot." It is true that "another person delivering the voter's ballot doesn't affect this security system." In fact the security system is unable to distinguish between the actual eligible voter and someone else who has the election documents and perhaps shares the same address who may have signed and returned the documents with or without the named elector's permission or awareness. Once one watches this system one becomes aware of cases where family member have likely marked ballots and signed envelopes for their relatives who are not present. Our system is not resistant to this practice but the precinct polling place was 100% resistant to it. Rule 7.2.6 should remain as proposed and should be made effective prior to the November election by use of pressure sensitive labels printed by the state and provided to each county.

Concerning 8.6.8 and 8.6.9

To be effective at discovering discrepancies, watchers must have access to all data that election judges do. Election watching must not be an activity so much circumscribed that it is rendered ineffective. The use of redaction of information between election judges and watchers interferes with the election process and it severely restricts the ability of the watcher to function. Watchers are the only members of the public likely present who are not invested in the presumption of integrity of the election and

therefore likely to defend the integrity of the election through whistleblowing rather than defend a less than ideal reality with silence. The Colorado constitution requires that no ballot be marked in a manner that would render it identifiable. It is shocking to propose that watchers be required not to try to find violations of this constitutional requirement. In order to prove a violation it would be necessary to look for it. If no one is looking for it, then and perhaps every violation will easily continue undiscovered.

Therefore I propose that these rules be adopted but in a different form and for very different reasons than those given by Clerk Reiner. I believe watchers have both the right and the responsibility to watch for violations of voter privacy. This need is only aggravated by Colorado's heavy use of the mail-in ballot system. In the precinct system, citizens themselves can watch for violations of voter privacy when they are voting. They can personally assure that the ballot is cast as anonymous into the ballot box. But the mail-in ballot system has no such natural provision to protect voter privacy and watchers are therefore likely to be depended on. Their effectiveness must not be restricted by this rule.

I suggest that 8.6.1 not include the new word "stop" when stopping the processing may in fact be the only way to correct a discrepancy before it becomes a permanent part of the election record. The rule should provide for a responsible mechanism for a watcher to intercede in a manner that is responsible and also will result in an appropriate review followed by proper processing of ballots and counting of the vote. I can provide many examples of mistakes that I have observed that led to discrepancies because there was no provision for the watcher to communicate about the error in a timely fashion.

Rule 8.6.8 and 8.6.9 must be written in a form that allows a watcher to recognize a constitutional violation of voter privacy and prove it to a court if necessary. This will require permission to record some evidence of the violation. As it stands, the rule appears to allow that function to take place.

Concerning 9.2 and 9.2.1

Colorado citizens deserve a means to confirm and challenge the eligibility of a voter with respect to any contest on any returned ballot, and particularly when the voter has affirmed a change of residence that is effective after the ballot was sent for printing. These rules provide for such a mechanism, although they do not allow for sufficient time for such a challenge to be raised prior to the counting of a ballot. It is possible and likely that a voter can change registration, obtain and vote a mail ballot and return it and have it counted all within hours under the current law. This time frame makes verification and correction almost impossible. One hopes that Colorado either in law or in rule will provide for a time delay between voter registration changes and the counting of the ballot so that citizens who are concerned about accountability may verify the eligibility of any ballot prior to the time it is separated from its envelope and rendered anonymous.

Responses directly to the text of the proposed rule, in order of appearance of the rule

Concerning 1.1.2

I have a problem with this definition as there is another viable definition for "audit log" that is the description of the post election audit that must not be "generated by a voting system" but rather by

hand by humans executing the audit intended to verify that functions performed by human and machine are accurate. Suggest: "AUDIT LOG IS SEPARATE FROM THE REPORT REQUIRED BY CRS 1-7-514 (2)(c) as follows:

> *(c) The canvass board and the county clerk and recorder shall promptly report to the secretary of state a description of the audit process undertaken, including any initial, interim, and final results of any completed audit or investigation conducted pursuant to paragraph (a) or (b) of this subsection (2).*

Concerning 1.1.3:

"Ballot image" means a DIGITALLY CAPTURED IMAGE OF A PAPER BALLOT OR A should read "PHOTOGRAPH, FACSIMILE, OR DIGITALLY CAPTURED VISUAL IMAGE OF A PAPER BALLOT OR A"

The fact that this definition collapses the important difference between a photographic image and a cast vote record will generate confusion now that voting systems produce both the array image and the text cast vote record. Now may be a good time to prepare for that in this definition, especially since auditing systems and some voting systems already on sale do provide both image (as defined here but not as defined in CRS 1-1-104) and a cast vote record. Some auditing systems that produce both image and cast vote record have been and may be in use in Colorado in 2014.

Concerning 1.1.4:

> *(d) Print a voter-verified ballot.*

This formulation unfortunately suggests that the verification occurs prior to printing of the ballot. This problem is inherent in both the sentence in (d) and its placement as the last step of 4. To avoid this I suggest the following replacement:

> *(d) physically deliver to the voter or an election official providing assistance a voter verified paper ballot.*

Concerning 1.1.6

It is crucial to distinguish between a ballot that has been printed and has not been marked by a voter and a ballot that has been returned from an elector and the voting system has detected no marks. The proposed definition makes no such distinction. It is important that our rules vocabulary not be defined by the terminology selected by voting systems manufacturers and used that way in their documentation, especially when this terminology creates confusion in the interpretation of rules.

Concerning 1.1.8:

Canvass workers should include a provision for the canvass board or election commission to either hire or appoint.

Concerning 1.1.10

The proposed rule is written in a manner to predict the contents of the log. Of course the log contains evidence either supporting or denying the continued chain of custody.

> *1.1.10 "Chain-of-custody log" means a written record showing that a voting system component or data, election record or other item is secured and in the documented and uninterrupted possession and control of an election official through the entire time of a jurisdiction's ownership, use or retention.*

This is how to write a rule that obviates the purpose of the report. Here is the correct way to write the rule:

> *1.1.10 "Chain-of-custody log" means a written record showing* ***evidence that allows a reader to determine if*** *a voting system component or data, election record or other item is secured and in the documented and uninterrupted possession and control of an election official through the entire time of a jurisdiction's ownership, use or retention.*

Please.

Concerning 1.1.12
I support the language of this provision.

Concerning 1.1.14
This provision allows unregulated transfer of a very powerful role within elections. It would be better if there were oversight for this transfer of responsibility, such as via the canvass board. Note that by this rule the designee also has the power to delegate the responsibility, thus moving the chain of responsibility very far from the intention expressed by the voters in electing the clerk who by statute is the designated election official in most elections. This rule as written is very dangerous.

Concerning 1.1.16
Another reason for a duplicated ballot is to remove identifying marks that would violate the CO constitution.

Concerning 1.1.22
The rule as written presumes that all paper ballots will be counted by machine. This is a disastrous presumption for election integrity.

> *1.1.22 "Electronic ballot" means a non-paper ballot such as on a touch screen or through audio feedback. After a voter casts an electronic ballot, the voter's choices must be:*
> *(a) Marked and printed on a paper ballot for subsequent counting by a paper ballot scanning device; or*
> *(b) Digitally recorded and counted by the touch screen device, commonly referred to as a Direct Recording Electronic (DRE) device.*

Here is a proposed replacement although I believe that after the 2009 decisions in Colorado that the "electronic ballot" should not exist:

> *1.1.22 "Electronic ballot" means a ballot created by a* Direct Recording Electronic voting device if there is no paper ballot created by the voting system. *After a voter casts an electronic ballot, the voter's choices must be:*
> *(a) Marked or printed onto a paper ballot for subsequent counting; or*
> *(b) Digitally stored and counted by the Direct Recording Electronic (DRE) device.*

Concerning 1.1.23

This rule as proposed is incomplete. Note that (a)(3) provides for no means of delivery:

> *To an affected elector requesting a ballot because of a disaster emergency*

It should read:

> *To an affected elector requesting a ballot because of a disaster emergency, by fax or email*

Concerning 1.1.26

This rule should read:

> *1.1.26 "Immediate voting area" means the area that is within six feet of the voting equipment, voting booths, and the ballot box* ***when voters are present.***

Otherwise the functions of watchers will be restricted unnecessarily and with negative effect on their role. For example watchers should be able to look at a voting booth to determine if electioneering information has been left by a previous voter, etc.

Concerning 1.1.29

The proposed rule does not match the functions provided by certain optical scanners in existing use. For example the Hart optical scanner used in "Ballot Now" does not tabulate. It only scans and interprets and stores the marks for each individual ballot On the other hand, the former Diebold OS 1.94W does only tabulate and does not store the individual representations of marks. The optical scanner used in the newest of systems only captures the marks on the paper and converts them into an image, as defined earlier in this rule. It does no interpretation or tabulation. So this definition may want to stick with the scanning function alone as the definition of optical scanner.

Concerning 1.1.35

The rule could be better written thus:

1.1.35 "Seal" means a serial-numbered tamper-evident device that **if properly applied, when** broken or missing, indicates that the chain-of-custody is broken **or** a device is not secure.

Concerning 1.1.41
The rule as written does not allow undervotes to be used to account for every vote in a contest when multiple seats are being filled in a single contest. SOS rules need to be improved upon to allow election observers to check if every voter mark is accounted for in every contest by accumulating votes, undervotes and overvotes.

Concerning 1.1.42
The rule does not require the video recording to be stored for sufficient time (and as written any time at all) to serve its purpose for election integrity.

Concerning 1.1.43
The effect of the rule as written is to de-regulate fully one half of the devices used in elections, maintaining requirements for certification of only the portion that takes the contents of marked ballots and produces an election result. The other half, in which an equal amount of mechanization has only recently been applied is the portion that determines who is eligible, what ballot packets are to be processed and how. Of course the accuracy of the tabulation and outcome cannot be more accurate than the quality of the eligibility system including the ballot delivery and return systems. It is disappointing and unreasonable to apply a severe regulatory criterion only to the ballot interpretation and tabulation portion.

Concerning 1.1.47
The definition is not consistent with the judicial determination in the Kathleen Curry case where it was decided that write in votes should count regardless of whether the target was marked or not.

Concerning 1.1.48:

The rule once again presumes that quality standards have been met and defines the "zero tape" as if that is true. One really hopes that voting system manufacturers have not implemented the zero tape under similar presumptions. The rule should be written thus:

> *1.1.48 "Zero tape" means an instance of producing a printout prior to the capture of any voter intent of the internal data registers in electronic vote-tabulating equipment that also produce printouts by identical means when reporting results at the conclusion of counting.*

Concerning 7.5.7
I support this new rule. I would have preferred that the rule make suggestions about using minimum limits on temporal and spatial separation in the employment of the secrecy sleeve such that it is impossible to determine how an individual voted.

Concerning 7.5.9

This rule appears to arbitrarily prevent registration records from containing references to batch numbers that are vital to provide access and accountability. It also probably prevents tabulation processes from providing reports of election results by batch. This is an unnecessary and excessively restrictive rule that will prevent certain common and beneficial forms of auditing from taking place. It is important that all subsets of ballots be subject to full reporting and accountability including by batch number. A more appropriate rule could say: "The county clerk must arrange for batching, aggregation and storage of ballots and separately of the corresponding envelopes such that no relationship can be constructed between any list of voters that can be created and any specific collection of more than 5 ballots unless they cannot be distinguished one from another by ballot style within the batch.

Concerning 7.6.1

This rule is opening a pandora's box of potential for arrival of ballots to clerks offices without the signed affidavit on the enclosing pre-printed sealed envelope. It is not clear what the affidavit prescribed by the SOS would say, but it would be very difficult to construct such an affidavit so that it would provide adequate certainty that the person who voted the ballot is eligible and also is the person who marked the ballot and that the ballot is of the correct style. I believe the origin of this rule is experience in Loveland where a municipal election overlapped geographically with a county election and ballots arrived in official envelopes of the other district. This rule seems to open the situation to all non-official envelopes and I think that was probably not intended. If it was, then the result will be a nightmare in which eligibility cannot be determined by election judges and large numbers of affidavits will be sent out and returned signed by persons the identity of whom and eligibility of whom who cannot be established. Note that the rule does not arrange for any sensible limitations on the nature of containers for ballots being returned.

Concerning 7.8.9

This rule seems directs itself to voters, when in fact any person may be dropping off a ballot (and in the not too distant future, perhaps non human entities as well). I would replace "voters" with "persons carrying return ballot packets"

Concerning 10.3.2(c)

The language in 1-7-514 concerning a report is not only a report of an investigation of discrepancies but a report of the execution of the audit including initial and interim results. In the first years after inclusion of the new statutory language the SOS provided a form for completion by canvass boards that collected and posted on the SOS website a description of the audit process. Since the CDOS stopped providing the form, most counties have stopped making the descriptive report. This rule does nothing to return to the intention of the statute.

Concerning 10.8.1

"The purpose of a recount is to retabulate the ballots with sufficient additional accuracy as to provide assurance that the election outcome is the one intended by the aggregated voter intent of every eligible voted ballot in spite of any errors in the original count that may have occurred."

Concerning 10.12.2

The test as described in this rule is insufficient to provide for the necessary additional accuracy that provides a reason for performing the recount. If the recount is designed to produce the same result as the original count, there is no point in conducting a recount. 1% of ballots itself is an insufficient number to detect errors in the vote capture process that might lead to errors in results on the order of ½ percent of one of the candidates' totals. Even so, the limitation to use only the original test deck as well as a maximum of that number of ballots increases the risk of reproducing an original error even more. Since the exact ballots in question are available for use in the test, it is irresponsible for the rule to limit testing to "test ballots" that are not representative of the marks on actual ballots. The rule ought to be written such that the canvass board is tasked to select ballots that represent all ballot styles, and that also represent a full set of unusual marking patterns, so that the test will in fact check the accuracy of the vote capture equipment. The only alternative, for accuracy, is to execute the recount as a hand count, as many states require. The 25 allowed to each candidate in case of a paid for recount is also a very small and embarrassingly insufficient number.

Concerning 10.13.1

Here again we find the rule requiring the recount replicate the process of the original count, such that errors in the original count are likely to be repeated. This is a mistake. The counting process for the recount should in every way be designed for independence from the original count.

Concerning 10.13.3

While it is beneficial to review undervoted and overvoted contests for voter intent, the recount as specified fails to review other ballots that might have been mis-interpreted by the vote capture equipment. For example ballots where the voter has marked the unintended target, then circled the intended target. This is the reason why other states call for a hand count during a recount. This is neither an undervote nor and overvote, yet the vote capture equipment will not identify it as needing human interpretation. Therefore the voter intent of all problematically marked ballots must be reviewed for voter intent to obtain the accuracy necessary for a recount.

Concerning 10.14.1(b)

This rule should require totals combined by precinct, except when the tabulation method makes it impossible. Since the objective of the recount is to retabulate ballots with additional accuracy, it should be possible to verify the additional accuracy at least as effectively as one can do so with the original results.

Concerning 10.13.5 (c)

The method of hand counting specified is not the most efficient or accurate, particularly when a single contest is being counted. The sort and stack method allows for incremental improvements in accuracy as additional time is spent on the count, or additional people involved.

Concerning 16.2.1 (E)

Note capitalization of E. This rule reveals a problem with the UOCAVA process. The intention of UOCAVA is to provide extra affordance to electors who are in difficult situations. The rule as written provides for the elector to continue on as if a UOCAVA voter forever regardless of eligibility. This should be corrected and a continued check for eligibility for UOCAVA access provided for.

Concerning 16.2.6

While duplication is the correct remedy for the privacy failure associated with the UOCAVA electronic return, the standard process for duplication in which the duplicate ballot obtains a written reference to the original is not correct, and does potentially interfere with anonymity of the duplicate ballot. This should be corrected for in rules.

End of comments