

Andrea Gyger

Subject: FW: Election Regulations Must Conform with US and CO Constitution - Rulemaking Comments for Hearing

Importance: High

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Sent: Tuesday, October 1, 2013 11:17:22 AM
Subject: Election Regulations Must Conform with US and CO Constitution - Rulemaking Comments for Hearing

Dear Deputy Secretary Staiert:

Since I am unable to travel to Denver today for your rulemaking hearing on the new 200 pages of election regulations, please enter these comments and recommendations into the record for me.

During the recent recall elections, there were several Colorado District and Supreme Court decisions which are highly relevant to the current election rulemaking. The District Court Judge ruled (and the Supreme Court upheld by not reviewing) that state statute cannot trump the Colorado Constitution and SoS regulations cannot override state statute when the items are not mentioned in the Constitution. The Supreme Court, separately, also issued guidance that the United States Constitution supersedes the Colorado Constitution when there is a conflict between the two. Therefore, I respectfully offer the following recommendation --

Before issuing final election rules, an attorney such as yourself from the Department of State and one from the Attorney General's office should carefully review each section of each rule to verify that it conforms with the plain language wording of:

- 1st - United States Constitution;
- 2nd - Colorado Constitution;
- 3rd - federal statutes, and then;
- Finally - Colorado statutes.

Judge McGahey and our state's Supreme Court followed (or upheld) this sequence in their decisions regarding the recall elections.

Additionally, after Judge McGahey ruled that part of the new Voter Access and Modernized Elections Act of 2013 (a.k.a. HB1303) was unconstitutional, I, as a layman just considering the plain language meaning of the text, have identified other sections of HB1303, which appear to conflict with the Colorado Constitution. **Thus, before your office issues over 200 pages of final election regulations, please conduct this recommended comprehensive review as if Judge McGahey were considering the constitutional and statutory conflicts throughout HB1303, other election laws, and the proposed regulations.**

Not only will this be upholding yours and Sec. Gessler's oaths of office and your profession, but also will save us taxpayers of Colorado a great deal of money dealing with legal challenges that are sure to follow during

the upcoming election cycles. **You can use the precedents of the recent court decisions to justify and defend your rules much more easily, if they are in compliance with those rulings.**

One example of particular interest to my family is **Election Rule 10.8, which needs to be revised so that it is brought into compliance with the Colorado Constitution.** Article VII, Section 8 of the Colorado Constitution states:

***Elections by ballot of voting machine.** All elections by the people shall be by ballot, and in case paper ballots are required to be used, **no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it...**Nothing 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.** [emphasis added]*

Despite this very clear plain language in the Colorado Constitution, Rule 10.8 allows paper ballots (most of them mailed to voters) to be marked with a bar code that can be traced back to the voter if repeating each number at least 10 times in a ballot style, as now appears to be used by several counties, including our county of Douglas. With this option, a *ballot can be identified as the ballot of the person casting it*, in direct conflict with the Colorado Constitution, due to:

- A. Large number of ballots in a ballot style in Douglas County (and several other counties across the state using bar codes on their ballots);
- B. High percentage of ballots not returned;
- C. Printing of both an identifiable bar code and precinct number on each paper ballot;
- D. Remote possibility that two or more voters from the same precinct with the same bar code will return their ballots at the same time;
- E. Batching of ballots and their corresponding return envelopes in lots of 50 to 200 (depending on county);
- F. Keeping the ballots and corresponding return envelopes in the exact same order so that all one has to do is have a copy of the list of names for the envelopes (kept with each batch of envelopes), which is readily available to any election worker, to look up its corresponding ballot via its bar code and see how that voter voted on any of the contests or ballot measures.
- G. Ballots are kept in the same order as their corresponding return envelopes and list of names until the election is certified, which give election workers, staff and officials well over a week to look up any ballot.

The identifying bar codes on and the processing of the ballots which allows them to be traced back to the individual voters have been instituted over time to make it more convenient for election officials and workers to use the machines, specifically mention in the Constitution. So this justification routinely offered by the clerks and their staff also is in conflict with our constitutionally guaranteed right to a secret ballot.

In order to restore secret ballots to all voters of Colorado, please rewrite 10.8 to:

- 1. Set the lower left bar code on HART ballots to read as "zero" as was used without major incident or problem in the November 2012 election, and,**
- 2. Require that ballots within a batch be thoroughly shuffled as soon as they are removed from the "secrecy" sleeves.**

Thank you for considering my comments and recommendations --

Lu

Lu Ann Busse