

Colorado Election Officials Resist Transparency as 2012 Elections Approach

Many Admit Ability to Trace Ballots to Specific Voters

Summary

The diverse group of bipartisan and unaffiliated authors of this document from across the state are concerned about the immediate, recent new threats of deterioration of voting rights and election transparency in Colorado.

- *Officials apparently assume that they may trace specific voters' ballots as long as they limit disclosure to a small group of insiders.*
- *Colorado Open Records Act may be diluted to prevent the press, public, and campaigns from verifying election results.*
- *The negative impact on the public interest is currently not well understood by the press or legislators even though introduction of legislation is imminent.*

We ask that the media check our facts and take a stand for election transparency and the public's right to know.

Both freedom of the press and citizens' constitutional rights to privacy in voting anonymous ballots are being threatened in swing-state Colorado. Many Colorado election officials are working to forbid independent verification of the 2012 election by the press and citizens, while serious problems of ballot traceability are surfacing. The officials' efforts would eliminate the type of press and public scrutiny given Florida's Bush/Gore tabulations,¹ Minnesota's Franken/Coleman recount,² and Alaska's Murkowski/Miller write-in votes. Legislative battle lines are being drawn. Anti-transparency arguments sanctioned by government officials have been repeated by news organizations without critical analysis.

Election officials are reacting to a recent Colorado Court of Appeals ruling (*Marks v. Koch*)³ and a recent decision in a case brought by the Colorado Secretary of State (*Gessler v. Myers*)⁴ reaffirming that anonymous voted ballots (not traceable to the voter) are public records available to press and public to verify elections. Officials in California, Minnesota, Michigan, Florida, South Carolina,⁵ and several other states respect citizens' right to examine ballots—the original records of voter intent. Some Colorado officials are working to prevent independent verification and investigative coverage of 2012 contests that draw national attention.

Legislators are being lobbied to weaken Colorado's Open Records Act by prohibiting public access to anonymous voted ballots.⁶ Recently, the press has generally taken an uncritical view of the officials' confounding arguments and admissions of ballots traceability,⁷ which violates the State Constitution. City and county clerks in Colorado have tremendous power over the handling of ballots. The disturbing primary argument against full election transparency put forth by many clerks is that data within their voting systems identifies some voters' ballots.^{8,9,10, 11} If true, those ballots' contents and the specific voters' private choices then become privately available to officials and some partisan appointees¹²—a shocking but until now almost unchallenged violation of the Colorado constitution. Like the constitutions of 48 other states, Colorado's foundational document mandates anonymous ballots not traceable to the voter.¹³ By claiming that ballots can be used to learn how individual voters voted, some election officials are revealing their violation of voters' basic constitutional rights, possibly admitting their own misconduct.

The State Supreme Court can invalidate an election involving ballots that violate the constitution's ban on identifiable, ballots.¹⁴ This drastic remedy is justified when voters' fundamental constitutional rights to privacy are widely violated. Will unconstitutional opportunities for officials to track ballots be remedied before interested parties seek court orders to void recent noncompliant Colorado elections?

Complaints filed with the Secretary of State against three counties by Colorado Voter Group¹⁵ for processing ballots in a traceable manner have not yet received a meaningful response.

Almost all Colorado's counties operate voting systems with a history of problems found during a 2006/7 court-ordered recertification.¹⁶ Although *Marks v. Koch* confirms the public's right to verify and authenticate Colorado elections, many officials are seeking legislative action to reverse that concept and 40 plus years of open records law. If they succeed, they will be allowed to count ballots "in the dark" and will prevent the public from verifying the officials' announced results.¹⁷ Perhaps worse, voters would be left to wonder whether powerful partisan politicians and bureaucrats know how they voted.

Among the excuses advanced to legislators being lobbied to block the public's right to know are

- the systems (unconstitutionally) capture voter identity linked to the ballot—data that officials appear to consider as allowable insider information,

- the press and public might disrupt election processing or reveal secret data (that should not exist), and
- independent verification of elections will lead to a chaos of complaints and “never-ending” election controversy.

These excuses seem rather brazen, as they reflect disdain for the Colorado constitution, disrespect for the value of fact-based citizen confidence in election results, and repudiation of citizens' rights to contest inaccurate election results.

The Secretary of State has circulated proposed rules¹⁸ that would prevent public and press from performing independent verification activities until after the deadline for recounts and election contests.¹⁹ The SOS document does not propose that ballots become unavailable records, but permits access to ballots only if review activities take place after results are finalized. However, to be effective, media and citizen oversight must occur well before it's too late to correct inaccuracies, especially considering the stakes in a presidential and congressional election year. Respectfully, we believe that the Secretary of State is in danger of exceeding his authority by attempting such a restriction of the Open Records Act.

Any attempt by Colorado election officials or the Secretary of State to exempt ballots from the Colorado Open Records Act or impose expensive or impractical barriers should concern the press as well as voters. Without the attention of the press in the next several weeks, the Colorado legislature, many of whom will be candidates in 2012, may be lured into pulling black curtains around one of the most important presidential and legislative elections in Colorado history.

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Numerous other election quality activists are also available to address questions or to provide further information.

¹ Dan Keating's paper "Democracy Counts, *The Media Consortium Florida Ballot Project*"
http://www.glassballotbox.org/storage/Florida_Keating_paper.pdf

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- ² Minnesota's 2010 Senate race ballots on the Internet
http://minnesota.publicradio.org/features/2008/11/19_challenged_ballots/
<http://senaterecount.startribune.com/>
- ³ Marks v. Koch, Colorado Court of Appeals
<http://www.glassballotbox.org/storage/Opinion.pdf>
- ⁴ Gessler v. Myers, Colorado 12th Judicial District: "CORA exempts only certain election records from disclosure.... An election record, including a voted ballot, may be disclosed as long as the identity of the voter is not disclosed."
<http://www.glassballotbox.org/storage/GesslerVMyers.pdf>
- ⁵ South Carolina ballot data files
http://www.scvotes.org/2011/08/03/2010_general_election_audit_files
- ⁶ http://www.glassballotbox.org/storage/Ballot_Battle_MontroseDailyPress.pdf
http://www.glassballotbox.org/storage/Alamosa_Valley_Courier_11.21.11.pdf
http://www.glassballotbox.org/storage/GrandJunctionSentinel_11.14.11_Ballots_not_so_secret.pdf
- ⁷ http://www.glassballotbox.org/storage/GrandJunctionSentinel_Editorial.pdf
- ⁸ Mesa County Clerk Petition to Court to prevent releasing ballot data
<http://www.glassballotbox.org/storage/MesaPetition%20pdf%20-%20Adobe%20Acrobat%202.pdf>
- ⁹ http://www.glassballotbox.org/storage/GrandJunctionSentinel_11.14.11_Ballots_not_so_secret.pdf
- ¹⁰ Presentation by Clerk Doyle, Larimer County to press and officials
http://www.glassballotbox.org/storage/Doyle_Memo_To_Legislators_TraceableBallots.pdf
http://www.glassballotbox.org/storage/Larimer_Tracing_Voters.pdf
- ¹¹ City of Aspen statements to press
http://www.glassballotbox.org/storage/AspenDailyNews_LitigiousDaysCityHall.pdf
- ¹² Reiner statement (paragraph 12) in Petition to Mesa County District Court: "The EL155 is the iVotronic ballot log. This file contains images of ballots, listed by precinct, and shows how someone voted. This log is also printed for the extensive auditing process with the major political parties. The paper medium is final, validated and secure. This paper document also becomes part of the election records that are stored for 25 months."
<http://www.glassballotbox.org/storage/MesaPetition%20pdf%20-%20Adobe%20Acrobat%202.pdf>
- ¹³ Colorado Constitution, Article VII, **Section 8. Elections by ballot or 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.** The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested election in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. 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.
- ¹⁴ Colorado Supreme Court voids unconstitutional election
http://www.glassballotbox.org/storage/Taylor_v_Pile.pdf

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- ¹⁵ [Colorado Voter Group](#) complaints of voting rights violation: Oct 27, 2011—A complaint filed with Colorado Dept. of State charges (1) County officials are using election systems that enable officials to discover which voter cast a specific vote and/or a specific ballot and (2) State officials have not prohibited the use of these election systems. Evidence has been filed against Larimer, Jefferson, and Mesa Counties.

[Complaint INDEX](#)

[Complaint Documents](#)

[Complaint Additional Document](#)

[Complaint summary as of Nov 14th](#)

- ¹⁶ Recertification of Colorado voting systems

<http://www.sos.state.co.us/pubs/elections/VotingSystems/VSArchiveMain.html>

<http://colorado.mediamatters.org/items/200708270004>

http://www.denverpost.com/news/ci_4388095

- ¹⁷ Carroll: Counting ballots in the dark (*The Denver Post*)

http://www.denverpost.com/carroll/ci_17702592#ixzz1Hkwp2trW

- ¹⁸ SOS Draft Rules

http://www.glassballotbox.org/storage/SOS_DRAFT_Proposed%20language%20re%20CORA%20and%20ballots%20112311.pdf

- ¹⁹ 52.3 BALLOT INSPECTION PERIOD.

*52.3.1 TO PREVENT DISRUPTION TO THE COUNTY ELECTIONS OFFICES AND ENSURE THE INTEGRITY OF THE CONDUCT OF STATE AND FEDERAL ELECTIONS, INSPECTION OF **BALLOTS AND TRACKING REPORTS IS NOT AVAILABLE DURING THE PERIOD BEGINNING ON THE DEADLINE TO CERTIFY BALLOT CONTENT THROUGH DEADLINE TO FILE A CONTEST, OR THE CONCLUSION OF ANY CONTEST FOR RACES OR ISSUES ON THE BALLOTS SUBJECT TO THE REQUEST, WHICHEVER IS LATER. (SECTION 1-5-203 AND PART 2 OF ARTICLE 11 OF TITLE 1, C.R.S.)***