

Senators,

This is a corrected version. I have commented **in red** on the America Votes message about SB-138 and Amendment L_011, included here in black.

Please do support Senator Lundberg's amendment, knowing that it deserves one or two amendments for clarification that will be presented including Senator Lundberg's own L_013. No doubt the House will make any necessary corrections. Without Senator Lundberg's L_011 amendment, please do not send the SB-138 to the House. It is not a crucial bill in any respect.

Harvie Branscomb

Rebuttal to America Votes on L.011 for SB17-138, April 17, 2017

Senate Bill 17-138 is scheduled for third reading on Monday **[now on Tuesday]**. Proposed amendment L.011 would substantially amend the bill as introduced. **America Votes does not support L.011 and will oppose SB 138 if this amendment gets on the bill.**

We urge you to vote against L.011.

Here are the concerns with the amendment:

First, for context it is important to note that election judges are representatives of the county clerk and like the clerk's staff, they are tasked with performing their duties on behalf of the county and its voters and to conduct the election per the laws of the state of Colorado. Watchers by definition are appointed by political parties, candidates and issue committees and act as advocates/representatives for their appointing authority when they are performing their watcher duties.

America Votes misapprehends the concept of election oversight and the role of election watchers in the U.S. and all modern democratic nations. Election judges are not, as America Votes claims, the "representatives of the clerk." They are selected by the two major parties and are representatives of those parties to conduct the election. [As a practical matter, unfortunately, many clerks create an unhealthy culture in which the judges operate as "representatives" of the clerk.]

Indeed, individual watchers are representatives of each interested campaign and advocate for them. Watchers must be able to challenge the decisions of the bipartisan judges and "assist in the correction of discrepancies" to be certain that all interested parties are treated equally and are not subject to bias or error from the bipartisan teams of judges or staff officials.

1) Witness and Verify

Add a new extremely broad definition of "Witness and Verify."

CONCERNS: This expands the definition of witness and verify too broadly and in a way that would elevate the watcher's role above that of the election judges and county clerk staff members. This language also essentially creates a limitless and boundless timeframe for the conduct of an election--meaning that a watcher could be present for any task performed by a county clerk/elections director--regardless of the task. For example, watchers could be present when clerks/election directors meet with their staff or train their staff. We would prefer the definition that is currently in Rule 8.10.2:

No, L.011 contains nothing that would "elevate the role" over officials. The watcher role is the same as it has been for over 100 years. The watcher does not, and never should, make election decisions. Decision-making is the role of the election officials. The watcher must be able to challenge those decisions and seek review and corrections of discrepancies if required.

The more than 100-year-old statute has been clear that the watcher has the right to "witness and verify each step in the conduct of the election." Nothing concerning the scope of that right is being changed by the amendment.

"Witness and verify means to personally observe actions of election officials in each step of the conduct of an election," combined with the definition of "conduct of the election" in the introduced version of the bill (see p. 7 lines 16-19): "'Conduct of the Election' means each stage of the election in which electors are marking and casting ballots or when election judges are present and performing Election-related activities."

Yes, election officials would no doubt prefer the limited and improper definition in the Secretary of State's Rules that limits the watcher to "observation" rather than inspection and verification.

The original language of the bill restricts watchers to observing only a limited number of steps in the conduct of the election, where no end-to-end review is available to the watcher and the campaign they represent.

A watcher's role is to watch, not to independently conduct the election, which is the role of election judges and the clerk's staff. Watchers are also appointed to represent/advocate for their appointing authority, and this expansive role may grant watchers a greater opportunity to alter the conduct of the election in favor of their appointing authority.

Watchers have no right, currently or proposed, to "independently conduct the election." Instead, they have the right to independently assess the work of the election officials, to call out any problems they detect, and to seek correction. To deny watchers for each interested party that right is illegitimate in modern democratic elections.

While the role is not "expanding" in any fashion in L.O11, as America Votes implies, in fact the watchers should continue to have full opportunity to "alter the conduct of the election" if there are errors that the watcher detects. Nothing should obstruct the detection of discrepancies or the right to assist in their correction.

2) Watchers - general requirements - legislative declaration

Adds new provision further elevating the role of the watcher to subsume the duties of election judges and clerk staff. Additionally, imposes a watcher to election judge ratio of 1:2--one watcher for every two election judges.

CONCERNS: The elevation of the role of the watcher raises the same concerns set forth in 1 above. [There is no "elevation" of the role.] Additionally, the new 1:2 ratio of election judges to watchers will not be feasible in most locations and will result in watchers having a disproportionate role in the conduct of the election. For example, a VSPC in a large county has anywhere from 4 to 12 or more election judges. If each appointing authority is allowed a 1:2 ration [sic] for watchers, then in a VSPC with 8 judges, you could, for example, have 4 watchers from the Democratic Party, 4 watchers from the Republican Party, 4 watchers from the Libertarian Party, 4 watchers from each of 3 different issue committees with ballot measures on the ballot, which would amount to 24 watchers plus the 8 election judges (and that is not even the limit--the Green Party could have 4 watchers, there might be 7 ballot measures on the ballot, an unaffiliated candidate could have 4 watchers, etc.). Not only do these numbers of watchers create space concerns for election administrators and potentially intimidate voters, but the sheer numbers of watchers might overwhelm election judges and provide watchers a greater opportunity to alter the conduct of the election in favor of their appointing authority.

This is exaggeration. These are ridiculously unlikely examples. First, the Secretary has the right to reduce the number of watchers to a reasonable level if some unanticipated situation caused overcrowding. There have rarely, if ever, been legitimate issues with the number of watchers, which is generally quite small. However, each interested party must have the ability to "witness and verify each step in the conduct of the election." Oversight through using small samples is simply inadequate.

Currently the law permits one watcher per precinct per candidate in a primary. That would amount to several hundred watchers per candidate times dozens of candidates on the ballot, yet there have been no instances of too many watchers attempting to watch. This is not a real problem, and there is a built-in safeguard. It is essential that each interested party be legally able to review and verify all of the election conduct, whether or not they take advantage of that right.

3) Line 23 of L.011--

Changes the role of the watcher from observing the process to verifying the accuracy of signature verification: "THE WATCHER MAY WITNESS AND VERIFY THE PROCESS ACCURACY OF SIGNATURE VERIFICATION."

CONCERNS: This amendment will allow watchers to essentially conduct a shadow signature verification process of their own, by granting the watcher the statutory authority to verify the accuracy as opposed to the process of signature verification. Here again, the watcher's role is not to conduct the election. It is instead the role of watchers to represent their appointing authority by observing the process and bringing any concerns to attention of the election judges/county clerk or Secretary of State.

The language does not change the statutory right of the watcher to verify the accuracy of the signature verification and voter identity. Just as the watcher in the polling place has the right to challenge a voter who has presented a fictitious ID, the watcher has the right to challenge the acceptance of a questionable signature or the improper rejection of a matching signature.

The right of the watcher goes beyond the passive role of "observing" and involves reviewing, discerning, and challenging discrepancies. This has been the law for over 100 years.

4) Lines 24-25 of L.011

Removes from the watcher oath the prohibition on disclosing the results of the votes until tabulated results of the election are formally announced by the designated election official.

CONCERNS: The role of the watcher is not to disclose the results of the votes before the designated election official. The watcher should not be able to exploit their access to the election by providing insider information to their appointing authority or others about the status of the vote before that vote has been announced by the election official.

America Votes seems to be unaware of the longstanding and almost universally adopted check and balance of public disclosure of any and all known tallies as soon as the polls have closed. Almost universally, and until recently in Colorado, each set of precinct judges was required to post the precinct results immediately upon tabulation, before delivering them to the clerk. This is to ensure a distributed base of knowledge and to avoid concentrating the knowledge centrally with the clerk, to avoid any manipulation in transit or in the central count accumulation.

Independent watcher disclosure of partial and subsets of results information after the closing of the polls is a positive and needed election security and quality check, not a negative.

Additionally, the watchers must be able to speak with candidates, attorneys, and their parties about concerns regarding subsets of results as soon as the polls are closed. They should not be delayed awaiting an announcement that may be many hours, or even days, later.

5) Lines 28-29 of L.011

Eliminates the discretion on the party *[sic]* of a County Clerk to conduct a background check at the Clerk's expense of a watcher.

CONCERNS: County Clerks presently conduct background checks on election judges, in part because they will have access to the personally identifiable information ("PII") of voters in the SCORE system, including information such as signatures, complete dates of birth, driver's license numbers, and other similar confidential information. Clerks should have the discretion to conduct background checks, at their own expense, on watchers who will similarly have access to PII while performing their watcher duties.

“Discretionary” background checks with no criteria for pass/fail can be easily abused and used to discourage well-qualified watchers from seeking to serve. Unlike election judges, a watcher cannot edit or handle such records. Watchers are sworn not to disclose such information, should they encounter it.

It is rare that a watcher even encounters date of birth or Driver's License numbers. Signatures cannot be copied, so there is no risk of misuse of signatures.

Delaying watcher activities until background checks are completed can serve to obstruct watcher observation when unanticipated problems arise and more watchers are immediately required.

In summary, there is almost no risk of identity theft by watchers, yet there are considerable opportunities to decrease oversight by implementing background checks.

Finally, the concepts in the introduced SB 138 arose out of the Secretary of State Bipartisan Election Watcher Advisory Panel that convened over the summer of 2015 to address updating the watcher statute to accommodate the changes in the law adopted in HB13-1303. That Panel contained representatives from both political parties, members of the State Legislature, representatives from the Secretary of State's office, several County Clerks, several election advocacy organizations such as Common Cause and Disability Law, along with election activists such as Harvie Branscomb. **The consensus of the Election Watcher Advisory Panel was to specifically reject the proposed changes reflected in items 1, 2 and 3 above, and to recommend that County Clerks have the ability to obtain a background check on watchers that witness PII.**

These changes did not represent the "consensus" of the group. The Republican and Unaffiliated representatives did not agree with these recommendations. The majority votes were heavily weighted by numerous election officials and their lobbyists and the votes of the Secretary of State universally voting for less transparency than required in the longstanding statutes.