**BOULDER COUNTY REPUBLICANS**


**Boulder 2004 General Election Report**

**by**

**Boulder County Republican Electoral Reform Committee**


**Chairperson**
**Shannon A. Robinson**

**Vice Chairperson**
**Troyanne Thigpen**

**Members**
**LeMoine Dowd**
**Barbara Kostanick**
**David Leeds**
**Marty Neilson**

**February 8, 2005**

# TABLE OF CONTENTS

# I.      Executive Summary

The 2004 Boulder County General Election was marked by significant voting and ballot counting delays, precipitated by the adoption of new voting system technologies, changing election rules and procedures, massive unregulated voter registration drives, emergency registrations, provisional balloting, voter identification requirements, and unclear statutory regulations regarding various aspects of the election process.

Such delays coupled with confusing election rules and procedures diminished voter confidence in the electoral process.  As set forth in this report, a number of electoral problems have been identified along with proposed solutions, including the following highlights:

(1)     <u>Voter Registration & Voter Registration Drives</u>:  Voters did not understand residency and change of address requirements or the methods and deadlines for voter registration, which increased the number of emergency registrations and the number of ineligible voters who attempted to vote.  *See* Section 1 at 6-12.  Voter confusion regarding registration requirements was compounded by massive unregulated voter registration drives that opened the door for fraud and impacted election costs incurred by the Boulder County Clerk & Recorder ("Clerk").  *See* Section 1 at 12-15.  Possible solutions include mobilization of a public education campaign, revision of voter registration applications and procedures, and significant regulation of voter registration drives.

(2)     <u>Secretary of State ("SOS") Election Rule Changes</u>:  Election rules regarding voter identification, emergency registration, provisional ballots, and polling place conduct caused confusion for voters, election judges, poll watchers, and election officials, resulting in voting and ballot-counting delays.  *See* Section 2 at 16-17.  Possible solutions include appropriate legislation to address gaps between election laws and election practices, creation of a citizen volunteer Pre-Election Task Force to anticipate and address procedural issues and changes, and improvement of the SOS Election Judge Manual.

(3)     <u>Provisional Ballots</u>:  Voters, media, election judges and officials did not understand the rules and procedures governing provisional ballots, which increased the number of provisional ballot voters and the number of voters who voted in the wrong precinct. This lack of understanding caused delays at the polls and also delays in ballot counting since provisional ballots had to be screened and verified.  *See* Section 3 at 17-28.  Possible solutions include legislative and regulatory changes relating to the usage of provisional ballots, an education campaign about provisional ballots for members of the media and the public, adoption of regional voting centers, revisions to the provisional ballot affidavit, and changes in polling place procedures for provisional balloting.

(4)      <u>Voter Identification</u>:  Due to changing rules, there was significant confusion about the identification requirements ("ID") for registration and voting, and concerns were raised about whether there were too many forms of permissible ID, and whether such ID requirements were sufficiently related to the purpose of preventing voter fraud. *See* Section 4 at 29-31.  Possible solutions include revision of the ID requirement to require photo and/or voter address, and implementation in 2006 of a centralized statewide SOS database with connectivity to the Colorado Clerks & Recorders ("Clerks") to ensure live real-time data regarding registration and voting to prevent fraudulent voting in multiple locations.

(5)      <u>Early Voting & Absentee Ballots</u>:  The limited number of early voting sites and the on-demand paper-ballot-based voting system which required printing of each voter's ballot on site did not accommodate increased numbers of early voters.  Absentee ballots were not received by voters, or were late and voters were concerned about whether to vote provisionally, and whether their ballots would be counted.  *See* Section 5 at 31-34.  Solutions for early voting issues include adoption of alternate voting system technologies and regional voting centers.  Absentee ballot solutions include limiting absentee-ballot usage in favor of more in-person voting at early voting sites, and providing a voter hot-line or website for voters to check to confirm that their absentee ballots were received and counted.

(6)      <u>Poll Watcher Issues</u>:  Poll watchers were unable to perform their duties since they were not allowed to observe election officials verifying voter registration records due to purported statutory privacy limitations.  Statutes and rules regarding poll watcher credentials and voter challenges were ambiguous and confusing.  *See* Section 6 at 35-39.  Solutions include clarification of rules and laws relating to voter challenges and poll watcher duties and credentials, and education of election judges and the public regarding the role of poll watchers.

(7)      <u>Electioneering</u>:  Voters and activist groups violated the 100-foot rule and also subjected voters at the polling place to electioneering and election-related activities that were considered intimidation and harassment.  *See* Section 7 at 39-43.  Solutions include public education regarding electioneering, and enactment of legislation clarifying the 100-foot rule to create a zone of protection or "bubble" around voters waiting in line.

(8)      <u>Election Judge Recruitment & Training</u>:  Recruitment and training of more than 1440 election judges was deficient.  *See* Section 8 at 43-44.  Solutions include adoption of regional voting centers to ensure availability of a highly-trained and knowledgeable cadre of election judges who can be apprised quickly of last-minute election rule changes.

(9)     Polling Place Logistics:  Inadequate polling place facilities and insufficient telephone communications capabilities between election judges and the Clerk on Election Day along with missing election supplies (poll books, locks, 100-foot tape) caused delays and confusion.  *See* Section 9 at 44-48.  Possible solutions include more telephone lines for election judge use, stricter check-in procedures for supply judges and regional voting centers.

(10)    Ballot Counting & Canvass Board:  The Hart "Ballot Now" System combined with misprinted paper ballots and the verification of provisional ballots caused significant delays in ballot counting.  *See* Section 10 at 48-56.  Staffing, training and supervision of temporary workers at the Clerk's Office was inadequate.  Uniform procedures and best practices were not employed by the Clerk during the ballot counting process.  *See* Section 10 at 56-62.  The canvassing process was disorganized and the reconciliation and certification duties of the Canvass Board were unclear.  The Canvass Board was unable to reconcile the number of ballots cast versus the number of ballots counted in 54 precincts.  *See* Section 10 at 62-68.  Solutions include improvement of voting system technologies, adoption of better management and security practices, clarification of the statutory duties of the Canvass Board and implementation of uniform canvassing, reconciliation, and certification procedures throughout the state.

## II.     Survey Background and Scope

During the 2004 General Election in Boulder County, hundreds of Republicans and Democrats volunteered to assist in various stages of the electoral process, including working as election judges and poll watchers during early voting and on Election Day as well as working at the Boulder County Clerk & Recorder's Office as members of the Reception & Staging Board, Provisional Ballot Teams, Duplication Board, Resolution Board, and Canvass Board.[1]

As a result of such participation, many volunteers expressed concerns regarding the efficiency and integrity of the electoral process.  In order to address such concerns, the Boulder County Republican Party Executive Committee authorized a volunteer committee (Boulder County Republican Electoral Reform Committee) to send out a survey ("Republican Survey") to collect the observations of such volunteers, and prepare a report ("Boulder 2004 Election Report" or "Report") which would then be submitted to various public officials so as to effectuate

---

[1]  The Reception & Staging Board consisted of Republican and Democrat teams who received ballots and election supplies delivered by election judges after the polls closed to Clerk & Recorder sites in Longmont and Boulder; Resolution Board consisted of Republican and Democrat teams who resolved optical scan ballots rejected by the scanners for reasons including overvote, blank ballot and write-ins; Duplication Board consisted of Republican and Democrat teams who duplicated damaged or defective ballots and provisional ballots cast in the wrong precinct; Provisional Ballot Teams consisted of Republican and Democrat teams who reviewed provisional ballot envelopes accepted by the Clerk's staff after the verification process, and if appropriate, opened such envelopes and removed ballots for the counting process; Workers for Canvass Board consisted of Republican and Democrat teams who reviewed and reconciled information provided by election judges regarding the number of ballots cast.

positive changes for future elections.  A sample of the Republican Survey is attached as Exhibit 1.  Nearly 100 Republican volunteers responded to the Republican Survey.[2]

In compiling the results, the Boulder County Republican Electoral Reform Committee ("the Committee") selected ten of the most commonly identified problem areas, and set forth possible solutions to be considered.  The Committee did not attempt to statistically quantify the results by compiling the number of responses to each question.  Rather, the goal of the Committee was to provide a narrative report that was as non-partisan as possible and designed to encourage dialogue with our public officials in order to serve all citizens by ensuring that elections are conducted fairly, honestly, efficiently, and in accordance with established election rules and laws.  Furthermore, it should be noted that the Committee did not study the significant problems and delays caused by the voting system technologies employed by the Clerk as such subject requires specialized expertise and is the subject of the Election Review Committee, appointed in December 2004 by the Boulder County Commissioners ("Commissioners") and the Clerk.  Finally, it should be emphasized that the work of this Committee is based upon observations of volunteers and members of the Clerk's staff, and the statements contained herein should not be relied upon or construed in any way as binding or authoritative legal opinions.

**III.    Top 10 Problem Areas and Proposed Solutions**

The top 10 problem areas identified by the survey respondents have been grouped below as follows:

**(1)    Voter Registration**

**Many voters did not understand the requirements, methods and deadlines for registration, including residency and change of address requirements. This lack of understanding coupled with massive voter registration drives, emergency registrations, and provisional balloting led to increased election costs and voting and counting delays in the General Election.**

1.1    Qualifications for Registration

In order to register to vote, a person must be a citizen of the United States, 18 years old, and must have resided in this state and the precinct in which the voter intends to register for at least 30 days prior to the election.  *See* C.R.S. § 1-2-101.  In determining residency, the residence of the voter is the principal or primary home of the voter, and the "residence given for voting purposes shall be the same as the residence given for motor vehicle registration and for state income tax purposes…."  C.R.S. § 1-2-102 (1)(c).

---

[2] In addition to the survey responses, more than 30 incidents reported by poll watchers during early voting and on Election Day were included.  Information was also drawn from other sources, including the staff of the Clerk, as reflected in the Exhibit 2 Notes.  For convenience, whenever the context requires, the gender of all words used in this Report shall include the masculine, feminine and neuter.

1.2     Change of Address

Since voters on Election Day are currently required to vote in their precinct, if a voter is registered and moves to another precinct within the county, the voter should notify the Clerk of such change of address in order to ensure that the registration records (including the poll book at the polling place) reflect the correct address of the voter. *See* C.R.S. § 1-2-216. Due to the thirty-day residency requirement, the voter's polling place location will be affected by a change of address, depending on when the voter moves to a new precinct. If the voter moves more than 30 days prior to Election Day, the voter may return to his old precinct and vote and fill out a change of address form at the polling place, or the voter may go the Office of the Clerk & Recorder. At the Clerk's office, the voter would complete a change of address form, and would be given a certificate of registration to be used as a "substitute" registration record, which the voter would take with him to vote in the new precinct. *See* C.R.S. § 1-2-216. If the voter has not lived in the new precinct for thirty days, the voter must vote in the old precinct on Election Day. *See* C.R.S. § 1-2-217.

1.3     Voter Registration Process

There are two methods for voters to register on a non-emergency basis. No later than 29 days before the election, voters may register by mail or they may apply in person at a Voter Registration Agency. *See* C.R.S. § 1-2-501 and C.R.S. § 1-2-504. Voter registration drives are considered to be registrations by mail.

In 2004, the Clerk registered **34,682** new voters compared to the year 2000 (last presidential election) when the number of new registrations was 23,442 (which included registrants from Broomfield when it was part of Boulder County). If year 2000 Broomfield registrations are excluded from the numbers considered, there is an increase in registration numbers of nearly 50%, without a concomitant increase in population. *See* Exhibit 2 at Note 1.

The number of voter registration <u>applications</u> that were turned into the Clerk was, however, significantly higher than the number of actual new registrations. For example, according to the Clerk's staff, the "New Voters Project," a voter registration drive based in Boulder, turned in approximately 50,000 voter registration applications, but at least **30,000 of those applications were for voters who resided in other counties. Since such applications had to be sorted and mailed to the appropriate counties, the Clerk had to incur significant additional postage and staffing costs for voters residing outside the county.**

The New Voters Project was a project sponsored by George Washington University and the State Public Interest Research Groups (PIRGs) to register young people to vote. On their website, the organization reported that as "of October 13, 2004, we have registered over 71,000 young people in Colorado." Unlike other voter registration drives ("VRD's") in Colorado, the organization also reported that "canvassers are paid an hourly rate, and we do not pay canvassers per registration form submitted."

In any event, a substantial number of man hours are required by the Clerk's staff to process such applications. *See* Exhibit 2 at Notes 2-3. **Moreover, the timing of the applications has a tremendous impact on staffing and costs.** As expected, a significant number of applications are received in the weeks prior to the election. However, the numbers in 2004 were significantly higher due to massive voter registration drives. For example, during the three-week period between 9/15/04-10/4/04, there were **11,640** new registrations recorded by the Clerk; representing one-third of the year's work on registrations. Additionally, during that same three-week period, there were **25,523** registration records that had to be changed or cancelled (change of address, change of party affiliation, etc.). **Therefore, during the critical three-week period preceding the close of the registration books, the Clerk had to process 37,163 registration records.** *See* Exhibit 2 at Note 3.

      1.4      <u>Verification of Eligibility</u>

With respect to verification of eligibility, it is important to recognize that under the current registration system, when the Clerk receives the voter registration application, **there is no substantive verification of the applicant's eligibility to register**. Regarding the age and citizenship requirements, the Clerk must presume that the voter is a U.S. citizen over 18 years of age. As long as the voter affirms that he meets such requirements, the conditions are considered met. As for the residency requirement, the Clerk simply checks to see if the address provided by the voter is a valid residential address (i.e. the address exists and is not a business address) within Boulder County. The application only asks for the applicant's "physical address," and does not ask the applicant to provide his "sole legal residence." Since the bulk of voter applications are not done in person, but are mailed by applicants, the voter cannot be administered an oath. Instead, the application (which can be downloaded easily from various websites) contains a "self-affirmation." Although the self-affirmation at the bottom of the form includes a statement that the address listed by the voter is the voter's sole legal place of residence, it is doubtful that voters appreciate the difference between physical address and sole legal address for purposes of determining residency requirements for voting. This is borne out by the fact that so many voters tendered out-of-state drivers' licenses and out-of-state addresses when trying to register or to vote. *See* Section 1.6 below. **Such evidence raises the distinct possibility that voters were registered in Colorado who were not eligible to register in Colorado**.

Given the fact that eligibility hinges on the self-affirmation taken by the voter, it is important that voters understand that the affirmation is an oath and that there are consequences for lying about their qualifications to register and to vote. In the Voter Registration Application Form, approved by the Secretary in January of 2004, there is a warning at the bottom of the form, printed in small type stating that it is a "crime to answer or affirm falsely as to your qualifications to register to vote." Since many electors may not understand the qualifications, as explained above, such warning may be futile. Furthermore, unless the county officials and law enforcement officials are willing to investigate and prosecute all offenders, and publicize such efforts, it is doubtful that voters will be deterred by the mere vague threat that it is a crime. In Boulder County, only three (3) cases of possible fraudulent registration were referred to the local district

attorney.  Such figure seems low given the massive voter registration drives that were conducted and the significant number of cases reported by the media and county clerks regarding fraudulent voter registration applications.  *See* Section 1.7 below.

       1.5     Emergency Registrations

       After the registration deadline passed and the registration books were closed (10/4/04), the Clerk received more applications for emergency registration.  The circumstances under which a voter may register on an emergency basis are limited.  The voter must swear that he was (1) registered to vote in another county in Colorado prior to 10/4/04, and failed to register with the Clerk within the prescribed time period, and has not and will not cast a vote in the county of his previous residence; or (2) that he applied prior to the registration deadline to register to vote by federal postcard application, mail registration or at a voter registration agency.  *See* C.R.S. § 1-2-217.5.  Emergency voter registrations must be done **in person at the Clerk's office,** and the voter must present one of the forms of identification set forth in C.R.S. § 1-1-104 (19.5).

       According to the Clerk's staff, between 10/4/04 and Election Day 11/2/04, the Clerk registered approximately 462 voters at the Clerk's office on an emergency basis.  In order to be so registered, the voters would have had to meet the foregoing requirements.  Since not all applications are granted the number of applications would have been greater than the number of actual registrations.

       Emergency registrations not only increase the costs of elections by diverting Clerk personnel from important Election Day preparations, more importantly, such process opens the door for potential voter fraud.  In the case of emergency registrations that were triggered because the registered voter had moved from another county ("old county") to Boulder County prior to 10/4/04, but the voter had failed to submit a change of address form, the voter was permitted in accordance with the foregoing statute to appear in person at the Clerk's office and change his address and register in Boulder County.  Since the Boulder County registration database was not connected to the old county's database, until the old county was notified of the new registration, the voter's name would then appear on the books of both counties.  To date, this problem has been addressed by requiring the Clerks to forward such changes to the SOS for inclusion on the "master list" as set forth below.  *See* C.R.S. § 1-2-302.

       Pursuant to C.R.S. § 1-2-302 (1), the SOS is required to maintain a "master list of registered electors of the entire state on as current a basis as is possible."  In order to meet such requirement, the statute provides further that the clerk and recorder of each county is required to forward to the SOS no later than five days after the end of each month "all additions, changes, and deletions to the master registration records made in each county for the previous month."  *Id.* This creates a situation whereby changes to voter registrations within the month of October in an election year would not be transmitted by the Clerks until after Election Day.  Hypothetically, if a voter is willing to commit voter fraud, until the voter's name is removed from the registration books of the old county and the SOS master list, a voter could vote in both counties.  Apparently,

to avoid this possibility, after the registration books close, some counties forward their new registrations on a weekly basis to the SOS and the old county. However, this practice is not uniform, and this solution does not address the scenario where the voter registers and votes in his new county (Boulder County) on an emergency basis during the last days of early voting. In such a case, the new county would not notify the old county of the new registration until after Election Day. Although prohibited by law, the voter could cast a ballot during early voting in both counties. When the Boulder County Republicans raised this issue with the Clerk, it was decided by the Clerk that notices of emergency registrations would be immediately (on the same day) sent via facsimile to the SOS and the old county. This stop-gap measure was implemented in Boulder, but it is unknown whether other counties adopted the same measure.

Another possible remedy for this problem lies in the centralized statewide registration system that must be implemented by the SOS. Pursuant to C.R.S. § 1-2-301, no later than January 1, 2006, the SOS must implement "in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive, computerized statewide voter registration system…maintained by the secretary of state that contains the name and registration information of every legally registered voter in the state and that assigns a unique identifier to each legally registered voter." *Id.* The statute requires further that after implementation of such a centralized statewide registration system, the Clerks will be required to enter all registration data into such system rather than individual county databases. In theory, such a centralized interactive system will prevent the foregoing notification issues since updates and changes by one county clerk will be immediately accessible to all other county clerks.

Although the SOS is required to provide "adequate technological security measures to prevent unauthorized access to the computerized statewide voter registration list," opponents of this statewide database contend that security measures will not be sufficient. *Id.* Furthermore, such a system does not cure the problems allegedly experienced in some counties where errors were made by staff during the input of voter registration information into the database. There is also a danger that if a county clerk registers a voter that is not eligible to vote, the voter will be in the system forever, and will not be removed.

To further compound the foregoing issues regarding potential voter fraud, on October 15, 2004, contrary to C.R.S. § 1-2-217.5, the Secretary of State amended its election rules and the emergency registration procedures above to permit voters appearing at the polling place who claimed to have registered to vote through a Voter Registration Drive ("VRD") to register on an emergency basis ("VRD exception"). *See* Colorado Election Rule ("C.E.R.") 26.7. Since the VRD exception was enacted a matter of days before the election, it created confusion for voters, election judges, poll watchers and election officials. On the other hand, because the VRD exception was not implemented until the last minute, it may be that most voters were unaware of the exception such that it did not have a material affect on this election.

1.6     <u>Voter Misunderstanding of Registration Requirements/Change of Address</u>

Many voters did not understand the residency requirements for registration.  As explained above, under Colorado law, the "residence given for voting purposes shall be the same as the residence given for motor vehicle registration."  *See* C.R.S. § 1-2-102.  Yet, a "review of provisional ballot affidavits alone indicated that a high percentage of voters tendered out-of-state drivers' licenses as their proof of identification."  Nancy Jo Wurl, Chief Deputy County Clerk, Boulder Clerk & Recorder.  *See* Exhibit 2 at Notes 4-5.  When filling out the provisional ballot envelopes, "voters also provided out-of-state addresses as their current addresses."  *Id*.  Throughout early voting, voters also attempted to vote or to register using out-of-state licenses and addresses.  Apparently, voters do not understand that by tendering out-of-state drivers' licenses and out-of-state addresses, they may be admitting that they are not residents of Colorado for purposes of voting.

In the case of voter registrations, when the voter appears in person to register and tenders an out-of-state license, the Clerk can question the voter further to determine whether the voter meets the residency requirement.  However, in the case of mail-in registrations, if the voter has an out-of-state driver's license, but provides a copy of one of the other permissible forms of ID, there is no way for the Clerk to know that the voter has an out-of-state license and therefore may not be a resident of Colorado with the requisite ties to the state to permit him to register.  Thus, under the current registration system, out-of-state residents can register by mail and vote in Colorado elections even if they do not meet the legal requirements for residency.  This creates a potential for voter fraud as well as voting by ineligible voters who may not realize that they should not be registered here.

In the case of provisional ballot voters, if an out-of-state driver's license was tendered at the polling place, the ballot was still counted if the voter was otherwise registered in one of the databases.  This raises, however, the question of why the voter was listed as registered in the database.  Hopefully, it was simply a case where the voter had moved to Colorado with the intention of making it his sole legal residence, and had simply failed to get a new license.

Some voters also did not understand change of address requirements and the impact of the 30-day residency rule on their polling place location on Election Day.  According to the Clerk's staff, approximately 296 voters voted in the wrong precinct, and were given provisional ballots such that only their votes for the presidential race counted.  Although some of these voters voted in the wrong precinct because they appeared at the polling place with the belief that they could vote anywhere in the county, and many voters appeared at the wrong precinct because it was more convenient, other voters were simply confused about whether to vote at their old or new precinct.

Possible Solutions:

- The Secretary of State and the Clerks should launch voter education campaigns in advance of every election to educate voters about registration qualifications, residency

and change of address requirements, the methods and deadlines for registration, and provisional balloting ("Public Education Campaign");

- A user-friendly website should be created for voter use since the current Secretary of State ("SOS") website is not easily navigated nor are the election issues and rules presented in a simple and easy to understand format for voters;

- Voter application forms should be revised to ensure that the 30-day legal residency requirement is met by the applicant and that the applicant understands the difference between physical address and sole legal residence for purposes of voting, and the application form should contain a warning that the residence given for motor vehicle registration and for state income tax purposes is considered the legal residence;

- To assure that voters are registered properly, the application should also advise applicants of the importance of using their legal names rather than nicknames, and that the information provided must be legible;

- Provisional ballot envelopes should contain a question about <u>when</u> the voter moved to the precinct since such information is important in determining whether the voter should have voted in his old or new precinct;

- Adoption of the centralized statewide voter registration database referenced above should prevent a voter from voting in multiple counties; and

- Adoption of Regional Voting Centers should eliminate the problem of voters casting ballots in the wrong precinct (*See* Exhibit 2 at Note 6);

Regarding regional voting centers, it should be noted for purposes of this Report, the Committee has not studied such option, and does not express an opinion as to their viability. However, as noted throughout this Report, adoption of such centers could ameliorate some of the problems encountered during this election. Opponents of regional voting centers contend that such centers would undermine or eliminate the precinct-based political system which is constitutionally-based in Colorado. Furthermore, regional voting centers would employ computerized systems that are interconnected with other systems, including the centralized statewide voter registration system, which raises concerns regarding the security risks of such centralization.

### 1.7 Fraudulent/Negligent Voter Registration Drives and Emergency Registration

During the months preceding the primary and general elections, massive voter registration drives were conducted by various organizations. During such time, there was extensive media coverage about misconduct by individuals conducting such voter registration drives ("VRD's"). Clerks throughout the Denver Metro area reported that large numbers of fraudulent applications had been received. Furthermore, some concerns were expressed that registration drive workers had failed to turn in all collected registrations or had delayed turning in the applications until after registration deadlines had passed. *See* Exhibit 2 at Note 7.

Consequently, on 10/13/04, Secretary of State Donetta Davidson (the "Secretary") announced that unregistered voters who claimed to have registered through a VRD would be allowed to register on an emergency basis at the polls and would be permitted to cast provisional ballots. *See* C.E.R. 26.7. The VRD exception, referenced above, was thereafter adopted by the Secretary on 10/15/04. **In doing so, the Secretary effectively eliminated the registration deadlines for voters who filled out applications through VRD's, but did not follow up with the Clerk to confirm that they were indeed registered. Worse yet, the exception enabled voters who were willing to claim falsely that they had registered through a VRD to vote in the election.** Unlike the emergency registration procedures above (C.R.S. § 1-2-217.5), VRD registration did not require the voter to provide any of the details of where he supposedly registered, nor did the voter have to appear in person at the Clerk's office. This opened the door for potential voter fraud since election judges and officials simply had to take the voter's word that he had registered through a VRD.

Furthermore, this impacted the election process itself since election officials now had to deal with registering unregistered voters at the polling places. The provisional ballot affidavit was used as a means of registration, but as explained further below in Section 3.3, there are many deficiencies in the form and substance of the affidavit. Registering applicants who invoked this exception at the polls necessarily caused delays and increased the number of provisional ballots cast and subject to verification by the Clerk.

Possible Solutions:

- Voters should not be permitted to register on an emergency basis at the polls based on a mere claim that they registered with a VRD since such registrations open the door to fraud, cause confusion and delays for voters and election officials, and unnecessarily increase the costs of the election;

- If the VRD exception is permitted in future years, more instances of fraud should be anticipated since more individuals will know about the exception, which in this election was only announced a few weeks before the election and therefore was not widely known;

- If the VRD exception is permitted in future elections, it could be a source of an organized attempt by individuals or groups to affect the outcome of the election by means of fraudulent registrations;

- Voters should be responsible for meeting registration deadlines;

- Before the registration deadline, voters should be responsible for checking to see if they are registered (Boulder County has a simple website link that allows any voter to check to see if he is registered); voters may also call or visit the Clerk's office to confirm their registration;

- Legislation should be enacted regarding VRD's and the conduct of registration drive workers to ensure that all registration applications are turned in to the appropriate Clerk;

- If VRD's are conducted at various non-government sites in the county (e.g. grocery stores), such drives should be conducted only by the Clerk's staff or other government personnel;

- Alternatively, any non-governmental organization conducting such drives should be required to register with the Clerk & Recorder of the county in which the drive is conducted ("Clerks"), and should be required to undergo training regarding appropriate conduct;

- VRD's must be required to turn in all applications they had received and workers should face criminal penalties if they discard or destroy applications, for any reason, including party affiliation;

- Deadlines and rules should be enacted regarding when applications must be turned in to the Clerks to ensure timely registrations (C.R.S. § 1-2-507 requires all voter registration agencies to transmit applications to the Clerk no later than 10 days after acceptance, and a similar rule should apply to VRD's);

- VRD's should be required to turn applications in to the county where the voter resides to avoid staffing and postage costs by the Clerk for forwarding applications to the correct county;

- Registration drive workers should be paid on an hourly basis, and should not be paid according to the number of signatures collected nor should they be paid according to the party affiliations of the voters registered;

- Organizations conducting VRD's should not be permitted to enter personal information of the voter (e.g. Social Security number and date of birth) collected from voters into their own databases unless they receive the express written consent of the voter;

- Voters should be given written receipts in a form approved by the Secretary from the organization conducting the VRD, and such receipt should document the date and place of registration, the name of the organization, the name of the drive worker taking the voter application, and such receipt should further advise the voter of registration deadlines and the voter's obligation to check with the Clerk before the close of the county registration books to ensure that the voter has been registered;

- After the election, the county clerks should meet with representatives of the VRD's to review the problems that arose;

- Stiffer criminal penalties should be enacted for creating, collecting and submitting fraudulent voter registration applications;

- Voter fraud should be taken more seriously and cases should be vigorously prosecuted by appropriate law enforcement officials;

- A cost-effective procedure that sufficiently safeguards voter privacy should be created whereby political parties and watchdog groups can review voter registration applications to ensure that fraudulent or improper registration does not occur; and

- Bipartisan citizen panels should be appointed for each county to review the suspected cases of voter fraud to ensure that cases are investigated and prosecuted.

1.8     Timing and Impact of High Volume of Voter Registrations

Although it is important to register new voters, it cannot be overemphasized that such registrations have significant impacts when they are received during the thirty-day window preceding the election and especially during the actual election itself.

(a) When thousands of applications are delivered to the Clerk in the last days of the registration period, it delays the timetable for preparing for Election Day since the information from the voter registration applications must be verified by the Clerk and then such data must be entered by the staff into the database in order to generate the poll books;

(b) The number of ballots to be printed for Election Day voting in the precincts needs to be known well in advance of the election;

(c) The number of election judges assigned to each polling place is based on the number of voters registered in the precinct;

(d) The number of voting booths needed for each precinct polling place is determined by the number of registered voters in the precinct;

(e) Election supplies for Election Day must be ordered in advance of the election and are determined in part based on the registration numbers;

(f) Fraud is more difficult to detect and prevent when the volume of registrations is so high and skilled staff are focused on other important Election Day tasks; and

(g) Election judges are not sufficiently trained to deal with instances of fraudulent registration at the polls, particularly in high volume precincts where the election judges are engaged in so many other tasks.

Possible Solutions:

- If VRD's are to be required to turn in applications within certain time periods after collection (as Election Day approaches, the turn-in period should be shortened), applications should flow into the Clerk at a more constant rate, and make the process less difficult to manage, more efficient, and less expensive;

- Deadlines for registration and change of address should be enforced; and

- The Clerk should anticipate that voter registration drives will continue in the future to produce large volumes of registrations, and should staff accordingly.

**(2)      Secretary of State Election Rule Changes**

The Secretary of State Election Rules were changed repeatedly during the 2004 General Election Cycle via amendments (adopted on 10/15/04 and 10/22/04) and continual Election Alerts.  These late arriving and sometimes conflicting changes caused confusion and frustration for voters, election judges, poll watchers and members of the Boulder Clerk's staff, particularly in the areas of voter identification, emergency registration and provisional ballots.  *See* Exhibit 2 at Note 8.  As a result, voters were unduly delayed and some ineligible voters may have been permitted to vote.

**Furthermore, in the process of conducting the election, it became apparent that many of the election statutes and rules were ambiguous or inconsistent, which led to a lack of uniform election practices.  The Clerks lacked appropriate guidance from the SOS, and procedures and decisions were reached on an ad hoc basis by election officials, causing uncertainty regarding application of the election laws.  There were numerous cases where the forms or procedures adopted by the Legislature or the SOS simply did not address the real-life problems encountered by election officials.**

Possible Solutions:

- Convene appropriate committees at the county and state levels which include volunteers and Clerk staff who worked in the election to consider and propose legislation and election rules to address the gaps between current election laws and the nuts and bolts of conducting an election;

- Enact statutes and election rules to address the deficient procedures identified throughout this Report;

- Finalize election rules and procedures at least 20-30 days before any election so that election judges, staff and poll watchers can be properly trained and voters and third parties will be knowledgeable about voting requirements and permissible conduct before arriving at the polls;

- Ensure the Election Judge Manual from the Secretary of State's Office is delivered to each Clerk & Recorder at least 30 days before the election; with supplemental rulings, if possible, added no later than 14 days prior to the election;

- Create an election-judge hotline and website to answer legal and procedural questions for election judges;

- Ensure the Election Judge Manual is current as to rules and is delivered to election judges well in advance of the election, preferably before election-judge training; and

- Prior to each election, convene a Pre-Election Task Force, a citizen volunteer panel (including a representative of each political party from the county and, if possible, a lawyer for each party) to meet with the Clerk to review the Election Judge Manual; discuss procedures for early voting, absentee ballots, emergency voter registration,

provisional ballots; and determine if there are unanswered questions or issues that have not been resolved or need further clarification.

**(3)    Provisional Ballots**

After the Presidential Election in 2000, Congress conducted investigations of various election problems that arose relating to the registration of voters and casting of ballots.  To address those problems, the House and Senate enacted the Help America Vote Act (HAVA), which received bipartisan support and was signed into law on October 29, 2002.  **Two of the major goals of HAVA are to ensure that eligible voters are not denied the right to vote and that voter fraud is prevented.**  To accomplish those goals, HAVA sets forth various requirements, including the requirement that voters be provided provisional ballots, and that voter identification be required of all first-time voters who registered by mail.  After HAVA was enacted, in 2002, the Colorado legislature enacted a law providing for provisional balloting (House Bill 02-1307) (C.R.S. § 1-9-301), and the Colorado Secretary of State adopted Colorado Election Rule 26 regarding provisional ballots.

    3.1    <u>Provisional Ballots Allowed</u>

According to the SOS Rules and relevant statutes in effect during the General Election cycle[3], provisional ballots should have been given to the voter when the voter:

(a)    appeared at the polling place without one of the ten forms of identification set forth in C.R.S. § 1-1-104 (19.5);

(b)    **claimed to be properly registered** but his "qualification or entitlement to vote cannot be immediately established upon examination of the registration list for the precinct or…the records on file with the county clerk and recorder" (C.R.S. § 1-9-301) (emphasis added);

(c)    applied for an absentee ballot, but the records do not indicate that the ballot was voted and returned, and the voter declared that he has not and will not cast any ballot other than the provisional ballot (C.E.R. 26.2.4)(adopted on 10/22/04);

(d)    appeared at the wrong precinct, and was allowed to cast a provisional ballot but only the presidential race would have been counted (C.E.R. 26.12 (A)) unless the voter was "misdirected" to the wrong polling place; in such event, the voter would have been allowed to cast a provisional ballot and all races and issues for which the voter was qualified to vote would have been counted (C.E.R. 26.14);

(e)    appeared at the polling place, but was not found in the poll book, and claimed to have registered via a voter registration drive (C.E.R. 26.7)(adopted 10/15/04); and

---

[3] Before, during, and after the 2004 General Election cycle, there were many iterations of the SOS rules and the corresponding numbering system.  The Committee makes no representation as to the numeric references applicable to any particular SOS rule or regulation as of the date of this Report.

(f)  appeared at the polling place, and was validly challenged, but the voter refused to answer or sign the challenged voter affidavit (C.E.R. 26.15).

3.2    Provisional Ballots Not Counted

Pursuant to C.E.R. 26.13, provisional ballots shall not be counted when any of the following is true:

(a)  The individual was convicted of a felony and is either incarcerated or on parole by the State of Colorado;

(b)  If the designated election official receives a provisional ballot from a voter who registered to vote by mail and who did not supply the required identification at the time of registration, at any time prior to voting, or at the time of voting, the provisional ballot shall not be counted.

(c)  The voter was not registered by the deadlines in the State of Colorado for regular or emergency registration;

(d)  The provisional ballot affidavit was not signed after notification to the voter pursuant to C.E.R. 26.4.3; and

(e)  If the Clerk is unable to verify the voter's registration pursuant to C.E.R. 26.9 (review of databases to determine whether provisional voter is registered).

**Additionally, provisional ballots would not have been counted if a voter invoked the VRD emergency registration provisions, and registered at the polls, but failed to show the required ID.** *See* C.E.R. 26.7.3.

Furthermore, as discussed more fully in Section 3.5.3 below, C.R.S. § 1-9-301(4) provides that voters who vote in the wrong precinct are **not** supposed to be given a provisional ballot. The Secretary, however, subsequently modified such provision by promulgating a new rule to permit the use of provisional ballots by persons voting in the wrong precinct. However, the Secretary mandated that in such instances only the race for the president would be counted.

In accordance with certain provisions of HAVA, any voter who casts a provisional ballot should be given a slip of paper at the polling place with his provisional ballot envelope number on it along with a telephone number for him to call to see if his ballot was counted. Such information was made available to the voters by the Clerk after completion of the acceptance and rejection process and the counting of the ballots as described below.

3.3    Provisional Ballot Affidavit & Envelope

Prior to casting a provisional ballot, a voter must complete the information fields contained on the provisional ballot affidavit and envelope. The purpose of such affidavit is to ensure that the voter is eligible to vote in the precinct and county where he has appeared. To

complete the affidavit, the voter must indicate whether he is a U.S. citizen at least 18 years of age. The voter must also set forth his "physical residence address," date of birth and gender. The voter has the option of setting forth his telephone number, Colorado driver's license number or Social Security number. In addition to providing such information, the voter must sign the self-affirmation, which states:

> I do solemnly affirm that I am a citizen of the United States, that I have attained the age of eighteen years, and that I have resided in the state of Colorado and in my present precinct at least thirty days before the election. I further affirm that the address indicated in this affidavit is my sole legal residence and that I claim no other place as my legal residence. I further affirm that:
>
> ➢ I registered to vote in my county and precinct of residence in the state of Colorado prior to the close of the registration books; OR
>
> ➢ I was registered to vote in the state of Colorado and moved to my county and precinct of residence at least thirty days before the election, but failed to register with the clerk and recorder of my county of residence; OR
>
> ➢ I applied to register to vote prior to the close of registration by federal postcard application or mail registration application, or I applied to register at a voter registration agency designated pursuant to Section 1-2-504, Colorado Revised Statutes.
>
> I further affirm under penalty of law that I am an eligible elector, that I have not and will not cast any vote in this election except by the enclosed ballot, that I will not vote in any other precinct, county, or state and that my ballot is enclosed….

*See* Provisional Ballot Affidavit and Envelope.

In essence, the self-affirmation contains three components. First, the **voter must affirm that he is eligible to vote in that precinct and county**, and that the address indicated in the affidavit is his "sole legal residence." As with the voter registration application form, as explained above in Section 1, there is no explanation as to the difference between physical and sole legal residence. Furthermore, although the self-affirmation states that the voter has resided in "my precinct" at least thirty days, it does not define "precinct" and although it is the obvious implication, it does not make it clear that "my precinct" must match the precinct in which the voter has appeared to vote. Thus, while the voter may have resided in his precinct somewhere else for the last thirty days, the self-affirmation does not make it clear that the voter is declaring that he has met the residency requirement for this particular precinct.

Second, the **voter must affirm that he is eligible to cast a provisional rather than a regular ballot because he meets one of three intended circumstances**: (1) the voter registered to vote in this precinct and county before registration closed (i.e. 10/4/04), but the voter's name

does not appear on the poll book, and the voter's registration cannot be immediately verified by the Clerk; (2) the voter was registered to vote in the state of Colorado, but moved to Boulder County and this precinct at least 30 days before the election such that the 30 day residence requirement in the precinct has been met; and (3) the voter applied to register prior to 10/4/04 through a federal postcard application, a mail registration or by applying in person at a voter registration agency. As for the VRD exception, since it was not adopted by the Secretary until a few weeks before the election, there was no reference on the envelope to voters who wished to register on an emergency basis at the polls because they claimed to have registered through a voter registration drive. However, it was the Secretary's position that VRD's constitute mail applications, so that as long as the voter applied with the VRD prior to 10/4/04, the voter was entitled to trigger this circumstance as a basis for casting a provisional ballot.

Although these are the intended circumstances for casting a provisional ballot, the language used on the affidavit arguably is not clear and is not easy to understand. The self-affirmation contains terms that are not necessarily understood by all voters such as "my county and precinct of residence" and "close of the registration books" (which in this election was 10/4/04). Presumably such specific information regarding the precinct and county is not placed on the envelope since such envelopes are used statewide, but the envelope could be clearer by referring to the county and precinct in which the voter is attempting to vote. The envelope also refers to three methods of registration: registration by federal postcard application, mail registration or at a voter registration agency. However, such methods are not explained. Since such terms are not defined, it is plausible that some voters triggered incorrectly the right to vote a provisional ballot because they signed the self-affirmation without understanding the requirements.

Third, **the affidavit contains language intended to warn the voter about the consequences of providing false information** as to the voter's registration eligibility or entitlement to a provisional ballot. The voter is warned that it is a crime to "make a false affirmation as to your qualifications to vote." The voter is also advised that such crime is a felony punishable by a fine and imprisonment.

However, without clear and unequivocal language on the self-affirmation to ensure that voters understand the residency requirements and appreciate the significance of "precinct" voting, and the circumstances under which it is proper to request a provisional ballot, it becomes difficult to distinguish between voters who intend to commit voter fraud and innocent voters who do not understand the legal requirements.

3.4     Verification by Clerk of Right to Vote Provisional Ballot

As set forth in Rule 26 of the SOS rules, before provisional ballots may be examined and counted, the Clerk must first verify that the voter is registered and entitled to vote ("Rule 26 search"). To do so, the Clerk must use the information provided by the voter in the provisional ballot affidavit to search one of four databases: (a) the local election office voter registration

database (i.e. county clerk & recorder); (b) the SOS voter registration database; (c) the Department of Motor Vehicles Motor/Voter database; and (d) the Department of Corrections felon database. *See* C.E.R. 26.9. The Rule 26 searches of such databases were conducted as described below.

### 3.4.1   Voter Claimed to be Registered and was Registered in Boulder County

If the voter claimed to be registered, but was not listed in the poll book, the voter was to be given a provisional ballot. If the Clerk determined after reviewing such databases that the voter was registered in Boulder County, and that the voter voted in the correct precinct, all of his provisional ballot votes would have been counted. If the voter was registered in Boulder County, but voted in the wrong precinct, only the presidential race would have been counted. *See* Section 3.5.3 below regarding wrong precinct rules.

### 3.4.2   Voter Registered in Another County

During the search, if the Clerk found that the voter was registered in another county in Colorado, and the voter had not provided a current Boulder County address on the provisional ballot affidavit, then the Clerk concluded that the voter was registered in another county and resided in another county and should have voted in that county. Such provisional ballots were not counted. According to the Clerk, 100 provisional ballots were rejected for such reason. *See* Exhibit 2 at Note 4.

### 3.4.3   Voter Registered but No ID

If the voter was given a provisional ballot because he was registered but did not provide the requisite ID, and the Clerk was able to locate a registered voter in the database whose personal data matched the data set forth in the affidavit, then the provisional ballot would have been approved, and all of his votes would have been counted. As discussed below in Section 4.3, although the ID requirement represented some deterrent against fraud, because it was inconsistent it was not a sure method of preventing voter impersonation.

### 3.4.4   Voter-Claimed VRD Exception

If the voter was given a provisional ballot because he was not registered but claimed to have applied for registration via one of the methods above (i.e. that he had applied to register via federal postcard, mail, voter registration agency, or VRD), the completion of the provisional ballot affidavit thereafter by the voter constituted an application for emergency registration.

After completion of the affidavit by the voter, the election judge was supposed to note on the provisional ballot affidavit envelope that the voter was claiming to have previously submitted an application for registration. Usually, the election judge would note "VRD" on the provisional ballot affidavit envelope. As the current affidavit does not contain boxes for the voter or the election judge to check off which method of application is being claimed by the voter, the entire

category was simply handled as a VRD.  Furthermore, the affidavit does not contain any spaces for the voter to list information such as date and place of application (i.e. which voter registration agency or which VRD).  Although the method of application would not have affected the outcome (as long as the voter was eligible the voter would have been registered and his votes would have been counted), requiring such information could prove helpful in deterring fraud.

In any event, when the provisional ballot affidavit was reviewed by the Clerk later, there was no expectation that the voter would be found in the registration databases.  At that point the affidavit was being treated as an application for emergency registration, and the Clerk was simply trying to ensure the voter was <u>eligible</u> for registration.  As long as the voter indicated that he was at least 18 and a U.S. citizen and signed the affidavit, the Clerk simply checked to see if the physical address contained on the affidavit was a valid Boulder County residential address.  Then, as long as the voter had tendered proper ID at the polls, the voter was considered registered, and the provisional ballot was counted.  According to the Clerk's staff, approximately 28 voters claimed the VRD exception.  Twenty six (26) of such ballots were accepted, and two of such ballots were cast in the wrong precinct such that only the presidential race was counted.  If the voter failed to tender proper ID at the polls, the provisional ballot was not counted.

### 3.4.5    Voter Did Not Claim VRD Exception and Not Registered

Finally, if the voter did not claim that he had registered via a VRD or one of the other methods set forth above, and the voter was not found on one of the databases, the voter was considered not registered and the provisional ballot was not counted.

### 3.4.6    Ballots Rejected/Possible Voter Fraud Cases

According to the Clerk's staff, 2,975 provisional ballots were cast, and 2,473 of those ballots were accepted and counted.  Of the 502 ballots that were rejected, **296 ballots were rejected because the voter was <u>not registered</u> in Boulder County,** and did not claim the VRD exception so as to be registered on an emergency basis**.  In such cases, the voter either failed to read the self-affirmation, did not understand the self-affirmation or falsely affirmed that he was registered in Boulder County.**  Likewise, **an additional 100 of the 502 ballots were rejected because the voter was registered and resided in another county,** and was not registered in Boulder County.  Again, the self-affirmations in such cases were false.  **Another 4 ballots were rejected because the voters' names were contained in the felon database and not eligible to vote.**  Finally, the provisional ballot of **one voter, who voted three times** in the election, was rejected, and his case was forwarded to the district attorney.  *See* Exhibit 2 at Note 4.

**Thus, 401 voters either committed voter fraud or were mistaken about their eligibility to vote.  Although 79.9 % of the rejected provisional ballot affidavits contained false affirmations, only one of these cases was forwarded for investigation and possible prosecution by law enforcement**.  According to the Clerk's staff, the reason for such decision is that the district attorney does not have the staffing to conduct such investigations, and

furthermore, the district attorney would not prosecute such cases because it is too difficult to prove criminal intent since it is easy for voters to claim they did not understand the self-affirmation.  Given the evident voter confusion about registration and provisional ballots as well as the arguably confusing language of the affidavit, such position is understandable.  However, unless law enforcement officials investigate these cases, the public will never take such matters seriously.  Even if a letter was sent to such voters explaining the grounds for rejecting their ballots, and explaining the self-affirmation for future elections, it would be educational and serve as a deterrent.

**A significant number of voters in other counties also cast provisional ballots even though they were not registered**.  The Rocky Mountain News reported that 32,946 provisional ballots were cast in Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson counties.  **Of the 6,534 ballots that were rejected**, **3,630 (more than 55%) of such ballots were rejected because the electors were not registered to vote**.  In Denver County, of the 2,442 ballots that were rejected, 1,142 were cast by voters who were not registered.  *See* Gabrielle Crist, *Rocky Mountain News*, *Unregistered Voters Tallied* (11/14/04).

It should be noted that watchdog groups have questioned whether so many voters were indeed not registered.  Pete Maysmith, executive director of Colorado Common Cause, "expressed concern that some voters didn't show up on the registration rolls because of errors by election officials." *Id.*  Due to the massive voter registration drives, there is no question that county clerks were under pressure to input thousands of voter registrations (*See* Exhibit 2 at Note 3).  Jefferson County Clerk and Recorder Faye Griffin "acknowledged that there might have been a small percentage of errors when the applications were input."  However, Griffin explained that it "was more likely election officials couldn't read the applicant's writing or that the applicant used a nickname instead of a legal name when filling out the form." *Id.*

3.5.    Voter Misunderstanding of Provisional Ballot Usage & Self-Affirmation

**Prior to this election, there was considerable publicity by the media and activist groups to the effect that no voter could be turned away from the polls and that every voter had to be offered a provisional ballot.  As discussed below in Section 3.5.1, instructions to the same effect were apparently given to election judges.  Provisional ballots were touted as the "cure all" for every voter problem.  As a result, many voters and even election officials had the impression that some of the most fundamental election rules and procedures (i.e. the voter must be registered to vote or claim to be registered and he must vote in his precinct on Election Day) no longer applied.  Such misunderstandings were further compounded by last-minute changes in the rules by the Secretary, including adoption of the VRD exception which allowed voters to register on an emergency basis at the polls.**

Given such misperceptions, it is not surprising that voters did not understand the circumstances under which provisional ballots were to be used and how and when such ballots would be counted.  The most common reason given by the election judges for handing out

provisional ballots was that voters had appeared at the wrong polling place, and had refused to go to the correct precinct. Most voters do not realize that it is a misdemeanor to knowingly vote in the wrong precinct. *See* C.R.S. § 1-13-709. Election judges and poll watchers also reported that some voters were under the impression that they could cast a provisional ballot at any polling place, including the wrong county and the wrong precinct. Some voters went to polling places that were close to their place of employment because it was more convenient. Other voters who had not registered to vote in Colorado or who had moved to Colorado from other states within 29 days before the election also tried to vote during early voting and on Election Day. *See* Exhibit 2 at Note 4. Such misunderstandings naturally increased the number of provisional ballots, and contributed to delays in voting at the polling places and delays in counting the votes, which resulted in increased election costs.

      Possible Solutions:

- A Public Education Campaign should be launched prior to each election, with a particular emphasis on provisional ballots;

- The media should also be apprised by elected officials of election rules and changes;

- Voters are unaware and should be educated that it is a <u>misdemeanor</u> to "knowingly vote or offer to vote in any election <u>precinct </u>in which he or she is not qualified to vote…." (C.R.S. § 1-13-709) (emphasis added);

- The rules and statutes relating to provisional voting need to be clarified to make the circumstances for provisional ballot usage more clear;

- Handouts should be prepared describing the circumstances under which a voter may vote provisionally, and such handouts should be distributed by election judges at the polls to any voter who is given a provisional ballot;

- Voters should be advised on their voter information postcards that are already mailed to all active eligible voters (C.R.S. § 1-5-206) of important election procedures, including provisional ballot rules;

- Law enforcement officials should investigate all instances in which provisional ballots were rejected because the voter was ineligible to vote, was not registered to vote in Colorado, or was registered and resided in another county. Even if the vast majority of such cases are explained away by voter misunderstanding, the publicity regarding such investigations would alert the public that such offenses are serious and that the self-affirmation is to be taken seriously by the voters;

- The provisional ballot affidavit and envelope should be revised to include the following:

  - Eligibility requirements for registration and voting must be clearly explained;

  - Definitions and explanations of the significance of "my precinct" and "sole legal residence" should be included;

➢ If the voter has moved within the county, or moved into the county, there needs to be a line for the voter to indicate <u>when</u> he moved in order to determine whether the voter moved before or after the registration deadline in order to determine where he was eligible to vote (old or new precinct);

➢ The circumstances for triggering a provisional ballot need to be better defined, and boxes should be added for the voter or the election judge to check off the applicable circumstance so that the Clerk will know the basis of the provisional ballot request;

➢ If the voter is claiming that he registered via federal postcard, mail, VRD, or a voter registration agency before the registration deadline, the voter should be required to make some effort at identifying when and where the application was made (such information would also be helpful in follow-up meetings with the VRD's to ensure their accountability); and

➢ In order to enforce penalties, the language in the self-affirmation must be so easily understood that voter fraud can be readily inferred if the facts prove otherwise than as reported by the voter.

### 3.5.1   Election Judge Misunderstanding of Provisional Ballot Usage

Some election judges did not appear to understand the rules about provisional ballots as evidenced by the fact that (a) some election judges and poll watchers reported that election judges were "pushing" provisional ballots and implying to the voters that provisional ballots were treated no differently than regular ballots; (b) some election judges reported that "no voter could be turned away, and that a provisional ballot had to be given to anyone who requested it;" and (c) voters were given provisional ballots even when they <u>admitted that they had not registered to vote</u> in Boulder County.  Election judges reported that they were confused further about the propriety of provisional ballots when they called the Clerk's Office on Election Day, and were given different answers about whether the voter could vote; one official would tell the election judge to allow the voter to vote provisionally, another would say the voter had to go to the Clerk's office.  Voters were angry when they were told to go to the Clerk's office to resolve problems.

Possible Solutions:

• Public Education Campaign;

• Improved training of election judges regarding provisional ballots; and

• Regional voting centers would decrease the number of staff and election judges needed to understand and deal with provisional ballots, and issues related to wrong-precinct voting would be obviated.

### 3.5.2 Provisional Ballots Counted as Regular Ballots

Some provisional ballots were cast as regular ballots and were never subjected to verification.  In several polling locations, poll watchers or election judges reported that voters placed their provisional ballots in the regular ballot box.  This occurred when voters who were to vote provisionally were given a security sleeve in addition to the provisional ballot envelope.  After completing their ballots, voters inserted them in the security sleeve (which was to be provided only to voters with regular ballots) rather than the provisional ballot envelope, and removed the sleeve at the voting box and placed the ballot in the regular box.  This also occurred when voters simply took their ballot out of the provisional ballot envelope before they arrived at the voting boxes, and placed the provisional ballot in the box before the election judge noticed that they had a provisional ballot envelope in their possession.  Based on available data from the Clerk, it appears that at least 12 provisional voters were able to convert their ballots into regular ballots.  *See* Exhibit 2 at Note 4 ("Empty Envelopes").

Possible Solutions:

- Use different colored paper for provisional ballots (with a unique identifying number linked to the envelope) so that even if the provisional ballot ends up in the regular ballot box, election judges or officials will be able to retrieve it later and match it up with the provisional envelope/affidavit.

### 3.5.3 Wrong Precinct

According to the Clerk's staff, approximately 499 voters voted in Boulder County in the wrong precinct during the General Election.  According to Colorado law, a voter who moves to a new precinct later than 30 days prior to the election may <u>not</u> vote a provisional ballot at the new precinct, but must vote in the old precinct.  *See* C.R.S. § 1-9-301(4).  In direct contradiction of this statute, the Secretary promulgated C.E.R. 26.12(A), which provided that no provisional-ballot votes cast in the wrong precinct would be counted except for president and vice-president.  This exception was apparently adopted by the Secretary because federal law prohibits durational residency requirements for the presidential election.

In September of 2004, Colorado Common Cause filed a lawsuit in Denver District Court challenging the "wrong precinct" rule in part because it would disenfranchise voters by counting only the presidential race.  *See* Exhibit 2 at Note 9.  The court ruled against Common Cause, and refused to enjoin enforcement of the foregoing rules.  Consequently, unless the voter was "misdirected" to the wrong precinct (another new rule by the Secretary) as explained below, the voter was given a provisional ballot and advised that only the vote for the presidential election would be counted.  According to the Clerk's staff, 203 of the 499 voters above were misdirected to the wrong precinct such that their entire ballot was duplicated and counted.  *See* Section 3.5.4 below.

Once the "wrong precinct" provisional ballots were identified at the Clerk's office, such ballots had to be duplicated by hand to ensure that only the votes for the presidential race were counted. Otherwise, if the ballots were simply scanned along with all the other ballots, votes for other races would have been recorded and counted. Duplication of these ballots was time-consuming and added to the delays in counting the ballots. Furthermore, the ballots were subjected to possible human error since volunteers had to duplicate the ballots by hand.

Possible Solutions:

- If wrong-precinct ballots had been marked in some distinctive manner such that all such ballots could have been segregated or if wrong precinct ballots had been segregated after their removal from the provisional ballot envelopes at the Clerk's office, then the scanners could have been programmed or re-set to scan that particular batch of ballots and count only the presidential race; and

- If regional voting centers are adopted, voters would not face this problem since they would not be required to vote in their correct precinct.

### 3.5.4 Misdirection of Voters to Incorrect Precincts

As indicated above, 203 voters were apparently "misdirected" to the wrong precinct. In at least one precinct, incorrect precinct maps were posted and voters were directed to leave the polling place and go to another precinct polling place. When the voters arrived at the second polling place, their names were not in the poll books, and they were told they would have to cast provisional ballots. These voters were either not aware of the fact that they had been misdirected or did not know that they should advise the election judges of the same. These voters that went ahead and cast provisional ballots were then disenfranchised since only their votes for the presidential race were counted. One of the misdirected voters reported the incident after refusing to cast a provisional ballot and returning to the original polling place which was his correct precinct. The voter asked the election judges to check the poll book, and the election judges discovered that his name was in the poll book. The voter then cast a regular ballot. This problem would not have happened if the election judges had reviewed the poll book for the voters' names before turning the voters away and directing them to the wrong precinct.

In order for a misdirected voter to have his entire ballot counted, the election judge must be knowledgeable that the voter was erroneously sent to the wrong precinct. *See* C.E.R. 26.12. The rules are unclear as to the basis of such knowledge. In other words, if the voter is misdirected by another voter, neighbor, etc., and so advises the election judge, is such knowledge sufficient to consider the voter "misdirected" and deserving of the protections set forth in the rule (i.e. all races are counted), or does the rule contemplate that the misdirection must be done by an election judge or election official?

Possible Solutions:

- Election judges should check the poll books before directing voters to another precinct;

- If this "Ballot Now" voting system is used again, there needs to be a better way to ensure that voters who are misdirected are given the benefit of the safety net so that all their votes are counted;

- On the provisional-ballot envelope affidavit, a line should be added for the election judges to indicate that the voter was misdirected, and by whom, so that the entire ballot will be counted, or if possible, the envelopes for such voters could be a different color so that they could be readily identified and segregated from wrong precinct ballots that will only be counted for the presidential race;

- C.E.R. 26.14 needs clarification as to who "misdirects" the voter in order to trigger the safety net for the voter; and

- Adoption of regional voting centers would eliminate this misdirection problem, but would not eliminate the issue of wrong ballot styles being given to the voter. Voting centers would arguably employ better-trained election judges to avoid such problem.

### 3.6    Impact of Provisional Ballots on Polling Place

Some election judges complained that the processing of provisional ballots was time-consuming and difficult and slowed down the rest of the voters. There was also confusion amongst voters and election judges as to how and when to offer and process a provisional ballot.

Possible Solutions:

- Educate voters regarding provisional ballots so they can cure any disqualification problems before Election Day and vote a regular ballot;

- Provide handouts to the voters at each polling place explaining the provisional voting process;

- The supply judge could focus exclusively on provisional ballots and the other election judges could deal more efficiently with regular ballot voters;

- Set aside a separate area in the polling place to deal with provisional voters in order to help ensure that: (1) the voter understands the circumstances under which a provisional ballot is proper; (2) the provisional ballot affidavit is completed properly; (3) the provisional ballot remains in the provisional ballot envelope; and (4) the provisional ballot remains segregated from regular ballots;

- **To prevent fraud and voter misunderstandings, the election judge should administer the oath rather than rely on the self-affirmation because voters either misunderstood the criteria as set forth in the oath or did not read them or possibly lied. This was evidenced by the fact that 296 voters claimed to be registered, but were not registered, 100 voters were registered in another county, but tried to vote in Boulder County, and 296 voters voted in the wrong precinct and were not misdirected there** (*See* Exhibit 2 at Note 4); and

- Despite the HAVA and state statutory requirements, some election judges recommended elimination of provisional ballots because voters should be responsible for registering on time and providing proper identification at the polls.

**(4)  Voter Identification**

Although HAVA only requires voter identification for first-time mail registrants who did not provide proper identification at the time of mailing their application, beginning with the primary election in August of 2004 all Colorado voters were required to present identification ("ID") at the polls.  Pursuant to C.R.S. § 1-10-104 (19.5) (a), the following ten categories of ID are considered acceptable:

(a)  Valid Colorado driver's license;

(b)  Valid ID card by Department of Revenue;

(c)  Valid U.S. passport;

(d)  Valid employee ID with photo issued by a branch of government;

(e)  Valid pilot's license issued by FAA;

(f)  Valid military ID with photo;

(g)  Copy of current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the elector;

(h)  Valid Medicare or Medicaid card;

(i)  Certified copy of birth certificate issued in U.S.; and

(j)  Certified documentation of naturalization.

On 10/22/04, the Secretary adopted Rule 30.13.1 which arguably clarified or supplemented the terms "utility bill," "paycheck," and "other government documentation" referenced in the seventh category of ID above.  The amended rule stated that:

(a)  "Utility bill" included "cable bill and telephone bill;"

(b)  "Paycheck" meant a "paycheck from a government institution or private company";

(c)  "or other government document that shows the name and address of the elector" included "documentation from a public institution of higher education containing at least the name, date of birth, and residence address of the student elector."

4.1  Confusion regarding ID

Since there were so many acceptable forms of ID, and the definitions of the forms of ID were changed by the Secretary, many election judges, voters, poll watchers, and election officials complained that the ID requirement was confusing.  Furthermore, voters and election judges did not appreciate that if the voter was registered on an emergency basis based on a VRD, the voter

was <u>required </u>to tender proper ID at the polls for the provisional ballot to be counted.  For example, one voter tendered a copy of her lost credit cards to establish her identification even though it was not one of the acceptable forms of ID.  If she was also registering with her provisional ballot affidavit based on a VRD, her provisional ballot would not have been counted.

### 4.2     Constitutionality of ID requirement

Some voter activist groups complained that the voter identification requirements were unconstitutional or violated HAVA.  In September, 2004, Colorado Common Cause filed a lawsuit in Denver to prevent the Secretary, in part, from enforcing the ID requirements for voters at the polls.  Colorado Common Cause claimed that such requirement imposed an impermissible burden on the fundamental right to vote.  After a two-day hearing, the court denied the requested relief, and the ID requirement was enforced at the General Election.  *See* Exhibit 2 at Note 9.

### 4.3     Relationship between ID and fraud

Since many of the listed categories of ID were not photo ID's or did not contain the voter's address, some voters, activist groups, poll watchers and election judges and officials complained that the ID requirement was either too lenient or was unrelated to the purported purpose of preventing voter fraud.  If ID was being required in order to prevent fraud and ensure that a voter was not impersonating another elector in violation of C.R.S. §1-13-705, but a voter did not have to produce ID with a picture or an address to verify that he was the person listed on the poll books, there really was no way to ensure that voter fraud was not committed.

In the *Common Cause* litigation referenced above, District Court Judge Hoffman recognized the fact that "the so-called identification requirement, when push comes to shove, isn't really an identification requirement at all" since so many of the forms of ID were not photo IDs, and since the voter was allowed to cast a provisional ballot even if he could not tender one of the ten forms of acceptable ID.  *See Denver District Court Order* at 24.  *See* Exhibit 2 at Note 9.  In response to the claim that the ID requirement would "chill" or discourage voters from exercising their constitutional right to vote, the court noted that "there was absolutely no credible evidence of that," but further noted that the ID "may also 'chill' <u>fraudulent</u> voters."  *See District Court Order* at 24-25 (emphasis added).  **In any event, the Clerks would agree that providing some ID is better than none since the information on the ID was used not only to prevent fraud, but was helpful in determining whether the voter was registered to vote and had voted in the correct precinct.**

With respect to University of Colorado students, the rules were in a state of flux and uncertainty.  Initially, voters thought that CU student ID would be sufficient, but were advised by the SOS that it was not a permissible form of ID.  Since many students did not have drivers' licenses and lived in dormitories with no utility bills, they were concerned that they would be unable to produce one of the permitted forms of ID.  This concern prompted the Secretary to change the rule to allow documentation from CU to be used for identification purposes.  Officials from CU and the Clerk's Office developed a form issued by the Registrar ("Certification of

Student Status and Personal Information") that a student could obtain that would constitute acceptable ID.  The Certification had to be on original letterhead from the Office of the Registrar with a proper seal, and contain the name, address, date of birth, and social security number of the student elector.  Since this Certification was not approved until shortly before the election, there was considerable voter confusion, which may have prompted voter activist groups such as Fair Vote Colorado to mobilize volunteers to assist students during early voting and on Election Day. *See* Section 7.3 below.

Although the foregoing Certification satisfied the ID requirement, some student voters did not understand that they still needed to be registered to vote.  Large numbers of student voters appeared at the early voting sites (particularly the downtown Courthouse) to vote, but were not registered to vote.  Unless the student was eligible for emergency registration, and completed the requisite steps, the student should have been given a provisional ballot that would not have been counted later if the student was not registered on any of the databases.  Nonetheless, one poll watcher at the courthouse complained that some students appeared without proof of a Boulder County address, and were not on the registration books/computer, but were nonetheless allowed to vote regular ballots rather than provisional ballots.

Another concern that was raised by election officials and poll watchers before the election was that there was no way to ensure that out-of-state students were not voting absentee ballots at home out-of-state while casting regular ballots in Boulder County.

Possible Solutions:

- For purposes of voter registration, require voter ID with the signature of the voter so that signatures on absentee ballots and provisional ballots may be compared to voter signatures on file with the Clerk.  In Boulder County, the signatures of approximately 70% of the registered voters are contained in the county databases; if 100% of the signatures were entered, it might be a significant method of preventing fraud;

- Revise the statutory list of permissible ID to require photo ID or at least voter address to be consistent with prevention of voter fraud;

- Implementation of the centralized, statewide SOS database above that is interconnected with counties to ensure live real-time data regarding voter applications, voter registrations, absentee voting, early voting and polling-place voting.  This capability will help prevent the possibility of individuals voting in multiple counties; and

- Adoption of a National Voter Registration Database to check voter registrations between states.

**(5)   Early Voting and Absentee Ballots**

5.1   Long Lines

Record numbers of voters during early voting caused voters to wait in line for hours. Early-voting sites were not laid out to accommodate large numbers of voters, election judges and poll watchers. The voting booths were too small given the large size of the paper ballots.

Possible Solutions:

- Boulder County should have added more polling locations, more election judges and more voting booths. Before selecting future early-voting sites, the Clerk should inspect the site carefully to ensure the floor plan will accommodate the numbers of voters and the various functions to be performed by election judges and poll watchers.

5.2   Printing of Ballots

At early voting sites, unlike Election Day polling places, ballots were printed individually for each voter after the voter's registration had been verified via computer. At some polling places, voters had to stand in cramped areas waiting for their ballots to be printed. The printers were constantly jamming and breaking down, which backed up the line and created long delays. Concerns were also raised about the accounting for spoiled ballots and new ballots.

Possible Solutions:

- The Clerk should have had back-up printers available. More printing stations were necessary, but were not readily accommodated due to space issues. If regional voting centers are adopted, the Clerk will need to ensure that there is sufficient space to accommodate all the necessary functions, including confirming registration and printing ballots, as well as sufficient space for voters and election officials.

5.3   Write-In Candidates

The list of write-in candidates was not readily available. It was not at the check-in tables. In Longmont, it was posted around a corner on a wall. *See* Section 10.8.3 below.

5.4   Ballots for Early Voting versus Election Day

For purposes of canvassing and the reconciliation process, as described below in Section 10, it would be helpful if the ballots had some sort of delineation on their face as to whether the ballot was voted during early voting or on Election Day.

5.5   List of Early Voters

Generally, if a person voted during early voting, the poll books should have contained a notation to that effect to prevent a voter from voting again on Election Day. However, since the

poll books are printed several days before the end of early voting, the names of any voters appearing thereafter during early voting would not have been marked in the poll books as having voted. Supplemental lists were therefore printed by the Clerk and handed to supply judges on or before Election Day. In addition to concerns about the completeness of such lists, some election judges failed to check these lists when checking in voters.

Possible Solutions:

- The Clerk should emphasize this issue in election-judge training; and

- Regional voting centers would permit all such documentation to remain centralized and in electronic form so as to help ensure that such lists are checked before voters are given ballots.

### 5.6     Absentee Ballots

In Boulder County, approximately 27,493 absentee ballots were cast, representing 15.9% of the total ballots cast. Although absentee ballots used to be limited to cases when the voter was unable to vote on Election Day due to illness or being out-of-town, absentee ballots are now widely used as a matter of convenience. Due to the growing usage of absentee ballots, some observers have raised concerns about the potential for fraud and abuse since absentee ballots can be intercepted in the mail. Ballot secrecy is also compromised by the very nature of the delivery and processing mechanisms used for such ballots. Nonetheless, for a variety of reasons, some voters have concluded that it is better to vote absentee than in person or at early voting. However, such a conclusion may not be warranted as many voters complained in this election that they did not receive their ballots and worried that their ballots were not counted. Although provisional ballot voters were permitted to call the Clerk after the election to determine if their ballots were counted, no similar accommodation exists for absentee voters.

Voters were also confused about the rules relating to whether voters could cast provisional ballots if they had requested absentee ballots, but had not received them or had not voted them. Some absentee voters were concerned that their absentee ballots would not be received in time by the Clerk and would not be counted. This confusion was created by SOS rule changes and a ruling by the Denver District Court in the *Common Cause* lawsuit referenced above. In such case, Colorado Common Cause challenged the SOS Rule (26.12 (B)) that provisional ballots would not be counted if the voter had already applied for an absentee ballot. The District Court concluded that such rule constituted a likely violation of HAVA such that the Secretary was enjoined from enforcing it during the General Election. *See* Exhibit 2 at Note 9. Since this ruling was issued only a few weeks before the election, voters, election judges and poll watchers had to be advised of such change. Contrary to the foregoing ruling, the provisional ballot envelopes were never revised. On the back of the envelope, it stated: "If you have already requested an absentee ballot for this election, you must vote that ballot. You may not vote a provisional ballot." There are no known incidents where absentee voters who had not voted their absentee ballots were denied provisional ballots.

Republican volunteers at the Clerk's office expressed concerns that the processing of absentee ballots was labor intensive, which created delays and possibilities of human error or fraud. In order to prepare absentee ballots for counting, temporary workers would: (1) date-stamp the envelopes; (2) scan the envelopes to capture the signature of the voter on the outside of the envelope; (3) visually compare the captured signature with the voter signature on file in the database to ensure that the signatures matched; (4) complete a handwritten report indicating that the signatures had been verified on a batch of envelopes and that the envelopes were ready to be opened (these four steps are referred to hereafter as the "absentee verification process").

Thereafter, the envelopes would be delivered to a machine ("Jogger") that opened the envelopes by cutting off the top edge. Sometimes, ballots inside the envelope were also cut during this process, and would have to be duplicated.

Bipartisan teams then opened the envelopes and removed the ballots. In many cases, the teams would discover that ballots were damaged. Damaged ballots then had to be duplicated before they could be scanned. Frequently, the teams would find that the ballot pages were out of sequence or mismatched (spouses' ballots were not kept separate and in order such that p.1 of the wife's ballot was put in with p.p. 2 -3 of the husband's ballot) because voters had not returned them to the security sleeve and envelope in the proper order. Since the "Ballot Now" voting system requires the ballot pages to be scanned in sequential order, workers spent days manually sorting and checking thousands of absentee ballots before they could be scanned and counted.

On election night, temporary workers worked around the clock on the absentee verification process. However, many of the workers had no experience and were only present for short periods of time. Consequently, valuable time was lost in training and re-training inexperienced workers, which caused additional delays in the overall absentee ballot processing.

Security issues were also raised as absentee ballots sat in unsecured piles for hours on the tables in the ballot-counting room at the Clerk's office on 33rd St. ("Houston Room"), and were carried back and forth between various rooms without any tracking or security measures. During the absentee verification process, absentee ballot envelopes (with ballots inside) were stored in an unsecured storage room upstairs that was not locked, and was usually open with no one assigned the responsibility of monitoring access to the ballots.

Possible Solutions:

- Absentee ballot usage could be limited or discouraged in favor of more early-voting sites;

- If regional voting centers are adopted, more in-person voting, particularly with DREs, could alleviate fraud concerns and result in faster, more efficient ballot counting;

- If the current Hart "Ballot Now" system is used in future elections (*See* Section 10.2 below), such that paper ballots must be read by optical scanners, with all the pages of a ballot in correct-sequence order, voter instructions for use of the absentee ballots must be more explicit regarding damage and sequence of ballot pages;

- Experienced workers should be used for the absentee ballot verification process, and on election night, workers should be required to work longer shifts to ensure continuity and efficiency;

- A security protocol should be developed, promulgated and posted regarding the processing and handling of absentee ballots since, unlike the Election Day ballots, absentee ballots do not arrive in sealed, locked boxes ready for counting; and

- An absentee ballot hotline or website should be created to permit absentee voters to contact the Clerk to ascertain whether their ballots were received and counted.

**(6)    Poll Watcher Issues**

6.1    <u>Inability to Perform Duties Due to Space Limitations and Privacy Concerns</u>

Poll watchers complained that they were unable to perform their duties due to the logistics of polling place set-up and/or voter privacy concerns. During early voting, due to space limitations and privacy concerns, some poll watchers were forced to sit or stand down the hall away from the check-in tables (or stand behind a yellow line taped on the floor) such that they could not see or hear any of the check-in activities. Other poll watchers reported that they could not see the form of ID being presented by the voter to determine if it was one of the acceptable forms of identification, and that they could not see the computer screens to determine if the voter was indeed registered. Many early-voting poll watchers quit because they concluded that their presence was pointless.

When this issue was raised with the Clerk, the Republican Party was informed that such constraints were mandated by privacy concerns and Colorado law. *See* C.R.S. § 1-2-302(8). As an accommodation, the Clerk agreed to require the election judges to announce the form of identification being presented by the voter when announcing the voter's name. Although this instruction was contained in the supplemental sheets for the election judges, very few election judges complied.

This issue of transparency versus privacy became even more significant during the counting process when the bi-partisan provisional ballot teams were not permitted to observe the verification process required by Rule 26 of the Secretary of State Rules. *See* Section 10.6 below. Again, the provisional ballot teams concluded that their functions were perfunctory with no real watchdog function.

Possible Solutions:

- Election judges should announce the form of ID being presented in a loud voice, and poll watchers need to be close enough to ascertain if the ID is an acceptable form of ID since the type of ID can affect whether the voter receives a provisional or regular ballot. In the case of voters claiming registration via a voter registration drive, an acceptable ID was

necessary before being given a provisional ballot (*See* Section 4 above regarding identification and Section 3 above regarding provisional voting);

- As with election judges, poll watchers should be permitted to see if the voter's name appears in the registration records/poll book, even if it means that the poll watcher will be able to view private voter information such as the voter's Social Security number and date of birth, and poll watchers should be required by law via their oath to keep such information confidential;

- C.R.S. § 1-2-302 (8) regarding privacy should be amended if necessary to permit poll watchers to view this voter information; and

- Election judges should be better informed about the role of poll watchers and the rules governing their conduct.

### 6.2    Voter Assistance for Disabled Voters and Non-English Speaking Voters

Poll watchers reported several instances where voter assistance to disabled or non-English speaking voters appeared to rise to the level of electioneering because the assistant was overheard directing the voter how to vote. One poll watcher reported that the volunteer assisting a visually-impaired woman instructed the voter to vote for Ken Salazar and Mark Udall. Furthermore, when assistance was provided, it should have been documented on the Record of Assistance for Disabled and Non-English Speaking Voters provided with the election supplies. In one precinct, the poll watcher reported that the supply judge initially noted on the Election Judges Report Form that no voters had been assisted. After the poll watcher brought this error to his attention, the election judge located voter assistance forms for 2 voters; however, this was only 2 voters despite the fact that assistance had been provided in 6-8 cases.

Possible Solutions:

- Bipartisan teams of poll watchers or election judges should be permitted to observe and monitor such interaction to ensure that electioneering is not occurring; and

- In addition to providing better training of election judges in this area, some consideration should be given to the fact that election judges have too many duties and cannot perform such duties adequately in some precincts where there is a large volume of voters requiring special attention, whether it is for disabilities, language barriers, or for voters needing provisional ballots. If regional voting centers were adopted, one or more election judges could be assigned to perform this function of special assistance to voters.

### 6.3    Poll Watcher Credentials

The issue arose as to whether either major political party was allowed to appoint registered electors who were "unaffiliated" to serve as poll watchers for their party. Although the Republican Party did not tender credentials for unaffiliated electors, upon information and belief, the Democrat Party did tender names of unaffiliated registered voters to serve as poll watchers.

The Clerk's Office issued differing opinions during the course of the election about whether such appointments would be proper, which led to confusion.

Additionally, there appeared to be differences in the standards applied to the appointment of Republican versus Democrat poll watchers. Pursuant to C.R.S. § 1-7-106, the chairperson of the county central committee of each major political party shall certify the names of the persons to be appointed as poll watchers. Although the Boulder County Republican Party Chairman was required to personally sign hundreds of credentials, upon information and belief, the Democrat Party was permitted to tender credentials signed by two other persons besides the Chairperson. If it is unreasonable to vest exclusive authority in the Chairperson, the statute should be changed, but in any event, the law should be applied uniformly.

It should be noted that activist groups may not have understood the credentials process. At one location, a poll watcher reported that a representative of MoveOn.org tendered a blank poll watcher certification form to the election judge in order to be a poll watcher. Since the purported credentials had not been properly issued by the Clerk, the Republican poll watcher objected, and the individual was not sworn in.

Possible Solutions:

- The statutory definition of "watchers" under C.R.S. § 1-1-104 (51) and related provisions as well as SOS rules regarding the eligibility requirements of watchers should be clarified;

- C.R.S. § 1-7-106 regarding poll-watcher credentials may need to be revised as explained above; and

- Activist and public-interest groups should be advised of such requirements.

6.4    Poll Watcher Conduct

Of the nearly 100 election judges who responded to the survey, only one election judge indicated that he was intimidated by a poll watcher. A few election judges and poll watchers indicated that some poll watchers behaved in an inappropriate or illegal (electioneering) manner. See Exhibit 2 at Note 10.

Possible Solutions:

- Election judges, poll watchers and activist groups need to be better trained regarding the important role of poll watchers and the functions and permissible conduct of poll watchers.

6.5    Voter Challenges

Although there was ample national press coverage regarding feared voter intimidation via poll watcher challenges, from the nearly 100 election judges who responded to the Republican

Survey, only one election judge reported a voter challenge by a poll watcher.  Poll watchers surveyed concurred that challenges did not occur on Election Day.  During early voting, two challenges were made by a poll watcher for two voters arriving after the polls closed, with no ID showing Boulder County residency, but they were nonetheless improperly allowed to vote regular ballots.

Poll watchers may have been discouraged from making challenges.  There were reports by poll watchers in early voting that election judges ignored attempted challenges by poll watchers, and that there were no challenge forms at the polling places.

The lack of voter challenges may also be explained by the confusing instructions regarding challenges, particularly whether a challenged voter was to be given a ballot at all, and if so, whether it was to be a regular or provisional ballot.  Under Colorado law, an election judge, poll watcher or any eligible elector of the precinct may make a written challenge regarding the eligibility of a voter to vote.  If a challenge is exercised, the election judge must ask the voter certain questions regarding eligibility (i.e. age of voter, citizenship and residency requirements).  C.R.S. § 1-9-201, § 1-9-202, and § 1-9-203.  If the challenge is withdrawn after the voter satisfactorily answers the questions, the voter is given a regular ballot.  *See* SOS Election Judge Manual at 30.  If the challenge is <u>not</u> withdrawn, the election judge administers or tenders an oath to the voter.  After the oath is administered, "a ballot shall be given."  C.R.S. § 1-9-204 (2).  The statute does not specify whether a regular or provisional ballot is to be given to the voter.

If the voter <u>refuses</u> to answer the questions asked by the election judge or refuses to take the oath, the challenged person "shall be refused a ballot…."  C.R.S. § 1-9-205.  In the SOS Election Judge Manual, used by the Clerks, election judges were instructed:  "If the challenged person refuses to answer the questions or take the oath, <u>he/she will not be permitted to vote.</u>"  Election Judge Manual at 30 (emphasis added).  The "Voter Challenge" form, approved by the Secretary in May of 2004, and contained in the Manual, explained the rule by stating:  "If the challenged voter refuses to <u>answer fully</u> any question which is put to him/her, does not answer the <u>appropriate questions satisfactorily</u>, or refuses to take the following oath, <u>do not allow this person to vote</u>" (emphasis added).

Thus, per the statute, the SOS Election Judge Manual and the SOS Challenge Form, election judges and poll watchers were instructed that a voter should **not** have been given even a provisional ballot if the voter refused or failed to answer satisfactorily the questions or refused to take the oath.  In contrast, the SOS rules, adopted by the Secretary on 10/15/04, stated in pertinent part:

> Any elector whose qualification to vote has been validly challenged pursuant to C.R.S. 1-9-201 and 1-9-202 and <u>who refused to answer or sign</u> the challenged voter affidavit form required by C.R.S. 1-9-203 <u>shall be offered and have the opportunity to cast a provisional ballot</u>.

*See* C.E.R. 26.15 (emphasis added).

Possible Solutions:

- Clarify via legislation, if necessary, the voter challenge procedure and whether a ballot is to be given at all, and if so, whether a regular or provisional ballot is to be given to the challenged voter; and

- Educate and train election judges, poll watchers and activist groups regarding the rules surrounding voter challenges.

### 6.6 Recruitment/Intimidation of Poll Watchers

Political parties had difficulty recruiting poll watchers because volunteers were overwhelmed by the complexities of the new rules associated with provisional ballots and emergency registration. Some poll watchers who later declined to serve also indicated that they were afraid of being challenged by other poll watchers as well as activist groups. Prior to the election, there was significant national press coverage about the issue of possible voter intimidation by poll watchers, and in Ohio litigation had been filed to eliminate the presence of poll watchers due to this alleged fear of voter intimidation. In Boulder, a FOIA (Freedom of Information Act) request was made to the Clerk requesting the names and polling place assignments of all the Republican poll watchers. Concerns were raised by the Republican Party that such information was being gathered in order to intimidate Republican poll watchers.

Possible Solutions:

- Educate the public and media about the important role of poll watchers, and train poll watchers regarding their legal duties. As evidenced by this survey, there was no intimidation by poll watchers so the public should be informed that it is not an issue; and

- Post poll-watcher rules at the polling places.

### (7) Electioneering and Inappropriate Conduct by Voters & Activist Groups

Poll watchers and election judges observed prohibited "electioneering" at the polling places. C.R.S. § 1-13-714 prohibits persons from doing any electioneering "on the day of any election within any polling place or in any public street or room or in any public manner within one hundred feet of any building in which a polling place is located…."

### 7.1 Voters

Voters engaged in prohibited conduct when they wore T-shirts, buttons, hats, jewelry, purses, and carried ads and signs with political slogans, candidate names/issues while standing in line to vote within the polling place or within 100 feet of the building. Some voters also placed signage on walkers, bicycles and cars that were within the 100-foot limit, and had to be asked to remove them. If the lines were outside the polling place, the election judge did not always observe such electioneering until the voter entered the building. If a poll watcher was present and able to go outside to check on electioneering, the supply judge was notified, and he asked the

voter to remove or cover up the offending item. When asked to remove the offending item, most voters were polite and cooperative; some voters were not readily compliant, and argued with the election judges about their free-speech rights.

### 7.2 Activist Groups

Activist groups also engaged in this prohibited activity when individuals claiming an association with certain groups wore, carried, or posted electioneering materials within the 100-foot limit. On Election Day, numerous incidents were reported by poll watchers that MoveOn.org had set up tables, chairs and volunteer workers within the 100-foot limit in many polling places throughout the county. In some instances, the organization set up tables at the front door of the polling place or inside the polling place. Voters were being stopped and interviewed at some locations. When asked to move by the election judge, the volunteers moved beyond the limit. However, at several locations, the volunteers repeatedly moved back into the 100-foot limit zone until asked again to move back. At several locations, the police were dispatched to deal with the situation. *See* Exhibit 2 at Note 11.

Possible Solutions:

- Educate the public before elections regarding this prohibited activity, and let them know that the offense is a misdemeanor in order to impress upon them the seriousness of the conduct. Since electioneering is so common, it is important to continue the practice of having poll watchers present to guard against this activity;

- Create mobile display boards with pre-printed signage from the Secretary of State with rules about electioneering and place them outside the polling place well in advance of the 100-foot limit so that voters can avoid the prohibited conduct before entering the polling place (current signage by SOS provided in election supplies is not big enough and is usually posted inside the polling place and is missed by voters);

- Public information efforts should include sessions to provide information to voters and activist groups regarding electioneering; and

- Websites for the SOS and Clerk should also include such information.

### 7.3 Voter Assistance Groups

During early voting, some individuals claiming an association with certain "voter assistance groups," such as "Fair Vote Colorado" and "Smart Vote Colorado" were present at the early voting sites in Boulder County. *See* Exhibit 2 at Note 12. Such individuals wore T-shirts and carried signs ("Need help voting?"), and set up tables with similar signage, all within the 100-foot limit. In some instances, the individuals were moving through the line of voters and interacting with them. After objections by poll watchers, the Boulder County Clerk's Office instructed these groups to move beyond the 100-foot limit. Initially, the groups complied. Later, during early voting, the groups moved back within the 100-foot limit, claiming that they were not subject to the 100-foot limit since they were not "electioneering" within the definition of the

statute (C.R.S. § 1-13-714), which referred to campaigning for or against any candidate or ballot issue. When objections were made again by poll watchers, the Clerk's staff at the 33rd Street location verbally advised such groups to observe the 100-foot limit.

Possible Solutions:

- Intervention by county and/or state officials. For example, in anticipation of a recurrence of this problem, on the morning of Election Day, citing C.R.S. § 1-5-105(1) (4) (referring to election-related activities not simply electioneering within 100-foot limit) and Election Rule 7.3.1, the Secretary of State issued an Election Alert to the Clerks and County Attorneys throughout Colorado, stating in pertinent part that the 100-foot prohibition applies to any "election-related activity." On Election Day, poll watchers reported that individuals associated with these groups set up tables again within the 100-foot limit (including inside the polling place), and had to be asked to move. In some cases, the individuals were seated at tables, and were conducting interviews or surveys of voters.

- The definitions of electioneering and election-related activities need to be clarified further, and public interest and activist groups should be advised accordingly well in advance of the election.

### 7.4 Early Voting Lines beyond 100-Foot Limit

During early voting, the lines of voters were so long that they went well beyond the marked 100-foot limit, and even wrapped around the building. From 101 feet onward, voters were then subjected to electioneering and election-related activities by activist and "voter assistance" groups.

Possible Solutions:

- Since the intent of the statute is to create a zone of protection for voters while they are voting and waiting to vote via a de facto expansion of the polling place to 100 feet from the building, it would be nonsensical to protect voters at the 100 foot mark, but not protect voters at 101 feet onward. Consequently, on Election Day, the Secretary of State issued the Election Alert referenced above, adding that the 100-foot limit applied to all voters waiting in line. In effect, there was to be a zone or "bubble" around the voters in line. This solution may require further legislative action and clarification; and

- An effort should be made by the SOS and the Clerk to notify the public and activist groups of such rules.

### 7.5 Voter Intimidation/Interference

Pursuant to C.R.S. § 1-13-713, it is unlawful for any person "directly or indirectly, by himself or by any other person in his behalf, to impede, prevent, or otherwise interfere with the free exercise of the elective franchise of any elector or to compel, induce, or prevail upon any elector either to give or refrain from giving his vote at any election…." On Election Day, voters,

poll watchers, and election judges complained that voters were being intimidated or harassed by individuals claiming an association with MoveOn.org. In numerous polling locations, voters and poll watchers complained that MoveOn.org had placed tables in locations (sidewalks, stairways, parking lots) that many voters had to pass in order to enter the polling place. In some cases, signage was placed on the tables indicating that voters should "check-in" there, and voters were misled into believing that they were required to stop there in order to vote. At several sites, voters were asked if they were there to vote, and if so, to come over to see if they were on the list. Voters were stopped going into and coming out of the polls.

Ostensible "exit polls" were considered intimidating by some voters. In several polling locations, voters exiting the polls complained that they were intimidated by MoveOn.org when volunteers with this organization questioned them about who they had voted for and yelled at the voters after hearing their responses. One woman reported that she was afraid of further reprisals after her encounter because her telephone number was on her business vehicle. At several polling places, the police were called to respond to the situation. *See* Exhibit 2 at Note 11.

Poll watchers and voters also reported that MoveOn.org blocked parking spaces close to the polling place such that access was disrupted. At several locations, poll watchers reported that refreshments were being offered to voters and election judges by the MoveOn.org volunteers.

Possible Solutions:

- The type of conduct prohibited by C.R.S. § 1-13-713 needs clarification;

- Further legislation may be required to protect voters from electioneering and election-related activities even outside the 100-foot mark if such conduct intimidates or interferes with voters; and

- Voters, election officials, poll watchers, and activist groups need to be educated regarding permissible polling place conduct.

### 7.6 Other Problems with the 100-foot limit

(a) 100-foot limit sign was not always posted by the election judge;

(b) 100-foot limit was not measured, but only estimated due to the lack of a measuring device, or election judges failed to notice the 100-foot police tape in their polling place kit;

(c) 100-foot limit was measured improperly from inside the building so that electioneering occurred inside the building in one school and at the front door at other polling places;

(d) Election judges reported that at the 100-foot mark, there were no walls or trees upon which to hang the 100-foot limit sign so they either did not put it up or moved it to a location where the sign could be put up (even if the location was within or beyond the 100-foot mark);

(e) School staff were reportedly engaged in electioneering; and

(f) Some election judges reported that they were not outside so they didn't know if there were problems and some said they "heard" there were problems.

Possible Solutions:

- Need legislative clarification regarding the 100-foot rule to ensure that all voters in line are protected from electioneering; and

- Election judges should be provided wooden stakes or wire to mount the 100-foot limit sign, or should be instructed to tape the sign on a folding chair placed outside the polling place at the 100-foot mark.

## (8) Election Judge Recruitment & Training

### 8.1 Recruitment

Over 1,440 election judges served in the General Election, and were recruited by the Clerk or the major political parties. Recruitment is difficult due to the long hours, low compensation and limited pool of candidates since many people are unable to take a day or more to serve as election judges. Some complaints were made regarding election judges who were uninformed about election laws and procedures, physically unable to do the job, disinterested, and/or worked poorly with the public and fellow election judges. Some election judges were not notified until the weekend before the election or later of their polling place location, and some were trained but never called by the Clerk's Office.

Possible Solutions:

- Adoption of regional voting centers would radically reduce the number of election judges needed, and would enable the Clerk's staff to train a small cadre of highly skilled and interested election judges who would be trained on a regular basis, and could be more readily apprised of last-minute changing election laws and procedures;

- Recruit students from the University of Colorado to serve as election judges, and perhaps arrange for them to receive school credit;

- Increase the wages for election judges;

- Place recruitment advertisements in the local newspapers;

- Shorten the work shift since a 12-14 hour day is too long for some election judges. However, if there were two shifts of election judges it would increase the number of election judges required and would raise accountability issues between the shifts;

- Screen and interview election judges, since this is an important and difficult job;

- Assign experienced election judges to problem precincts; and

- Provide feedback forms to poll watchers, election judges and members of the public to evaluate the performance of election judges and ensure improvements in future elections.

### 8.2 Training

Training sessions were too short and were held in venues that did not accommodate the number of trainees, causing overcrowding and forcing trainees to leave without being trained. The presentations by the training instructors were considered insufficient by some election judges. *See* Exhibit 2 at Note 13. The Election Judge Manual was considered helpful by most election judges, but many election judges recommended changes. *See* Exhibit 2 at Note 14.

Possible Solutions:

- Smaller training classes with a sign up in advance in order to prevent overbooking of space and needing to turn potential trainees away;

- Multiple choice self-tests could be mailed to election judges or posted on the Clerk website so that election judges could test themselves after training and in advance of the election regarding election rules and procedures;

- Hire professional training instructors; and

- Hire an appropriate expert to produce a video training tape to ensure the materials are presented in an interesting, clear and memorable manner.

### 8.3 Selection & Notification of Election Judges

The Republican Party complained that it did not know the names of many of the Republican election judges selected by the Clerk's office. Some election judges complained that they did not know whether they had been selected to serve until a few days before the election, and some election judges complained that they did not know their polling place location or the names of their fellow election judges until the Sunday before the election. Some former election judges complained that they had served in prior elections, and received training, but then were never contacted by the Clerk's office. *See* Exhibit 2 at Note 15.

Possible Solutions:

- The Clerk should be required to deliver a draft list of the proposed election judges for each political party to the respective chairpersons of the two major political parties at least 90 days before the election so that the parties may recruit additional judges. A final list of election judges should be delivered to such chairpersons at least 30 days in advance of any election. *See* Exhibit 2 at Note 15. The Clerk should notify election judges of their selection at least 21 days prior to the election, and should notify them at least one week in advance of their Election Day assignments and the identities of their co-workers so they may carpool, visit the site if necessary, and be better prepared.

**(9)    Polling Place Logistics**

At the outset, it should be noted that the adoption of regional voting centers would solve most, but not all of the logistical issues reported below.

9.1     Elderly & Disabled Voters

It was difficult for elderly and disabled voters to stand in long lines.

Possible Solutions:

- Make check-in more efficient, and have chairs and wheelchairs available for the elderly and disabled.

9.2     "Ballot Now" Paper Ballots

As discussed in Section 10.1 below, the voting system used in this election required voters to complete paper ballots, which were then hand-delivered to the Clerk, and then subjected to optical scanning and resolution before a final count could be reached.  This paper ballot system was criticized as offering no improvement over punch cards.  Preparation of paper ballots by voters took longer and slowed the voting process down.  Voters also complained the ballots were too large and unwieldy.  For a number of reasons, as discussed further below, problems related to these paper ballots delayed the counting process.

Possible Solutions:

- Replace the current paper-based voting system; and

- If paper ballots are used in future elections, the Committee recommends that a light-weight card stock be used for easier handling, and that the size of the ballot be smaller. Further, if possible, the optical scanners should be reprogrammed to read an "X" in the box rather than requiring voters to completely shade in each box.

9.3     Different Ballot Styles

Some precincts had multiple ballot styles and some election judges failed to give the voter the correct style which meant that some voters were disenfranchised on certain issues.

Possible Solutions:

- Use different colored paper for different ballot styles and improve training of election judges regarding the importance of ensuring the voter is given the correct ballot style.

9.4     Communications with Clerk's Office

Communications with the Clerk were poor via telephone prior to and on Election Day. Election judges reported they were not able to speak with the office staff from Friday, 10/29/04

through Election Day. On Election Day, when election judges attempted to call the Clerk's office to verify the status of a voter's registration, the lines were continuously busy, causing long delays in voting. Some election judges complained they never did get through to the Clerk and just solved the problem themselves. One precinct was unable until very late in the day to contact the office by telephone, so a poll watcher and the computer lab teacher set up a computer link to the database so they could check out voter registrations themselves (which may raise certain security issues).

Possible Solutions:

- Need more telephone lines into the Clerk's office so that questions on the status of voters can be answered in a timely manner on Election Day; and

- If regional voting centers were adopted, this should not be an issue as long as the voting center computer systems have connectivity with the Clerk and SOS databases.

9.5    Election Supplies

Supplies were not made available to the election judges until Sunday afternoon before the election. Upon later examination, some election judges discovered that supplies were missing from the supply box. Padlocks for ballot boxes were not provided in several precincts, and not discovered by the election judge until Election Day. One election judge complained that the election supplies were given to the wrong person because the Clerk's staff failed to cross-check the precinct number with the correct supply judge's name, but just took the person's word that he was the supply judge. In one or more precincts, the wrong poll book was placed in the election supplies, a problem which was not discovered until Election Day. The election judge had to call the Clerk's office to have the correct poll book delivered to the precinct, but it was not delivered until later. While the election judges were waiting for the poll book to be delivered, voters were not allowed regular ballots, but were given provisional ballots. Some voters left the polling place because they did not want to vote with a provisional ballot. Lastly, the precinct maps were not clear enough especially for people living on a line between precincts.

Possible Solutions:

- Set up a schedule listing a specific pick-up time for specific precinct election judges during particular hours of the day so that all election judges will not arrive at the same time;

- Establish a strict check-in procedure for distributing supplies. Check-lists and receipts should be used by staff before handing over supplies to the election judges. If each election judge is required to review all the materials and sign for them before leaving the warehouse, missing locks, incorrect poll books, and supply issues would be detected before Election Day; and

- Establish a strict check-in procedure for reception & staging at the end of Election Day voting.

### 9.6 Polling Place Facilities

Election judges complained that in some polling places there was no place to put up maps or signs. There were insufficient electrical outlets and insufficient space to accommodate voters in line. Voters had difficulty determining in some locations where the polling place was located. Polling places needed better precinct signage with bigger lettering on doors and with more directional signage.

Possible Solutions:

- Sites need to be visited in advance by the Clerk's staff to anticipate and solve logistical issues. Apparently, a member of the Clerk's staff had conducted site visits in 2003, but many sites had been remodeled since such visit.

- If regional voting centers are adopted, there should be fewer such logistical issues.

### 9.7 Write-In Candidate List

Approximately one-third of the election judges admitted that they did not have the explanatory letter/list of write-in candidates or were unaware that it was in the election materials and was supposed to be provided to voters upon request. An incident was reported where one election judge refused to provide the list of names to voters.

Possible Solutions:

- Voters should not have to ask for this list. This became an important issue during ballot resolution because so many voters misspelled Jason Savela's name or could not remember the name such that the vote was not counted. *See* Section 10.8.3 below.

### 9.8 Security Sleeve for Ballots

The paper ballots were excessively large and did not fit the security sleeve. Many voters did not use the security sleeve and were not aware of how it worked before depositing their ballots.

Possible Solutions:

- Smaller ballots should be used with security sleeves that cover the entire ballot. Voters should be verbally reminded at the beginning of the process to place the regular ballot in the sleeve.

### 9.9 Combined Polling Place

Regarding multiple precincts in one polling place, there was confusion by voters as to which precinct they were in. Some voters waited in the wrong line and were angry when directed to another line. Election judges had to step away from their other duties to direct people at the

map.  Regarding early voting, election judges complained that the Louisville Recreation Center was inadequate for heavy turnout.  Voting also interfered with the daily business of the recreation center, and safety concerns were raised.

Possible Solutions:

- Registered voters should have received post cards in the mail regarding their polling place location, but many voters were not registered or did not keep their post cards so they would know the location of their polling place.  Such voter post cards could be designed so that voters could put them in their wallets; and

- Voters need more education about the precinct process.  Perhaps a letter should be sent out to all voters with a brief step-by-step explanation of voting requirements.

### 9.10  Wrong Precinct Map

At one location, the wrong precinct map was posted, and the election judges, rather than checking their poll books first for the voters' names, advised the voters to go to another precinct. For several hours voters were misdirected to another precinct where they were given provisional ballots, which would not be counted except for the presidential race.

Possible Solutions:

- The Clerk's staff should check to make sure the correct map is included before the election judge leaves the warehouse with the election supplies; and

- Election judges should be trained to always check the poll book before directing voters to another precinct.

### 9.11.  Ballot Box Security

During early voting, it was observed that the absentee ballot box in Longmont was not locked.  Not all polling-place ballot boxes were locked on Election Day.  Two poll watchers reported that ballot boxes did not have locks on them when the polling place was being opened. The locks were either located in the supplies or the Clerk's office was contacted, and locks were delivered later.  Some election judges did not know how to use the locks.

Possible Solutions:

- When election judges pick up their supplies, the Clerk's staff should check to insure that the locks are included and demonstrate their use and operation if necessary.

### (10)  Ballot Counting & Canvass Board (Electoral Procedures at Clerk & Recorder Office)

As was widely reported, Boulder County was one of the last counties in the nation to report its election results for the 2004 General Election.  On Saturday, November 5, 2004, the

Clerk announced that "Boulder County had **concluded counting** the nearly **150,000 ballots** received in this year's general election." *See* Boulder County Press Release, dated 11/5/04. However, the counting was <u>not</u> concluded on 11/5/04. In that same press release, the County acknowledged that "2,500 provisional ballots" had not yet been verified, much less counted, and "about 200-300 damaged ballots" had not been duplicated for the counting process. Significantly, the Official Results for the 2004 General Election, released on November17, 2004, **15 days after the election,** indicated that "**160,012" ballots** had been cast (**not 150,000 as stated on 11/5/04**). *See* Official Results for Election-11/17/2004 2:15 PM ([www.co.boulder.co.us/clerk/elect/2004](www.co.boulder.co.us/clerk/elect/2004)). According to the Clerk's staff, the discrepancy was attributed to the fact that after November 5th, more ballots were located in the Houston room that had not been counted. According to volunteers, this type of situation has occurred in past elections.

The Clerk attributed the counting delays to many factors, including ballots being misprinted by the printing company EagleDirect of Denver, damaged ballots that had to be duplicated and re-scanned, and the time consuming verification process for provisional ballots. *See* Boulder County Clerk Press Release, dated 11/5/04.

While it is undoubtedly true that election results were delayed as a result of misprinted ballots (bar codes on the ballots were blurred or smeared and could not be read by the optical scanners) and the time-consuming process of duplicating ballots and conducting the Rule 26 search for approval and rejection of provisional ballots, it must also be emphasized that problems with the Hart "Ballot Now" voting system may have contributed to delays, as discussed further below. *See* Section 10.2 below.

In any event, such delays were not without precedent. In the 2002 General Election, Boulder County election results were also delayed. The "**remaining ballots** for the 2002 General Election **were counted** Friday morning" (11/15/02), **10 days after the election**. See Boulder County Press Release, dated 11/15/02 (emphasis added). In 2002, 3,540 provisional ballots were cast with the highest number of provisional ballots being cast by voters at Libby Hall (87) and Kittridge Hall (80), two dormitories on the CU campus. *See* Boulder County Press Release, dated 11/15/02.

As with the 2004 election, the count had also been delayed in 2002 due to problems with the voting system. The punch card ballots for seven precincts were not read properly by one of the card readers on election night at the Clerk's office, resulting in an "inordinate number of blank votes being recorded for some races and questions." *See* Boulder County Press Release, dated 11/26/02. Significantly, the "turnout and blank vote totals for ballots from <u>other</u> precincts tabulated by <u>that reader</u> were checked and no abnormalities, except for in the seven precincts, were found." *Id* (emphasis added). The Clerk was ordered by the Secretary to recount such ballots, and as a result of the re-reading of the ballot cards (which was witnessed by Republican and Democrat watchers), the Clerk was required to amend the vote count, and recertify the abstract of results delivered to the Secretary. Although the Press Release stated that "it is not

known why that specific card reader failed to read some ballots and not others," the failure was simply attributed to the fact that the "card readers are more than 20 years old and were purchased as part of the Datavote system in 1975." *Id.*

Since delays in the 2004 election may also have been caused by adoption of the new voting system described below, the Committee concluded that it would be helpful for readers of this Report to understand the basic characteristics of the various voting systems being used by voters, including the advantages and disadvantages of such systems. Given such background, readers should be able to draw their own conclusions regarding the observations of the Committee and volunteers relating to the operation of the particular voting system used in this election.

**As the Committee did not study the various types of voting systems, and its members do not profess to be experts in this area, the Committee does not express any opinion or recommendation regarding the adoption of future voting systems in Boulder County**.

10.1    Review of Voting Systems

Various voting systems have been employed in America ranging from hand-marked paper ballots to mechanical lever machines to computer-assisted counting systems (punch card and optical scan) to electronic voting machines ("DREs"). In order to understand some of the issues that arose in this election, it is important to appreciate the basic differences in the voting systems that have been used here and around the country. *See* Exhibit 2 at Note 16.

Punch card and optical scan systems both use document ballots that are read and counted by computers and offer the advantages of speed in counting and preservation of a hard copy ballot for auditing and recount purposes. Both types of systems have been criticized since the counting process may be delayed by voter error in marking or punching the ballot. In the case of the VotoMatic punch card system used in Florida, voters failed to mark the ballots properly by punching through the card completely ("hanging chad").

Prior to this election, Boulder County used the Datavote punch card system that required computer cards to be either perforated manually or hole-punched with a slide mechanism, and then subsequently read and counted by computers. *See* Exhibit 2 at Note 16.

During the 2004 election, the County employed central-count optical scanners that read and counted absentee, early voting, and precinct paper ballots at a central location (33rd Street location) after they were delivered to the Clerk's office. As explained in this Report, thousands of paper ballots were rejected by the optical scanners for a variety of reasons, including improper markings by the voter. Ballots had to be reviewed by bi-partisan teams to discern voter intent, causing delays in counting and raising concerns regarding accuracy and potential abuse. *See* Section10.7 below.

A third type of voting system is the electronic voting machine, known as "DRE" (direct recording electronic). In its simplest terms, DRE voting systems utilize computer technologies via electronic voting terminals to directly record votes in an electronic format at the polling place. Generally, voters are required to press buttons or touch the computer screen to record their votes. The votes are then stored electronically, and ultimately transferred (via modem, satellite link, or physical delivery of a memory card by the supply judge) to a central tallying location (Clerk's office). The final election results are obtained by using tallying software which downloads the data and compiles and records the total results for the county for each race. *See* Exhibit 2 at Note 16. One of the greatest advantages of DREs is the purported accuracy and speed with which votes can be counted.

HAVA (Help America Vote Act) was enacted in part as a result of the nationwide publicity regarding the problems with the VotoMatic perforated punch card system ("hanging chads") used in Florida. HAVA seeks to ensure that every eligible citizen has an equal opportunity to vote and have that vote counted, and to prevent the dilution of that vote via voter fraud. To effectuate such purposes, HAVA sets forth various requirements intended to improve this country's voting systems and election procedures.

**Three provisions in the Act make it likely that more DRE's will be used in future elections**. *See* Eric Fischer, Senior Specialist in Science and Technology, Domestic Social Policy Division, Congressional Research Service, The Library of Congress, in *Election Reform and Electronic Voting Systems (DREs): Analysis of Security* Issues," CRS Report RL 32139 (November 4, 2003) at CRS-4 ("Fischer Report"). First, HAVA authorizes the federal government to spend 3.65 billion dollars in grants to states to replace punch card and lever machines.

Second, beginning in 2006, HAVA requires that all voting systems used for federal elections must employ "second chance" voting systems, which means that before the ballot is officially cast, the voter must have the opportunity to review it, change it, or request a new ballot. The voting system must also notify the voter when he has made a mistake in voting (e.g. overvote) to correct the mistake before the ballot is cast. The goal of this requirement is to prevent votes from being discounted or misinterpreted when voters fail to mark their ballots properly ("hanging chads" or incorrect or incomplete markings on paper ballots) such that computer voting systems are not able to determine voter intent. With DREs, voters are supposed to be guided through the balloting process and the common errors committed by voters with paper ballots, such as undervoting and overvoting, are eliminated.

It should be noted that in Boulder County the use of "central-count" optical scanners (scanners located at a central location), rather than "precinct-count" optical scanners (scanners located at each polling place), did not allow voters to correct their own mistakes. Voters left the polling place unaware of any problems that there might be with their ballots. Consequently, the use of "central-count" scanners arguably did not afford voters a "second chance" voting system as contemplated by HAVA. The same problem arguably occurs in the case of hand-counted

paper ballots and punch cards.  Nonetheless, HAVA and the SOS Rules expressly state that in the case of paper ballots, punch cards, or central optical scanner systems, such condition is met by "establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office" and "providing the voter with instructions on how to correct the ballot before it is cast and counted…." C.E.R. 37.1.3. *See* Section 301 of HAVA.  Since many ballots were rejected by the optical scanners due to overvotes, as explained below, it is apparent that such instructions were not sufficient for some voters.

Third, HAVA requires, beginning in 2006, that each polling place used in a federal election be fitted with at least <u>one voting machine that is fully accessible for persons with disabilities</u> (including nonvisual accessibility for the blind and visually impaired) in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.  DREs are probably the most accommodating system for the disabled.  For the blind or visually impaired, DREs can easily be fitted with earphones for an aural ballot.  An aural ballot is also helpful for persons with limited reading ability, and can be done in multiple languages to overcome language barriers.  Also, touchscreens are easier for people with physical disabilities since voters do not have to manipulate a pen or pencil.  In the HAVA State Plan for Colorado, submitted July 15, 2003, the Secretary indicated that in order to meet the foregoing HAVA requirements for accessibility, Colorado will ensure that at least one DRE is installed in each polling place in Colorado.

**However, there is considerable controversy regarding the security of DREs.  Unlike document ballots where a voter sees the vote as he records it on the actual document, with computerized voting systems the voter cannot be certain that the machine is recording his vote in accordance with his choices.  Furthermore, it has been reported in several states (New Mexico, North Carolina, Pennsylvania) that significant numbers of votes have been "lost" by DREs.**

Some computer experts contend that DREs are vulnerable because software can be written and installed in DREs in a manner that manipulates and changes the votes being recorded or otherwise jeopardizes the integrity of the votes being recorded.  "*Malware*, an *elision of malicious software*, includes viruses, Trojan horses, worms, logic bombs, and any other computer code that has or is intended to have harmful effects." *Id.* at n. 11, CRS-5.  In theory, such malicious software could be installed by the manufacturer or another "insider."  Moreover, the DRE could be "hacked" so that an outsider could manipulate the results, particularly if electronic voting machines are linked or the Internet is used to transmit the voting records.  Some observers contend that such concerns are compounded by the fact that the source code used by DREs is proprietary information belonging to the DRE manufacturer such that public scrutiny and testing cannot be done to detect any such problems. *Id.* at CRS-6.  Although cryptography (encryption of information before it is sent so that it cannot be deciphered and decryption of that information before it is delivered) represents an important weapon against these problems, some experts have opined that cryptography efforts to date are still vulnerable. *Id.* at CRS-13.

Given such dangers, there is significant national debate regarding the audit trail capacities of DREs. Although HAVA requires all voting systems to produce a paper audit record, it does not prescribe the form of such record and it does not require verification by the voter of such record. "According to the National Institute for Standards and Technology's (NIST) Voting Standards Team, most DREs have the ability to produce a paper printout of votes cast, or audit trail, which election officials may use to crosscheck electronically tabulated totals," and such trail "may be stored on a cartridge or printed within the machine itself." National Association of Secretaries of State Fact Sheet, dated May 10, 2004. However, critics contend that such paper audit trails are insufficient because they do not constitute an independent record that can be verified by the voter. While some proponents of DREs disagree, there has been a significant movement by many states towards adoption of some form of VVPT (voter-verified paper trail). The form of the paper record varies and can range from receipts with votes cast to printing of the entire ballot.

10.2    Hart "Ballot Now" Voting System

In order to comply with certain HAVA requirements, in 2003 Boulder County issued RFP (Request for Proposal) #4437-03 for a Direct Recording Electronic ("DRE") voting system. The RFP contemplated the use of DRE units (average of 5 units per polling place) to be used by voters during early voting and on Election Day. However, there are two categories of voting that necessarily cannot employ DRE units: absentee and provisional balloting. In the case of provisional balloting, since a provisional ballot must be subjected to further verification by the Clerk, the voter cannot be allowed to electronically record his vote. Consequently, the RFP also contemplated the use of paper ballots for absentee and provisional ballot voting.

In June of 2003, Hart InterCivic, Inc. ("Hart") responded to the RFP and proposed that Boulder County purchase the Hart "eSlate Electronic Voting System," which is a "fully integrated voting and tabulation solution, with a DRE component for Early voting and Election Day plus an optical scan component for absentee/mail/provisional voting." *See* Hart Response to RFP, "Boulder County Solution Overview," Section 3-1 (www.co.boulder.co.us/Clerk/HartInfo). In other words, the Hart eSlate system employs DRE voting units at each polling place and uses paper ballots only for absentee and provisional voting. The paper provisional ballots would have been collected by election judges at the polls and delivered to the Clerk's office where they would be counted by the use of optical scanners and tallying software.

In order to count paper ballots, the eSlate system utilizes "Ballot Now," a paper ballot software application that uses "optical scanners to capture the image of each ballot, which is then tabulated with Hart's software." Boulder County Clerk & Recorder Press Release, dated 4/27/04. In the event that issues arise due to undervotes, overvotes or write-in candidates on the paper ballots (absentee and provisional), it is then up to bipartisan teams of volunteers (Resolution Board) to discern voter intent. *See* Section 10.5 below.

In April of 2004, for approximately $1.365M, the Boulder County Commissioners decided to purchase "Ballot Now," one of the components of the eSlate voting system. The Commissioners decided not to purchase the entire eSlate system because "national standards for DREs are still being developed." (*See* Boulder County website above, Hart InterCivic Ballot Now). Consequently, instead of limiting paper ballots to absentee voters and provisional voters, paper ballots were used by all Boulder County voters.

**If Boulder County had purchased the eSlate Electronic Voting System such that DREs would have been used by voters at the polling place, almost 75% of the ballots would have been voted electronically, and only 25% of the ballots would have been paper ballots subjected to scanning and manual intervention.** As reported by the Clerk, 89,896 precinct ballots were cast (51%) and 42,183 early voter ballots were cast (23.9%), representing 74.9% of the ballots cast. Only 27,934 absentee ballots and 2,975 provisional ballots were cast. See Official Results as of 11/17/04, Boulder Clerk website. If DREs had been used, the vast majority of the 160,012 ballots cast would have been electronically recorded at the polling places during early voting and on Election Day. **Assuming that the eSlate system would have performed as promised**, **presumably the final count should have been tallied electronically within minutes or hours rather than days of the election**.

Again, in theory, had DREs been employed at the polling places, there would have been far fewer ballots to send to a commercial printer such that any misprinting problems with the ballots may not have resulted in a material delay of the counting.

In considering whether to continue the use of optical scanner systems, or adopt other voting system technologies, the County should consider the various logistical and legal issues explained above as well as the observations and experiences of the volunteers who used this system, which are reported below.

10.3    Operation of Optical Scanners and Hart software

Republican volunteers who assisted in the scanning, duplication and resolution processes made certain observations regarding the operation of the optical scanners and the Hart Ballot Now software. Such responses are lay observations by non-experts in this field, but are nonetheless worthy of consideration.

Beginning election night and continuing for at least a week, there was no time when all of the scanners were operated simultaneously. Most of the time there were no more than two or three scanners being used. This appeared to be a failure of management to plan for the workload and to train and staff accordingly. There were not enough machine operators, and the training of the operators was minimal. Training consisted of volunteers simply watching the operators and replicating what they did. There were no written instructions or guidelines, or if they existed, they were not shown to workers. Moreover, there was no written documentation regarding the tasks performed by the volunteers with respect to the scanners.

There were serious problems with how the scanners handled the ballots. Thousands of ballots either arrived in a damaged condition (absentee ballots and misprinted ballots) or were subsequently damaged by the scanners. Sometimes ballots were ejected in disarray by the scanners and not re-sorted by workers into proper order. Also, duplicate ballot numbers were treated differently by the software.

Operators were supposed to confirm that the number of ballots that were scanned matched the number of ballots the election judges identified in their reports in the ballot box, but more times than not, the ballot boxes did not contain the election judges' count reports, so operators just wrote down their own numbers because they had no other numbers with which they could compare their results.

Volunteers reported that the entire system was poorly designed and/or implemented from a user standpoint. Foremost among these problems was a lack of scripts to run the two major steps: scanning ballots into the system and resolving the ballots that required human intervention and then finishing the batch. Operators (in most cases, a volunteer or temporary election worker) required in excess of 70 mouse clicks or keyboard entries to process a completely clean batch with no need for human resolution of ballot issues. This should have required at most two scripts, each of which should have been simple clicks of the mouse with the software instructing the operator on what to do next. Furthermore, the operator had to write out summary sheets when the software should have been capable of generating and printing the summary sheets, introducing further opportunities for error and delay. Every ballot was electronically coded by precinct, yet repeatedly the operators had to key in the precinct number and manually instruct the system to save the data to a file name using the precinct number. The operator had to issue separate instructions to save the data to disk and to send the reports to the printer. The lack of appropriate scripts should have been detected and corrected long before the election began.

Internally, the software has a number of programming design choices that did not fully automate the scanning process as contemplated. Requiring that each multi-page ballot be loaded into the scanner in the correct page order is unnecessary when the software should have scanned each page of every ballot and determined if all sheets were present. Workers were required to sort through huge stacks of ballots in order to find and remove the sheets that were not in the correct order. Ballots then had to be re-scanned, which caused further delay. Workers were often confused about which ballot pages were to be segregated for duplication. Rubber-banding stacks of ballots after scanning led to many ballots being torn by the rubber bands, posing more problems in the event that recounting was required.

Possible Solutions:

- Careful consideration should be given to the kind of voting system to be implemented for future elections, and all voting systems should be reviewed and considered. In making such decision, the Commissioners should consider factors such as accuracy, security, speed, ease of use by voters, compliance with HAVA requirements, availability of a paper audit trail, and costs of procurement, operation and maintenance;

- Any future voting system should also take into account that volunteers and temporary workers will be operating the system at the central counting location, and therefore, such systems must be user-friendly, flexible, expeditious and fool-proof;

- Procurement of all components of any voting system should be conducted through a bid process that is subject to public scrutiny, and adequate public hearings should be conducted to provide the public the opportunity to review and consider all options being considered by the County;

- Before any voting system is actually employed, volunteers should be given the opportunity in advance of any election to conduct test runs of the machines and simulate the tasks to be performed in order to anticipate and resolve potential operational issues;

- If Ballot Now is to be used again, the foregoing design problems should be corrected. Full-time professional teams of operators should be employed to scan all ballots from a central location, with the ballots to be resolved being sent to the resolution teams thereafter;

- In the event that Boulder County decides to implement a DRE voting system, consideration should be given to purchasing the entire eSlate system or another integrated DRE voting system from another vendor in order to obtain the benefits of all of the DRE components;

- All voting systems should be subjected to rigorous testing, and should meet state and federal voting systems standards;

- Staff and volunteers who are involved in the actual scanning and counting of ballots should be required to complete a log of their activities in order to protect the security of the system, and to provide an audit trail for post-election analysis of equipment or administrative failures; and

- Documentation regarding access to the voting system should include a protocol requiring paper or electronic signatures for each person who has contact with the system and a description of the task(s) performed.

10.4    Staffing and Scheduling of Workers and Supervision

While there is significant truth to the claim that poorly-printed ballots and use of the Ballot Now system caused delays in vote counting in Boulder County, there is a deeper truth that, unless significant changes are made to the management of the process, delays and errors should be expected in every future election.

Any election requires that there be significant management oversight, planning and control.  A general election that was forecast months earlier as likely to have the highest turnout in years should have been warning enough that there would be significant need for management.

It is also axiomatic that any election is going to involve many relatively untrained workers and volunteers. This creates a need for effective training, user-friendly reference materials, ongoing monitoring, and easy access to specialized assistance when questions arise. Overall management and supervision of the entire process is also required. During the 2004 General Election, election workers noted significant shortcomings in each of these areas.

During the ballot-counting process, which was conducted around the clock, there were many hours when management was not present at all in the ballot-counting room ("Houston" room), or management was engaged in clerical tasks such as sorting envelopes or checking registration databases to determine if voters were registered.

The Clerk failed to hire enough temporary staff to conduct the verification process and the counting of ballots. Volunteers for the Republican and Democrat Parties had to be used for tasks ranging from opening of absentee envelopes to straightening and collating ballots to locating missing pages of ballots to scanning ballots.

Scheduling of volunteers was difficult as the Clerk's office had no sense of the manpower hours needed or when tasks would be completed. The political parties had to manage the staffing, and were frequently unable to advise their volunteers as to work hour expectations as there were no supervisors from the Clerk's office or the supervisors failed to take responsibility for adopting a work schedule or plan.

Furthermore, the Clerk failed to advise the political parties in a timely manner as to the number of party-affiliated electors that would be needed to serve daily on the Resolution Board, Duplication Board, and Canvass Board. Since the volunteers had to perform their tasks in bi-partisan teams, it was crucial that each political party have an equal number of volunteers present. Each day, the Clerk staff failed to set out a work plan for these boards and failed to monitor their progress and advise as to the start and stop times so that volunteers could be properly notified. Volunteers would show up, and the office would have nothing for them to do and the parties would be told to send them home, only to call them back later. But for the Herculean efforts of the volunteers of the political parties, the counting process would have been delayed much longer.

Possible Solutions:

- Prior to the election, the Clerk should meet with the chairpersons of the political parties, and agree upon a work plan setting forth the tasks to be accomplished, the number of volunteers needed and the work hours anticipated; and

- The Clerk should determine the number of supervisors needed, and then staff and train accordingly so that there are enough experienced personnel to supervise the large number of temporary workers that are employed during the election season.

10.5    Security

There was minimal security in the "Houston" room where ballots were being scanned, counted and canvassed.  People were walking in and out of the room at all hours.  There were no staff or security personnel present to check people in and hand out badges. Eventually, the staff started locking one of the doors, and people started wearing nametags.  Although C.E.R. 27.3.3 (a) (2) requires "all persons engaged in the counting and processing of ballots" to be deputized or take an oath "to faithfully perform their duties," many volunteers were not given the oath or the necessary employment paperwork to fill out.  Ballot boxes were stacked, unattended, by the doors, and could have been removed by unauthorized persons.

All of the precinct materials, including unused ballots, were stored in the warehouse at the 33rd Street facility, but the doors to the warehouse were not always locked.  Employees of the Motor Vehicle Department were often in the warehouse to access stored Motor Vehicle materials or for other reasons during their breaks.

Possible Solutions:

- Restrict physical access to all components of the voting system, including ballots and ballot boxes, precinct election materials, optical scanners, and tallying components, and ensure that ballots and voting systems are never left unattended; and

- Access to all election facilities should be strictly controlled and monitored.  A security guard should have been present at all times that the Houston room was being used.  The guard should have been checking nametags and/or a list of approved personnel.  All volunteers and temporary workers should have been issued badges which identified their function and party affiliation.  Staff members should have been wearing badges with their name and title.  For the warehouse, consideration should be given to installing another security door to prevent access by the public or unauthorized employees.

10.6    Provisional Ballot Teams

Bipartisan teams should have been allowed to observe the Clerk's staff while they were checking the databases to verify whether a voter was registered or had already voted.  The verification process, governed by C.E.R. 26, was not subject to observation by the poll watchers even though C.E.R. 8.5 expressly states that poll watchers may observe "the processing and counting of precinct, provisional, mail and absentee ballots."  Provisional ballot teams were not given the provisional ballot envelopes/affidavits until after the Clerk's staff had conducted the verification process and approved the ballot for counting.  Rejected ballot affidavits were not subject to inspection by the ballot teams.  Ballot teams and poll watchers could not, therefore, ensure that ballots had been properly accepted or rejected.  Prior to the election, the Clerk's office had no guidelines in place as to the task to be performed.

Possible Solutions:

- If necessary, change the aforementioned privacy statute to permit ballot teams to see voter registration databases; and

- For every board, the Clerk should prepare, in advance of the election, a handout regarding the tasks to be performed and any anticipated questions.  These handouts should be reviewed and commented on by the political parties and their lawyers in advance of the election to avoid operational and legal issues later.

### 10.7    Duplication Board

There was no training, but staff members were nearby to answer questions.  There were no written instructions or guidelines.  Duplication may not have always been accurate since the copied ballot was not always double-checked by both partners.  Time was wasted when members spent hours filling in every box completely, but were later told they could simply make an "X" in the box, and the scanner would be able to read it.

Possible Solutions:

- Once  the political parties tender a list of workers, such workers should be trained by the Clerk before the election; and

- Prepare written instructions with sample ballots to be duplicated.

### 10.8    Resolution Board

In addition to rejecting all ballots with write-in candidates, the optical scanners rejected thousands of ballots because the bar codes on the ballots did not match up or were blurred.  As a result of this printing problem, and the inability of the scanners to read write-in names, thousands of ballots were rejected and subjected to human intervention via the resolution teams, leading to a lack of uniformity, disenfranchisement of voters, and significant delays in counting the ballots.

#### 10.8.1  Tasks:

Rather than resolving disputed/rejected ballots, Board members spent hours going through ballots to make sure each ballot was in numerical order and that all the pages were ordered together.  Board members complained that the machines should have been able to perform this task.

In accord with C.E.R. 27.3, all blank ballots should have been subject to examination by Board members to determine if the ballot was "a true blank ballot or one that has been marked with a non-detectable mark."  Board members reported that they were never asked to examine any blank ballots.

On election night and the immediate days following, when Board members were not performing the foregoing clerical tasks, the Clerk's office implemented a procedure whereby the resolution teams had to work in conjunction with the scanning process. Since there were usually not enough people to operate the scanners, most of the time the resolution teams had no work to do. In reality, scanning and resolution are two different processes and they didn't need to be concurrent. If scanning had continued at full speed during the whole of the night following the election and the following day, resolution teams could have been kept fully busy and the entire process would have concluded much more quickly.

The ergonomics of the resolution process were very poor. Given the placement of the projector, there was no place to sit or stand to look at the projection without hunching over and twisting or craning one's neck. Eventually some resolution teams adopted the habit of pulling up chairs next to the operator and simply doing the resolution from the display on the operator's screen.

The software operations required to resolve each particular ballot contest were arcane. They differed depending on the problem the software had had in interpreting the marks on the paper. Conceptually, the resolution should simply be a point-and-click to record the resolved contest with a single click. In the case of contests where a voter may legitimately record multiple votes, the software should allow point-and-click to record each of the votes that the resolution team determines reflected the voter's intent. In many cases, the software required 5-10 clicks on different parts of the computer screen to record one resolved issue. Sometimes the operator had to go back and do it several different ways until the decision was accepted by the system. Resolution teams then had to check to make sure that the software had accepted the correct entry.

### 10.8.2 Training:

Training of resolution teams was haphazard, informal (mostly oral) and not uniform. Training consisted of watching other teams resolve live ballots. The Clerk and her staff were not able to answer some of the questions asked by the teams. Although written instructions were eventually made available, some teams reviewed them and others did not. The instructions were not clear, and were interpreted differently by different teams, particularly in the case of write-in candidates, as explained below. The instructions were subsequently modified verbally by staff members, as explained below, which led to more confusion. The Clerk staff should have been present at all times and should have been supervising the teams by randomly and constantly moving around the room to answer questions and observe the decisions being made.

### 10.8.3 Write-In Candidates:

Regarding write-in candidates, all ballots that contained the name of a purported write-in candidate were rejected by the scanners, and were subjected to the resolution process. Since the Republican candidate for the race for Boulder County District Attorney (Jason Savela) was a qualified write-in candidate (i.e. had fulfilled statutory requirements, but had not gone through the political party nomination process so as to appear as the Republican candidate opposed to the

Democratic nominee and incumbent Mary Keenan), there were thousands of rejected ballots for this race. Various problems were observed regarding these write-in ballots.

Unclear Ballot Instructions

First, the ballot itself was unclear as it was not readily apparent that the voter was required to completely fill in the oval box next to the term "write-in", and then fill in the name of the write-in candidate on the line provided below. C.R.S. § 1-7-114 only requires the voter to write "the name of the person in the blank space provided for write-in candidates." However, the SOS rules stated that "in order to be counted, the oval must be darkened…." C.E.R. 27.3. During the resolution process, many ballots that contained a name on the write-in line, but were not colored in, were not even read by the scanner, and were therefore not subjected to possible resolution and counting. Even if the voter circled the box, but no edge of the mark went inside the box, the scanner did not pick it up for resolution. Although the Resolution Board would see these attempted votes while resolving other portions of the rejected ballot, they were instructed that they could not resolve the write-in even though the voter intent was clear. Some Board members were eventually told that the scanners had been programmed not to detect such votes because the law required the oval to be colored in before the vote could be counted.

Erroneous Spellings of Candidate Names

Second, voters sometimes misspelled the name of the write-in candidate. This was true for many ballots where a voter attempted to vote for "Jason Savela." C.R.S. § 1-7-114 states, in pertinent part, that each "write-in vote may include a reasonably correct spelling of a given name, an initial or nickname, or both a given name and an initial or nickname, and shall include the last name of the person for whom the vote is intended." Since the statute requires the last name of the write-in, and is silent as to the spelling requirements, many ballots were rejected if the voter failed to spell "Savela" correctly. One team rejected all ballots for Jason Savela that were not spelled correctly even if only one letter was wrong, and this occurred throughout one entire day. Other teams counted the vote if the spelling of the last name was close. The most common observed misspellings of his last name, included "Cavello," "Sabella" and "Sabello." This disparate treatment lead to a lack of uniformity in resolution decisions, and more importantly, disenfranchised many voters. Thus, even though the voter intent was clear, depending upon the resolution team, the vote may or may not have been counted. Some Republicans reported that they were intimidated by other team members who insisted that the vote not be counted. Although the Clerk eventually interceded and directed the teams to count the vote if the last name was reasonably close, many votes were lost prior to such time. The Clerk refused, however, to recognize ballots that did not contain the last name. Thus, ballots with "Jason" or even "Jason S." were rejected. Given that there was only one Jason on the entire ballot, it would seem that voter intent was clear for Jason S., and even for "Jason." The foregoing results are inconsistent with the statutory requirement that "write-in votes shall be counted only when the intention of the elector is clearly apparent." C.R.S. § 1-7-114.

Failure to Provide Write-In Lists to Voters

This failure by voters to spell correctly the name of the write-in candidate was made possible and likely when voters were not provided a list of the write-in candidates. One third of the election judges reported that they did not have such a list on Election Day. Furthermore, even if the election judges had the list, Colorado law puts the burden on the voter to ask for such list, and does not allow the posting of the list nor is the voter allowed to take the list into a voting booth. *See* C.R.S. § 1-7-114(4) (b).

Possible Solutions:

- The procedures and laws regarding write-in candidates need to be revised to effectuate voter intent;

- The list of write-in candidates and the method of marking ballots for write-in candidates should be provided to each voter or posted in the voting booth;

- The County should use better voting system technology; this system's paper ballots with optical scanners do not work efficiently and require too much human intervention;

- Resolution instructions need to be generated and reviewed by experienced resolution board members and if possible, by the Pre-Election Task Force before they are put into use; and

- Training must take place prior to working with live ballots, and must be formal, consistent, and include explicit and clear written instructions.

10.9    Canvass Board

10.9.1  Composition of Canvass Board

C.R.S. § 1-10-101 provides that the Canvass Board shall consist of at least three persons. The county chairpersons of each of the two major political parties are entitled to appoint one or more representatives and the Clerk & Recorder is entitled to appoint one or more representatives to the Board. In this case, the Board consisted of five members, with two appointed by the Republican Party, two appointed by the Democratic Party and one appointed by the Clerk.

10.9.2  Duties of the Canvass Board

The duties, however, are far more than five people could possibly accomplish. C.R.S. § 1-10-101.5 sets forth two major duties for the Canvass Board: (a) "reconciliation" of the ballots cast in the election to "confirm that the number of ballots counted in that election does not exceed the number of ballots cast in that election"; and (b) certification of the "abstract of votes

cast in any election." Presumably, the duty to reconcile the ballots cast versus the ballots counted requires that an effort be made to examine the records of the precincts to ensure that the ballots counted did not exceed the ballots cast. Since there were 227 precincts, the task was not inconsequential. Apparently, the practice of the Boulder County Clerk & Recorder is to hire temporary workers (referred to incorrectly by the staff and volunteers as the Canvass Board) to review the records turned in by each precinct to accomplish such reconciliation. The Canvass Board representatives then typically rely on the findings of such workers in certifying the results.

10.9.3  Duty to Reconcile

The first issue that arose in this election was what was required in order to "reconcile" the records. The question arose as to whether "reconciliation" required that the Board conclude: (a) that the number of ballots cast equaled the number of ballots counted such that there was a classic reconciliation; or (b) that the number of ballots counted did not exceed the number of ballots cast. Since the statutory language specifically referenced the latter, some members of the Board concluded that they were not to consider the situation where the ballots counted were less than the ballots cast (i.e. votes were somehow lost between the ballot box and the counting machines) or continue their accounting until the numbers were truly reconciled or equal. Thus, per the explicit language of the statute, the duty purported to require an accounting to ensure only that the ballots counted did not exceed the ballots cast.

The next issue that arose was whether the records of every precinct had to be canvassed or whether a statistically significant sample could be taken.

Finally, since the Clerk was able to generate a precinct-by-precinct report regarding ballots cast vs. ballots counted, the issue arose as to whether the Board could conclude that there had been a proper reconciliation as required. **Since the report indicated on its face that in 54 precincts the number of ballots counted on Election Day was larger than the number of ballots cast, the statutory requirement above was not literally met**.

10.9.4  Duty to Certify

Faced with this conclusion, the Canvass Board had to decide whether it could certify the results since there was no exact reconciliation. However, the numbers were clearly statistically insignificant for this particular election since most of the precincts counted only one ballot more than the recorded ballots cast, and no contest on the ballot was decided by that few votes. Furthermore, on a county-wide basis, the number of ballots counted was equal to, or less than, the number of ballots cast. In attempting to determine the extent of its duty, the Board discussed its duties and sought advice from the Secretary of State. The Board also inquired about the practices of other boards, and learned that some boards simply sign off on the results without any investigation or attempted reconciliation. Based on such good-faith inquiries, the Canvass Board decided to write its own findings rather than use the form language of the standard certification. Two of the five members of the Board (one Republican and one Democrat) declined to certify the

results. However, since a majority agreed to certify the results, the abstract of votes was forwarded on to the Secretary of State in a timely manner.

Possible Solutions:

- The statutory language of C.R.S. § 1-10-102 et. seq must be clarified so that canvass boards will have a clear understanding of their duties; and

- Canvassing, reconciliation, and certification procedures should be uniform throughout the state; and

- The SOS should adopt an audit/reconciliation protocol for each type of voting system being utilized in Colorado because auditing/reconciliation is affected by the type of system used.

### 10.9.5 Conducting the Canvass

The canvass process necessarily includes absentee, early, election-day ballots, both regular and provisional. However, all mention of this canvass in this Report refers to election-day regular ballots only. The Clerk set up a separate canvass team to canvass early and absentee ballots, and the Republican Party was neither informed of the existence of such team nor invited to provide partisan workers to participate. It is unknown who canvassed the provisional ballots.

### 10.9.6 Commencement of the Canvass

The decision to start the canvass on the Monday following the election was premature given the fact that the ballots had not been counted and the entire canvass process must be based on the final ballot count. Nonetheless, staff members directed workers to disassemble and file many of the contents of the satchels from each precinct: unused ballots, sign-in sheets, election judges' reports, and poll books. After more than a day spent in this process, it was then explained by the staff that in order to reconcile each precinct, each of these items needed to be retrieved by the team canvassing that precinct. In other words, everything the workers had previously separated had to be located and reassembled by precinct. In many cases it took hours to find all of the materials for the precinct because of filing errors and misplacement of materials. Keeping all of the materials in the satchels until it was time to resolve each precinct would have saved an enormous amount of time and avoided the many situations where important material could not be located quickly or easily. In some cases, hours were spent searching for material that had never been returned to the Clerk's Office, an oversight which would have been obvious if all the materials had been left in the bag. Careful check-in of materials at the end of election night would have further eased this problem.

Beginning the actual canvass before the computer-generated tally reports were available also led to a tremendous amount of unnecessary work. The reconciliation for a precinct was complete when the information from the election judges (ballots cast, ballots spoiled, provisional ballots cast, unused ballots returned) mathematically agreed with the count of ballots issued to

the precinct, and the number of ballots cast that were recorded in the computer system for election day voting from that precinct equaled the election judges' count. Without the tally reports, no reconciliations could be completed. Returning to a partially-completed reconciliation days later when the tally reports were made available caused significant confusion and delay and again introduced problems with managing all of the materials needed for each precinct's resolution.

If Boulder County continues to canvass precinct-by-precinct, a much more methodical work plan needs to be established and more attention given to the management of the process.

### 10.9.7  Facilitation of the Canvass

Canvassing is a complex process that could be greatly facilitated by computer support that is tailored to the tasks to be performed. In designing the format for the tally reports, the software designers apparently had not considered that each precinct needed to be separately reconciled, and thus, that a reporting format that printed out one page per precinct would be crucial. Instead, the tally reports were printed out so that partial data for many precincts were reported on each page, with the complete data for a single precinct spanning many pages. Since each report involved several hundred pages, the thirty or so people conducting the canvass ended up having to share a few copies of each report rather than having a single sheet of paper that could be exclusively used for each precinct. Canvassing has specific requirements for reporting, and reports should be designed to efficiently and effectively support the canvass.

More is needed than computer support since canvassing is a labor-intensive process. Canvass workers must be apprised of the objectives of the canvass and must be adequately trained to perform the tasks of the canvass. For this election, canvass workers were provided with very little training and the training that was provided did not address the common problems that continually arose. A bipartisan team of experienced canvassers should be designated to handle questions as they arise and to help with particularly tough reconciliation issues. It would also be helpful if a handout was prepared for canvassers, which included a step-by-step sample of how to conduct a canvass of a precinct.

### 10.9.8  Reconciliation Process

During the conduct of the Canvass, it became apparent that a number of changes should be considered in order to make the task of reconciliation easier. The problems and solutions include:

Voter Sign-In Slips:

Voter sign-in slips were difficult to read (signatures illegible) and were not designed to expedite the canvassing effort. Reconciling voter slips to poll books was time-consuming;

Possible Solutions:

- Sign-in slips should contain one column that says "print your name," another column that says "sign your name," another column for "type of voter ID provided," and a column that notes whether the voter was given a provisional or regular ballot, left without voting, or was directed to go to another precinct; and

- Ask election judges when polls close to put sign-in slips in alphabetical order so they can be compared quickly to the poll book, which is in alpha order.

Unused Ballots and Spoiled Ballots:

Election judges failed to return unused ballots (one election judge had them in the trunk of her car until the deadline for canvassing). During canvassing, unused ballots were difficult to locate as they were placed in the warehouse in no order.

Spoiled ballots were not handled properly by some election judges. When voters spoiled a page of the ballot (e.g. p. 2), rather than providing a whole new ballot some election judges would simply substitute a new page 2 of another ballot for the spoiled page, which then affected the ballot sequence numbers and the scanning process.

Possible Solutions:

- Establish a strict check-in procedure at reception and staging whereby each election judge must review and sign a receipt listing the materials returned, and require the receiving worker to counter-sign the receipt after a visual inspection of the materials;

- If this voting system is retained, election judges need better instruction regarding the handling of spoiled ballots and the effect that mismatching ballots have on the optical scanner system;

- Election judges should also be trained to ensure that ballot pages are kept in consecutive order when placed in the ballot box by the voter. Otherwise, as happened here, canvassers must expend a massive number of man-hours to find missing pages and reassemble ballots; and

- Unused ballots should be set out by precinct number and in numerical order in the warehouse so that they can be retrieved readily.

Missing/Incorrect Election Judges Report Forms:

Not all election judges turned in the Election Judges Report Form for their precinct, and some election judges included provisional ballots in the ballots cast figure and other election judges did not. Election judges also made mathematical errors when completing the Report;

Possible Solutions:

- The Judges Report form should be listed on the receipt mentioned above to ensure that it is turned in by the election judge, and if not, the election judge should be required to fill out the report before leaving the warehouse; and

- The Judges Report form should be redesigned so that the accounting for provisional ballots is clear; election judges should be advised in advance of the election to bring a calculator, or else the Clerk should provide one with the election supplies.

Failure to Document Voters Given Provisional Ballots:

Canvassers were unable to determine what type of ballot the voter was given because a "P" was not recorded on sign-in sheets or poll books;

Possible Solutions:

- Ensure that the type of ballot provided is recorded by all election judges uniformly, whether on the poll book, sign-in sheet, or report.

Precinct Records Location:

Locating various records from the different precincts was difficult and time-consuming as the boxes of precinct material were stacked randomly around the warehouse;

Possible Solutions:

- All materials should be laid out in the warehouse by precinct and in numerical precinct order.

10.9.9  Failure to Reconcile

The more important issue, however, which was never fully addressed, was why so many precincts could not be reconciled. When canvass teams found numerous precincts where the number of ballots cast by voters on Election Day (as recorded in the computer system) exceeded the number of ballots cast according to the precinct election judges' records (and confirmed by sign-in slips and poll book entries), teams were told that it must be election judges' errors. Teams quickly determined that this could not possibly be the answer in many of the cases because the physical ballots reconciled perfectly. If a precinct had 1,000 ballots issued to it, and the election judges recorded 800 voters voting, no spoiled ballots, and 200 unused ballots, and the canvass team physically counted 800 signatures in the poll book and physically counted 200 unused ballots, then a computer system report showing 802 ballots cast from that precinct on Election Day is necessarily dubious. It took several days after these situations were pointed out before the Clerk's staff acknowledged that it might not be a problem with the election judges. While several scenarios were proposed to explain the source of the extra ballots, none of the explanations fully reconciled the problem.

Again, such reconciliation issues are not without precedent in Boulder County. In 2002, the "Canvass Board identified anomalies in the number of ballots cast versus the number of voters that election judges recorded as voting…." *See* Boulder County Press Release, dated 11/15/02. **While in 2002 apparently only two precincts were reported as not being reconciled, in 2004 the number of precincts that were identified as not being reconciled had risen to 54**. In 2002, the ballots from the two precincts were actually recounted. As a result of the recount, it was concluded that the reconciliation anomalies "likely came from counting 30 ballots twice" in one precinct and counting "11 ballots twice" in the other precinct. *Id*. As a result of such recount the "vote totals for each precinct were adjusted to reflect the new totals." *Id.*

In the 2004 General Election, **no such attempt was made to reconcile the numbers in 54 precincts** where as explained in Section 10.9.3 above, the number of ballots counted on Election Day were larger than the number of ballots cast. While some failures to reconcile may indeed be attributable to error by election judges, other explanations may be found in errors by the voting system tabulation software or errors relating to the scanning and/or duplication process. *See* Exhibit 2 at Note 17.

With the advent of more close elections here and around the country, such as in the state of Washington, it becomes even more important to reconcile such numbers since a few ballots here and a few ballots there could be the difference in a narrow margin election. **While the foregoing discrepancies may not have changed the outcome of any of the contests, failure to address meaningfully such reconciliation issues not only undermines present voter confidence in the integrity of the electoral process but raises the specter of illegitimacy in future elections.**

## IV.    Conclusion

Due to extensive media coverage of past controversial elections, there is a national clamor for electoral reform. During this election, Republican and Democrat volunteers in Boulder County had significant access to the behind-the-scenes workings of the election system. As a result of such experiences, many volunteers in both political parties expressed alarm and concern regarding the management and administration of the election system, not only in Boulder County, but in the state of Colorado. As this Report makes clear, new voting systems alone will not solve the voting problems evidenced in this past election. Statewide standards and practices for the management and administration of the electoral process must be adopted, including uniform and clear standards for voter registration, voter registration drives, provisional ballots, voter identification, polling-place conduct, election-judge training, ballot counting, canvassing and the certification of results.

Such issues have statewide implications that should be addressed by the SOS, the Clerks, and the Colorado Legislature, as the case may be, to ensure that the election process is

transparent, accountable, efficient, and cost effective.  Measures must also be taken in all of these areas to minimize the potential for fraud and abuse.

In particular, the following identified problem areas are worthy of legislative clarification and reform by our elected officials:

(1)     Statutory provisions and election rules regarding qualifications for voter registration, residency requirements, methods of voter registration, and requisite deadlines must be reviewed and revised to ensure that eligible citizens are registered to vote.  *See* C.R.S. § 1-2-101, § 1-2-102, § 1-2-216, § 1-2-217, § 1-2-504.

(2)     Emergency registrations should be limited to in-person registration at the Clerk's office, and should not be permitted during the election based merely on a claim by the elector that he registered via a voter registration drive.  *See* C.E.R. 26.7.

(3)     Voter registration drives must be regulated to ensure that all voter applications are delivered to the appropriate Clerk in a timely manner, and measures should be implemented to deter fraudulent conduct by registration drive workers.

(4)     Statutes and rules regarding the usage, verification, and counting of provisional ballots need clarification to minimize confusion by voters and election officials in order to avoid disenfranchisement, voter abuse, and increased election costs.  *See* C.R.S. § 1-9-301, § 1-9-301 (4), and C.E.R. 26.

(5)     Voter identification requirements need to be clearly defined well in advance of any election, and should be more narrowly tailored in order to prevent fraud.  *See* C.R.S. § 1-10-104 (19.5) (a), § 1-13-705 and C.E.R. 30.13.1.

(6)     Poll watchers and provisional ballot teams must be able to view voter ID and registration records (poll books and registration databases) to ensure that election officials are applying election rules properly, and to ensure that the votes of eligible electors are counted.  *See* C.R.S. § 1-2-302 (8) and C.E.R. 8.5.

(7)     Rules, procedures, and forms relating to voter challenges at the polling place should be clarified and amended to ensure that voters, election officials, and poll watchers understand the requirements and consequences of challenges, including whether an elector may be refused a ballot, and if a ballot is given, whether it should be a provisional or regular ballot. *See* C.R.S. § 1-9-201, § 1-9-202, § 1-9-203, § 1-9-204, § 1-9-205, and C.E.R. 26.15.

(8)     Electioneering and election-related activities conducted by individuals and organizations at polling places need to be regulated further to protect voters from being coerced, harassed, or intimidated, and the 100-foot rule should be clarified and amended to provide a zone of protection or "bubble" around voters waiting in line to vote.  *See* C.R.S. § 1-5-105 (1), § 1-13-713, § 1-13-714, and SOS HAVA Election Alert, dated 11/2/04.

(9)     Statutes, election rules, and voting systems regarding write-in votes need to be modified to ensure that electors who cast votes for write-in candidates are not disenfranchised because electors failed to spell the candidate's name correctly. *See* C.R.S. § 1-7-114 and C.E.R. 27.3.

(10)    The statutory duties of the Canvass Board must be clarified and uniform procedures for canvassing, reconciliation, and certification should be adopted and applied by the Clerks. *See* C.R.S. § 1-10-101.5, § 1-10-102, § 1-10-103, and § 1-10-104.

It is equally important that appropriate measures be adopted to ensure that voting systems, registration systems, and the soon-to-be implemented centralized statewide SOS database be reliable, secure, accountable, and transparent.

In order to restore, maintain, and increase voter confidence in the integrity of the electoral process, it is imperative that the public be given a meaningful opportunity to review and comment on election procedures, rules, and voting systems before elections are held. Moreover, it is critical that bipartisan participation and oversight be incorporated into every facet of the election process. During this election, volunteers and temporary workers from both of the major political parties worked together countless hours at the Clerk's office to ensure a fair and honest election. The Committee hopes that this Report will spark earnest and constructive bipartisan dialogue among our elected officials in an effort to ensure that significant electoral reforms are implemented before the next election cycle.

# EXHIBIT 1

BOULDER COUNTY REPUBLICAN PARTY
SURVEY OF VOLUNTEER WORKERS
2004 GENERAL ELECTION

Thank you for having served as a volunteer/temporary worker on behalf of the Boulder County Republican Party (BCR) during the 2004 General Election.

We would greatly appreciate your comments to help us improve the reliability and integrity of the electoral process. Your collective feedback will be presented in a constructive manner to our public officials so as to recommend positive changes for future elections.

**This questionnaire is divided into sections that correspond to the areas of responsibility that are listed below.**

**Please indicate below the areas of the electoral process in which you served, then go to that section and answer the pertinent survey questions.**

___ I. **Poll Watcher** (Early Voting or Election Day), go to Section I (page 2);

___ II. **Election Judge** (Early Voting or Election Day), go to Section II (page 3);

___ III. **Reception & Staging Board** (Received Ballots and Election Supplies delivered by Election Judges after polls closed to Clerk & Recorder sites in Boulder, Lafayette, and Longmont), go to Section III (page 6);

___ IV. **Provisional Ballot Teams** (Reviewed Provisional Ballot envelopes accepted by Clerk's staff after verification process, and, if appropriate, opened envelopes and removed ballots for counting process), go to Section IV (page 7);

___ V. **Duplication Board** (Duplicated damaged/defective ballots and Provisional Ballots cast in wrong precinct), go to Section V (page 8);

___ VI. **Resolution Board** (Resolved ballots rejected by the scanners for causes including overvote, blank ballot, and write-ins), go to Section VI (page 9);

___ VII. **Machine Operator** (Operated machines that scanned and counted ballots), go to Section VII (page 9);

___ VIII. **Canvass Board** (Reviewed and reconciled information provided by Election Judges regarding number of ballots cast), go to Section VIII (page 10);

___ IX. **Other** (A task that is not listed above), go to Section IX (page 11).

### I.  POLL  WATCHER

*TRAINING (POLL WATCHER)*

(1)  Did you receive Poll Watcher training or instruction?  If so, briefly describe the nature of the training you received, including when and by whom you were trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3) Were there written instructions or guidelines, and were they adequate? If not, why not?

(4) What recommendations would you make to improve the process for recruitment and training of Poll Watchers for the Republican Party?

*SERVING AS A POLL WATCHER*

(5) Did you serve as a Poll Watcher for Early Voting or for Election Day?

(6)  What was your understanding of your duties as a Poll Watcher?

(7)  What problems, if any, did you experience in carrying out your duties, and were these problems resolved to your satisfaction?

(8) At the check-in area, did the Election Judge clearly and audibly announce the name of each Voter in a loud and distinct voice?

Did the Judge also clearly announce the form of identification being presented by the Voter?

(9) Other than Colorado drivers' licenses, what other forms of ID did you observe being presented by Voters?

(10) Did Election Judges permit you to perform your duties?
If not, please describe the problems you encountered.

(11) What other problems, if any, did you observe with Voters, Election Judges, third parties (for example, activist groups), and how were these problems resolved?

*PROVISIONAL BALLOTS*

 (12)  Did you observe Provisional Ballots being given to Voters?

 (13)  For what reasons?

 (14)  Was the Voter taken aside to administer the oath/fill out the affidavit on the envelope?

 (15)  What instructions was the Voter given regarding what to do with the envelope and ballot after the Voter filled out the ballot?

 (16)  Did the Voter put the ballot in the envelope before returning both to the Election Judge?

 (17)  Were the Provisional Ballots and envelopes kept apart from the Regular Ballots?

 (18)  Did you witness any Provisional Ballots being placed in the Regular Ballot box?

*POLL WATCHER CHALLENGES*

(19)  Did you make or attempt to make any Voter challenges?

(20)  If so, did you make it in writing?

(21)  Were the challenge forms available to you at the polling place?

(22)  What were the grounds for your challenge?

(23)  What was the outcome? (Voter given a Regular or Provisional Ballot, or Voter declined to vote).

(24)  Were you intimidated in any way during your exercise of a challenge?  Please explain.

*POLL WATCHERS FROM OTHER POLITICAL PARTIES*

(25)  Were there one or more Poll Watchers present from any other parties?

(26)  Do you know whether they tendered proper credentials from the Clerk & Recorder's office?

(27)  Did any other Poll Watchers behave in any manner that you believed was inappropriate or illegal?  Please explain.

(28) Was the situation brought to the attention of the Election Judge, and if so, what was the outcome?

*IN CLOSING (POLL WATCHER)*

(29) What would you recommend that would facilitate the task or improve the process of poll watching in future elections?

(30)  Do you have any additional observations or comments?

(31) Would you be willing to serve as a Poll Watcher again?
If not, why not?

## II. ELECTION  JUDGE

*ELECTION JUDGE TRAINING*

(1) Did you receive Election Judge training or instruction?  If so, briefly describe the nature of the training you received, including when and by whom you were trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3) Did you receive and read the Election Judge Manual?
Was it helpful?
What changes would you recommend?

(4) Were there other written instructions or guidelines?
If so, were the written instructions adequate, and if not, why not?

(5) What recommendations would you make to improve the process for recruitment and training of Election Judges?

*SERVING AS AN ELECTION JUDGE*

(6) Did you serve as an Election Judge for Early Voting, and if so, at what sites and for how many days?

(7) Did you serve as an Election Judge for Election Day, and if so, at what precinct and polling place?

(8)  What was your understanding of your duties as an Election Judge?

(9) What problems, if any, did you experience in carrying out your duties, and were these problems resolved to your satisfaction?

(10) How were you kept informed of last-minute changes in election rules?

(11) What effect, if any, did last-minute changes in election rules have on your ability to perform your duties?

*BALLOT STYLES*

(12) If your precinct had multiple ballot styles, did this cause any problems, and if so, what would you recommend to avoid the same problems in the future?

*PROVISIONAL BALLOTS*

(13) What was your understanding as to when a Voter should be given a Provisional Ballot?

(14) Were Provisional Ballots given to Voters?

(15)  For what reasons?

(16)  Was the Voter taken aside to administer the oath/fill out the affidavit on the envelope?

(17)  What instructions was the Voter given regarding what to do with the envelope and ballot after the Voter filled out the ballot?

(18)  Did the Voter put the ballot in the envelope before returning both to the Election Judge?

(19)  Were the Provisional Ballots and envelopes kept apart from the Regular Ballots?

(20)  Did you witness any Provisional Ballots being placed in the Regular Ballot box?

(21)  What problems, if any, did you encounter with the use of Provisional Ballots?

*ELECTION JUDGE CHALLENGES*

(22) Did you make or attempt to make any Voter challenges?

(23) If so, did you make the challenge in writing?

(24) Were the challenge forms available to you at the polling place?

(25) What were the grounds of your challenge?

(26) What was the outcome?  (Voter given a Regular or Provisional Ballot, or Voter declined to vote).

(27)  Were you intimidated in any way during your exercise of a challenge?  Please explain.

*WRITE-IN CANDIDATES*

(28) Were you given an explanatory letter about write-in candidates to provide to voters?

(29) If not, did you have a list of the names of the write-in candidates available for Voters?

(30) Did any Voters ask for the names of the write-in candidates, and if so, what assistance did you provide the Voter?

*ELECTION JUDGES REPORT*

(31) Did you have any problems filling out the Election Judges Report, which required you to reconcile the number of unused Ballots, spoiled Ballots, and cast Ballots?

(32)  Would you recommend any changes to improve this form/report?

*POLL  WATCHERS*

(33) Were there one or more Poll Watchers present from the political parties?

(34)  Did any political party have more than one Poll Watcher present at any given time?

(35)  Do you know whether the Poll Watchers tendered proper credentials from the Clerk & Recorder's office?

(36)  Did any of the Poll Watchers attempt to make a challenge to any Voter?  If so, what was the response of you and/or your fellow Election Judges?

(37)  Were you intimidated by any Poll Watcher, and if so, please explain.

(38) Did any of the Poll Watchers behave in any manner that you believed was inappropriate or illegal?  Please explain.  What was the outcome?

*ELECTIONEERING*

(39) The law prohibits election-related activities within 100 feet of the polling place.  From what point was the 100 feet measured?  For example, was it measured from inside the polling place, or from the front door of the polling place?  How was it measured, with a measuring tool or by estimation?

(40) Were there any electioneering materials within the 100-foot limit?

(41) Were there any problems with individuals conducting election-related activities within the 100 foot limit?  What was the outcome?

(42) Were Voters standing in line to vote subjected to electioneering efforts?   If so, were the waiting Voters within the 100 foot limit or beyond it?

*IN CLOSING (ELECTION JUDGE)*

(43) What would you recommend that would facilitate the task or improve the process of being an Election Judge in future elections?

(44)  Do you have any additional observations or comments you would like to offer?

(45) Would you be willing to serve as an Election Judge again?
If not, why not?

**III.   RECEPTION & STAGING BOARD**  (Republican/Democrat teams received Ballots and Election Supplies delivered by Election Judges after polls closed to Clerk & Recorder sites in Longmont and Boulder.)

*TRAINING (RECEPTION & STAGING)*

(1) Did you receive training or instruction for the tasks of the Reception & Staging Board?   If so, briefly describe the nature of the training you received, including when and by whom were you trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3) Were there written instructions or guidelines, and were they adequate?  If not, why not?

*SERVING ON THE RECEPTION & STAGING BOARD*

(4) What was your understanding of the tasks of the Reception & Staging Board?

(5) What problems, if any, did you experience in carrying out your duties, and were these problems resolved to your satisfaction?

(6) Was there a check-in list of materials to be delivered by the Judges?

(7)  Did someone in Reception & Staging check off each item that was to be delivered before allowing the Election Judge to leave?

(8)  Was a receipt given to the Election Judge?

(9) Was the staging completed precinct-by-precinct such that unused Ballots, spoiled Ballots, Regular Ballots, Provisional Ballots, sign-in slips, poll books, etc. were organized and laid out by precinct?

*IN CLOSING (RECEPTION & STAGING)*

(10) What would you recommend that would facilitate the task or improve the process of Reception & Staging in future elections?

(11)  Do you have any additional observations or comments?

(12) Would you be willing to serve on the Reception and Staging Board again?   If not, why not?

**IV. PROVISIONAL  BALLOT  TEAMS**  (Republican/Democrat teams reviewed Provisional Ballot envelopes accepted by Clerk's staff after verification process, and, if appropriate, opened envelopes and removed ballots for counting process.)

*TRAINING (PROVISIONAL BALLOTS)*

(1)  Did you receive training or instruction?  If so, briefly describe the nature of the training you received, including when and by whom you were trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3) Were there written instructions or guidelines, and were they adequate?  If not, why not?

*SERVING ON A PROVISIONAL BALLOT TEAM*

(4) What was your understanding of your duties as a member of the Provisional Ballot Team?

(5) What  problems, if any, did you experience in carrying out your duties, and were these problems resolved to your satisfaction?

(6) What concerns, if any, arose during your work with Provisional Ballots, including, if applicable, ballot security, form and substance of Provisional Ballot affidavit/envelope, accuracy and reliability of the verification/acceptance process, and uniformity of rules and procedures?

*IN CLOSING ( PROVISIONAL BALLOTS)*

(7) What would you recommend that would facilitate the task or improve the process regarding Provisional Ballots in future elections?

(8)   Do you have any additional observations or comments?

(9) Would you be willing to serve on a Provisional Ballot team again?
If not, why not?


## V.  DUPLICATION BOARD (Republican/Democrat teams who duplicated damaged or defective ballots and Provisional Ballots cast in wrong precinct)

*TRAINING (DUPLICATION BOARD)*

(1) Did you receive training or instruction for the tasks of the Duplication Board?   If so, briefly describe the nature of the training you received, including when and by whom were you trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3) Were there written instructions or guidelines, and were they adequate?  If not, why not?

*SERVING ON THE DUPLICATION BOARD*

(4) What was your understanding of your duties as a member of the Duplication Board?

 (5) What problems, if any, did you experience in carrying out your duties, and were these problems resolved to your satisfaction?

(6) What concerns, if any, arose during your service on the Duplication Board, including, if applicable, issues of ballot security, uniformity of procedures, partial ballots, discernment of voter intent, and accuracy and reliability of the duplication process?

*IN CLOSING (DUPLICATION BOARD)*

(7) What would you recommend that would facilitate the task or improve the process regarding Duplication Board in future elections?

(8) Do you have any additional observations or comments?

(9) Would you be willing to serve on the Duplication Board again?
If not, why not?

**VI. RESOLUTION  BOARD** (Republican/Democrat teams who resolved optical scan ballots rejected by the scanners for causes including overvote, blank ballot, and write-ins)

*TRAINING (RESOLUTION BOARD)*

(1) Did you receive training or instruction for the tasks of the Resolution Board?  If so, briefly describe the nature of the training you received, including when and by whom were you trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3) Were there written instructions or guidelines, and were they adequate?  If not, why not?

*SERVING ON THE RESOLUTION BOARD*

(4) What was your understanding of your duties as a member of the Resolution Board?

(5) What problems, if any, did you experience in carrying out your duties, and were these problems resolved to your satisfaction?

(6) Were you ever given the opportunity to examine blank Ballots rejected by the scanners?   If so, what did you conclude?

(7) What, if any, other concerns arose during your service on the Resolution Board, including, if applicable, issues of ballot security, discernment of voter intent, and uniformity of procedures?

(8) During your service, what, if any, problems did you observe with the operation of the optical scanners, and how were these problems resolved?

(9) What, if any, documentation was made regarding such problems, and by whom was the documentation made?

*IN CLOSING (RESOLUTION BOARD)*

(10) What would you recommend that would facilitate the task or improve the process of Resolution Board in future elections?

(11) Do you have any additional observations or comments?

(12) Would you be willing to serve on the Resolution Board again?
If not, why not?

## VII. <u>MACHINE  OPERATOR</u>

TRAINING (SCANNING/COUNTING MACHINES)

(1) Did you receive training or instruction?  If so, briefly describe the nature of the training you received, including when and by whom you were trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3) Were there written instructions or guidelines, and were they adequate?  If not, why not?

*SERVING AS A MACHINE OPERATOR*

(4)  What was your understanding of your duties?

(5) What problems, if any, did you observe or experience?

(6) Were these problems and concerns resolved to your satisfaction, and how?

 *IN CLOSING (MACHINE OPERATOR)*

(7) What would you recommend that would facilitate the task or improve this process?

(8) Do you have any additional observations or comments?

(9) Would you be willing to serve as a Machine Operator again?
If not, why not?

## VIII. <u>CANVASS BOARD</u> (Republican/Democrat teams reviewed and reconciled information provided by Election Judges regarding number of ballots cast)

*TRAINING (CANVASS BOARD)*

(1) Did you receive training or instruction for the tasks of the Canvass Board?   If so, briefly describe the nature of the training you received, including when and by whom were you trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3)  Were there written instructions or guidelines, and were they adequate?  If not, why not?

*SERVING ON THE CANVASS BOARD*

(4)  Indicate which types of ballots you canvassed:
Early ___;    Absentee ___;    Election Day ___;    Provisional ___.

(5) What was your understanding of the purpose of the Canvass Board?

(6)  What was your understanding of your duties on the Canvass Board?

(7) What problems, if any, did you observe or experience in carrying out your duties, and were these problems resolved to your satisfaction?

(8) What concerns, if any, arose during your work on the Canvass Board, including, if applicable, ballot security, uniformity of procedures, reconciliation and documentation of ballots cast, and accuracy and reliability of the canvassing process?

*IN CLOSING (CANVASS BOARD)*

(9) What would you recommend that would facilitate the task or improve the process of canvassing?

(10) Do you have any additional observations or comments?

(11) Would you be willing to serve again on the Canvass Board?
 If not, why not?

**IX.  OTHER**   (a task not listed elsewhere on this survey)
Give this task a name or brief description _____

*TRAINING*

(1) Did you receive training or instruction for this task?   If so, briefly describe the nature of the training you received, including when and by whom were you trained.

(2) Was the training adequate in your opinion, and if not, why not?

(3)  Were there written instructions or guidelines, and were they adequate?  If not, why not?

*PERFORMING THIS TASK*

(4) What was your understanding of your duties?

(5) What problem and concerns, if any, arose during your performance of this task?

(6) Were these problems and concerns resolved to your satisfaction?

*IN CLOSING*

(7) What would you recommend that would facilitate the task or improve the process regarding this task?

(8) Do you have any additional observations or comments?

(9) Would you be willing to serve again at this task? If not, why not?

# EXHIBIT 2

**Note 1**

Voter Registrations:

According to the Clerk's staff, the new registrations for Boulder County over the last four years were as follows:

| Year | New Registrants |
|------|-----------------|
| 2000 | 23,442 (includes Broomfield which became a county in 2001) |
| 2001 | 16,761 |
| 2002 | 17,031 |
| 2003 | 15,087 |
| 2004 | 34,682 |

**Note 2**

According to the Clerk's staff, the process of registering voters by mail is as follows:

| Step | Activity |
|------|----------|
| 1. | Registration application is received by the Clerk and date stamped since the receipt date constitutes the "date of application"; |
| 2. | Application is reviewed to determine if it should be processed by Boulder County or by another county. If the applicant does not reside in Boulder County, the application must be forwarded to the appropriate County Clerk; |
| 3. | Staff member enters data from the application into the computer, and generates a label for each application that contains information such as the applicant's name and address, date of the application, initials of the data-entry person, and a reception number which is an identifying number assigned to that application; |
| 4. | If the application does not provide sufficient information to fill the required fields (i.e. valid address, date of birth, or signature), then the application has to be forwarded onto another staff person who will attempt to contact the voter to obtain the required information; |
| 5. | Staff member affixes label to each application; |
| 6. | Staff member ensures accuracy and completeness by reviewing both the application and the label and comparing the information on them to the data entered in the database; |
| 7. | Staff member scans the application and captures the applicant's signature to be used for future verification of voter identity; and |

8.    Hard copies of the application are placed in storage for 25 months.

**Note 3**

In 2004, according to the Clerk's staff, 108,715 transactions occurred in relation to voter registrations (includes new registrations, change of address, change of party affiliation, etc.).  The annual break-down of such transactions was as follows for the last five years:

| Year | Transactions |
|------|--------------|
| 2000 | 71,443 |
| 2001 | 55,868 |
| 2002 | 63,946 |
| 2003 | 86,922 |
| 2004 | 108,715 |

During 2004, the 108,715 transactions regarding voter registration records occurred during the following time periods:

| Dates | Transactions |
|-------|--------------|
| 1/1/04-3/14/04 | 9,414 |
| 3/15/04-6/14/04 | 11,877 |
| 6/15/04-7/12/04 | 11,195 (Primary Election 8/10/04) |
| 8/11/04-9/14/04 | 18,177 |
| 9/15/04-10/4/04 | 37,163 |
| 11/3/04-12/31/04 | 20,899 |
| Total for year | 108,715 |

The number of staff required to perform the daily entries relating to voters was 6.575 FTE, and is broken-down as follows:

| Item | Activity | Days |
|------|----------|------|
| 1. | Separating for other counties | 20 |
| 2. | No Change entries | 20 |
| 3. | Entering 108,715 transactions @150 /day | 725 |
| 4. | Verifying applications @300/day | 362 |
| 5. | Labels @150/hour | 91 |
| 6. | Confirmation cards @150/hour +formatting +mailing | 36 |
| 7. | Scanning @ 2000/day | 54 |
| 8. | Capturing and verifying forms and signatures @400/ day | 270 |
| | Total | 1578 |

(6.575 FTE years)

**Note 4**

Provisional Ballots Cast/Rejected:

According to the Clerk's staff, 2,975 provisional ballots were cast in the 2004 General Election. Of that number, 2,473 were accepted and counted, and 502 were rejected. The rejected ballots were not counted based on the following grounds:

| Item | Reason For Rejection | Number |
|------|----------------------|--------|
| 1. | Not Registered in Colorado | 296 |
| 2. | Absentee ballot had already been received and counted | 14 |
| 3. | Not eligible (felons incarcerated or on parole) | 4 |
| 4. | Incomplete (the voter failed to provide enough accurate information on the affidavit, and the staff was unable to locate the voter in any of the databases) | 19 |
| 5. | Not registered in Boulder County, but registered in another Colorado county (voters who voted in Boulder County rather than their county of residence and where registered); | 100 |
| 6. | Empty Envelopes (when opened, there was no ballot; the likely explanation is that the voter removed the ballot from the envelope and placed it in the regular ballot box such that it was counted as a regular ballot); | 12 |
| 7. | Provisional Envelope Affidavit Not Signed (voter would have been contacted by the staff and asked to come in and sign; when voter failed to do so, the ballot was rejected) | 32 |
| 8. | Spoiled Envelopes (voter makes a mistake and completes another envelope or voter leaves the polling place without voting); | 24 |
| 9. | Referral to DA (suspected case of criminal conduct) | 1 |
| | Total: | 502 |

**Note 5**

Information from Clerk for Report:

After the election, the Chairperson of the Committee interviewed Nancy Jo Wurl, Chief Deputy County Clerk of Boulder County regarding various issues germane to this report that arose during the 2004 General Election. Ms. Wurl and other members of the staff were extremely helpful in providing information for this report, including the statistics reflected in Notes 1-4 above.

Furthermore, it should be acknowledged that throughout the election the Clerk and her staff were helpful and courteous and made every effort to work with the members of this Committee to assure a fair and transparent election. This Committee did not observe or have any reason to believe that the staff might be engaged in any effort to affect the outcome of the election.

**Note 6**

Regional Voting Centers:

Regional Voting Centers are used in place of precinct polling places and allow voters to vote at any center in the county. Larimer County was the first county in the nation to implement voting centers, and election officials in Denver, Adams and Broomfield Counties are in the process of converting to voting centers. Voting centers have the advantage of reducing election costs and voter confusion by decreasing the number of election judges required and eliminating precinct voting rules that confuse voters and are inconvenient. However, one of the obstacles to voting centers is that a number of large facilities must be rented to accommodate the increased number of voters, and some counties may not have a sufficient number of such facilities. Furthermore, for residents who live in the mountains or rural areas, driving to voting centers may be much less convenient than voting at nearby neighborhood polling places.

**Note 7**

Voter Registration Drives (Fraud and Negligence):

Fraud:

On 10/11/04, the 9News I-Team reported that it had documented "719 cases of potentially fraudulent forms at county election offices," and that many registration drive workers "re-registered voters multiple times by changing or making up information about them." I-Team reporter Deborah Sherman reported that one registration drive worker with ACORN (Association of Community Organizations for Reform Now) "admitted to forging three people's names on about 40 voter registration applications," and that another ACORN worker admitted that he had registered "about 35 times" this year. The workers complained that they had been pressured by the "company" to register as many voters as possible, and one worker claimed that she had to register 5 people an hour or be fired. (*See also* 9News story on 11/19/04). On 10/14/04, the Rocky Mountain News (Peggy Lowe) reported that "about 1,500 (voter registration applications) have been deemed questionable-500 from Arapahoe County alone." Lowe reported that according to the Secretary of State's Office ("SOS"), Adams, Arapahoe, Denver, and Jefferson Counties had reported various potential registration frauds revolving around signatures that did not match signatures on file, invalid addresses, incorrect birth dates and social security numbers, invalid driver's license numbers, and numerous applications that appeared to be signed by the same person.

Despite such evidence of registration fraud, voter activist groups claim that even if there were several thousand fraudulent registrations, such number is not significant given the fact that there were over 300,000 new registrations. Furthermore, activists contend that registration fraud does not translate into fraudulent voting since the fraud by drive workers generally appeared to center around the workers' desire to get paid more money. If that is the case, then the question must be asked as to why the VRD exception permitting emergency registration was needed. The remedy of eliminating registration deadlines for such voters may have far exceeded the scope of the problem. Moreover, while it may have been true that there was no concerted effort to encourage impersonators to show up at the polls and vote, there is no guarantee that such fraudulent schemes might not be orchestrated to effect future election results.

Negligence:

In addition to fraud concerns, the VRD's were negligent in their handling of applications. Boulder Deputy Clerk Nancy Jo Wurl advised that some organizations directed voters to return their applications to the organization rather than to the Clerk. The organizations then took days and even months to turn the applications in to the Clerk. Some applications were turned in after the primary election such that voters may have been disenfranchised. The organizations claimed that they were in the process of entering the data into their systems. The Clerk's office contacted such organizations, and raised the following objections: (a) the forms should not be returned to the organization but should go from the voter to the Clerk; (b) the forms did not comply with SOS and Clerk requirements; (c) the organizations should have been turning the forms in immediately to the Clerk; and (d) the organizations should not have been entering the personal data of the voters such as social security numbers into their databases.

**Note 8**

Changes in SOS Election Rules:

Last-minute changes in election rules made the election judges' job more difficult when election judges were not able to answer voter questions or when election judges would tell the voter one rule and then call the Clerk and be told the rule had changed. Many changes in the rules and instructions were not received by the election judges until Sunday afternoon so election judges did not have time to familiarize themselves with changes, which made them hesitant with voter questions. Many election judges relied on the supply judge to keep them informed of changes, and if the supply judge did not read the materials, as some complained, or did not have experience, other election judges did not know what to do. Some supply judges had to give new instructions to fellow election judges between 6:00 and 7:00 a.m. before the polls opened. Some election judges reported they were not told of last-minute changes; others said they learned of changes via newspaper articles. Changes should be made before training sessions. Changes could be forwarded by email to the election judges. Changes should not be reflected on multiple loose sheets of paper as was done here in the election materials packets delivered on Sunday.

Although a few of the changes were necessitated as a result of the *Common Cause* litigation referenced in Note 9 below, those changes were known several weeks before the election.

**Note 9**

On 9/20/04, Colorado Common Cause filed a motion for injunctive relief in Case No. 04-CV-7709 against the Secretary of State in Denver District Court seeking to enjoin enforcement of certain electoral rules and statutory provisions relating to (a) the voter identification requirements of C.R.S. 1-7-110 and 30.13; (b) the wrong precinct rule set forth in C.R.S. 1-9-301(4) and 26.12(A); and (c) the rule that provisional ballots would not be counted if the voter applied for an absentee ballot as set forth in C.E.R. 26.12(B). On 10/5-10/6/04, an evidentiary hearing was held to consider whether these provisions were constitutional and whether they violated the Help America Vote Act ("HAVA"). *See* 42 U.S.C. Sections 15301 et seq. (2002). Judge Hoffman ruled thereafter that the voter identification requirement and the wrong precinct rules were not likely violations of HAVA and were not likely unconstitutional. However, Judge Hoffman did grant injunctive relief to prevent enforcement of the rule regarding absentee ballots as a likely violation of HAVA. Regarding the constitutionality of the identification requirement, the court concluded that "there is a substantial probability that recent unprecedented voter registration drives in this state have resulted in an unprecedented level of registration fraud." *See District Court Order* at 23.

**Note 10**

Poll Watcher conduct:

Reports were received by election judges and poll watchers that:

| Item | Activity |
|------|----------|
| 1. | More than one Democrat poll watcher was on site at a time; |
| 2. | Democrats would bring in updates to the Democrat poll watcher, including that Kerry was ahead in the polls; |
| 3. | A Democrat attorney poll watcher insisted that provisional ballots be given to everyone even if non-residents and the voter admitted not being registered; |
| 4. | A Democrat poll watcher put up sign in polling place "How may I help you vote?" and interacted with voters in line until election judge asked him to stop; |
| 5. | A Democrat poll watcher was "very verbal and in the election judge's way"; and |
| 6. | A Democrat poll watcher parked his car within the 100 foot limit, and his car had political stickers on it. |

**Note 11**

Other incidents reported by poll watchers regarding MoveOn.org:

| Item | Incident |
|------|----------|
| 1. | Complaints were received from parents dropping off children at schools; |
| 2. | MoveOn.org volunteers positioned themselves at the school doors and were asked to move; |
| 3. | At one location, the election judge had to call the police department; MoveOn.org volunteers moved, but came back again later; |
| 4. | At another polling place, the Boulder County Attorney personally responded to complaints about MoveOn. org; |
| 5. | Democrat poll watchers ferried information back and forth to MoveOn.org outside the polling places; |
| 6. | MoveOn.org volunteers showed up at the same time that election judges were trying to get the polls ready, creating a lot of stress for the election judges and diverting their attention from other important jobs; and |
| 7. | Throughout the county, MoveOn.org had placed tables and chairs within the 100 foot limit. |

According to their website, the "MoveOn family of organizations consists of three entities. MoveOn.org, a 501(c) (4) organization, primarily focuses on education and advocacy on important national issues. MoveOn PAC, a federal PAC, primarily helps members elect candidates who reflect our values. And MoveOn.org Voter Fund, a 527 organization, primarily educates voters on the positions, records, views, and qualifications of candidates for public office." Regarding MoveOn PAC, the website indicates that MoveOn PAC focuses on "electing progressives to national office," and that MoveOn "members will build an organized grassroots campaign on the ground in every Congressional district to stop the Bush agenda and win back the House." The MoveOn PAC contributed "more than $2 million to key congressional campaigns in the 2000 election, and more than $3.5 million in the 2002 election." *See* MoveOn.org website.

**Note 12**

The Fair Vote Colorado website does not contain information regarding its legal status or information about its founders. However, the telephone number listed on the website is answered by the Bighorn Center for Public Policy, which was founded by its CEO, Rutt Bridges. Bridges was widely reported as being one of four wealthy Democrats (Bridges, Tim Gill, Jared Polis and Pat Stryker) in Colorado who are credited with funding efforts that resulted in the return of control of the Colorado Legislature to the Democratic Party. *See* Susan Greene, *Denver Post, Powerful Democrat Bridges hoping to build a better state* (1/2/05). Shortly after the election, the Denver Post also reported that **Bridges** "backed legislative candidates, funded get-

out-the-vote efforts and **helped create FairVote Colorado**….”  (emphasis added).  *See* Susan Greene, *Denver Post*, *Election reshaped Colorado politics* (11/7/04).

The Colorado Common Cause website indicates that its “collaborative election monitoring project, Fair Vote Colorado, proved to be a tremendous success.  We trained and placed nearly 200 volunteers at over 140 polling places.” In a press release, dated 12/7/04, Colorado Common Cause stated that “Colorado Common Cause and several other organizations teamed up to run a voter alert line-866-MYVOTE1-that took in nearly 210,000 calls from voters in 50 states.”  The press release stated further that Common Cause had “more than 1,000 monitors at polling places nationwide, with a concentration in Ohio, Colorado, and New Mexico.”

**Note 13**

Election Judge Training

Respondents reported:

| Item | Report |
| --- | --- |
| 1. | Training for election judges at 33rd Street and Longmont was overcrowded; some trainees were turned away or left; |
| 2. | There should have been more sessions with smaller groups; |
| 3. | Training was generally 1 hour and was too short; |
| 4. | Training was limited to review of changes from previous years, and depended on reading the manual before election day, but election judges did not receive the updates to the manual until a few days before the election; |
| 5. | The instructor rushed through the handbook and referred election judges to it for most questions.  Questions were not answered well, and the training was not consistent between instructors.  Instructors were not sufficiently prepared; |
| 6. | Training should take place between elections with several classes, not just a one-hour session two weeks or one week in advance of the election; |
| 7. | Training should include mock voting scenarios so election judges can understand the process and probable issues that will arise; |
| 8. | Manual was not helpful enough regarding provisional voting; |
| 9. | Supply judges should have separate training in detail to review all the various possible scenarios with voters; |
| 10. | Experienced election judges recommended that separate training sessions be held for first-time election judges; training was wholly inadequate for first-time election judges; and |

11. Supply judges should have experience from prior elections. First-time election judges should not be appointed to serve as supply judges. Complaints were received that supply judges were not familiar with their duties or the rules.

## Note 14

Election Judge Manual:

Respondents reported:

| Item | Report |
| --- | --- |
| 1. | Manual was not helpful enough regarding provisional voting; |
| 2. | Election Judge Manual too long, and didn't cover subjects well enough, particularly provisional ballots; |
| 3. | Manual should be condensed into 10-20 pages with bullet format to respond to specific points; |
| 4. | Tabs should be placed on manual for quick reference, and the Manual should include a more detailed table of contents; |
| 5. | Manual should be printed on 8 ½ x 11 because legal sized paper was too hard to handle; |
| 6. | Forms should follow the page on which they are first mentioned for easier reference; |
| 7. | Manual should utilize color coding of pages/topics; |
| 8. | Manual should contain a section of FAQ's; and |
| 9. | Manual should be provided to all election judges before the training class so that election judges may read it in advance and be better prepared for Q&A at training. |

## Note 15

Selection of Election Judges:

Although the political parties are responsible after the precinct caucus for submitting to the Clerk a list of recommended eligible persons to serve as election judges, in the event that an insufficient number of names are submitted the Clerk may supplement such list in order to ensure that there is at least one election judge from each major political party. *See* C.R.S. § 1-6-102, § 1-6-103, and § 1-6-111. In this election, the Boulder County Republican Party was unable to learn the identities of the Republican election judges and to determine if further recruitment was needed. At one point, the Clerk's Office reported that the database had been "lost" and was being reconstructed. To date, the Clerk's Office has been unable to advise the Republican Party

as to the identities of the Republican election judges.  Yet, it is important that the political parties know this information to ensure adequate representation and training.  The Republican Party has been advised that some Republicans volunteered to serve as election judges, and were trained as election judges, but were never contacted by the Clerk's Office.   Poll watchers also reported that there were polling places without a Republican election judge or that election judges admitted they "weren't really Republicans."  Furthermore, election judges were not notified until the weekend before the election or later of their polling place location and with whom they would work.

**Note 16**

Voting Systems History and Issues:

As explained by Eric Fischer, Senior Specialist in Science and Technology, Domestic Social Policy Division, Congressional Research Service, The Library of Congress, in *Election Reform and Electronic Voting Systems (DREs):  Analysis of Security Issues*, CRS Report RL 32139 (November 4, 2003)("Fischer Report"), the following types of voting systems have been used in this country:

(1)      Ticket or prox paper ballot:

In 19th century America, the voter selected a preprinted ballot for a particular political party containing a slate of that party's candidates (party ticket) and placed the ballot in a ballot box.  Disadvantages of this voting system included the lack of privacy in casting the vote and the potential for vote-buying and coercion since poll workers would be able to determine how the voter voted based on the ballot style selected by the voter.  Such system also posed risks of fraud by poll workers since ballots were not printed with unique consecutive serial numbers.  As a result, ballot stuffing and substitution could occur.  *See* Fischer Report at CRS-2.

(2)      Australian or mark-choice paper ballot ("secret ballot"):

All candidates are listed on one ballot and the voter in the privacy of a voting booth marks in secret the ballot to select his candidates.  Although these secret paper ballots are still used today, other systems described below evolved due to concerns regarding tampering and fraud because "ballots could still be removed, spoiled, or altered by corrupt poll workers."  *Id*. The following systems also offered advantages such as speed in ballot counting and less human intervention, but did not eliminate the potential for tampering and fraud.  *See* Fischer Report at CRS-2.

(3)      Mechanical lever machines:

To lessen concerns regarding ballot tampering by corrupt poll workers and vote-buying or coercion, the mechanical lever machine was introduced in the late 1800's.  The lever machine permitted a voter to enter a voting booth, view a posted ballot, and record his votes by moving

appropriate levers next to the candidates' names. After completing his selections, the voter would then pull one large lever that would cast the ballot. The votes would then be recorded "by advances in mechanical counters in the machine." Fischer Report at CRS-3. The lever machine not only offered the advantage that ballots would be counted by machine rather than by hand, but it also prevented voters from making mistakes in casting their ballots. Lever machines use mechanical interlocks that "prevent voters from choosing more candidates than permitted for an office (such as two candidates for President)" (i.e. "overvoting"). Fischer Report at CRS-3. However, lever machines were also subject to tampering since the counting mechanisms could be altered to affect the election outcome. *See* Fischer Report at CRS-3.

(4)      Computer-Assisted Counting (Punch Card and Optical Scan):

The punch card system was introduced in 1964. It was the first voting system that utilized computers to count votes. The voter records his selections by punching holes in the paper computer card next to the candidates' names. The computer cards are then read and counted by a computer. This system offered the advantage of speed in counting via use of computers. It also retained the advantage of paper ballots because the computer cards could be retained for auditing and recounts. *See Improving Voting Technologies: The Role of Standards,* Hearing before the House of Representatives Committee on Science, 107th Cong., 1st Sess. (May 22, 2001) (Serial No. 107-20) ("Hearing Transcript").

Punch card systems were the most common systems used by voters (about 1/3 of registered voters) in the 2000 federal election. *Id.* There are two kinds of punch card systems: VotoMatic and Datavote. The VotoMatic punch card system was used in Palm Beach County, Florida. *Id.* In such system, the punch card does not contain the names of the candidates, but instead contains numbered boxes that correspond to a booklet attached to the voting machine. To record a vote, "the voter slips the card into the 'throat' of the voting machine, where it rests on a set of rubber strips under the ballot book, and uses a simple stylus to punch out the chad for the box(es) corresponding to the candidate(s) chosen for each race…." *Hearing Transcript* at 8. While voters experienced problems with the VotoMatic punch card system in Florida ("hanging chad"), as explained below, no such problems were experienced by Boulder County voters using the Datavote "slide" punch cards.

The Datavote punch card system was used in Boulder County prior to the 2004 election. In such system, "there is no ballot book" and there were two possible types of punch cards that could be employed. For absentee voting, the voters were provided punch cards with perforated holes that a voter would punch out with a stylus (pen or pencil). For early voting and Election Day voting, the voter was provided a smooth ballot card that the voter punched by using a stapler-like punching mechanism on a slide ("slide punch cards"). For many years, Boulder County voters used the slide punch cards for the vast majority of the votes cast. The Committee is not aware of any problems reported by voters with such system. However, as noted previously in Section 10 above (p.49), serious problems arose in the 2002 General Election when one of the card readers failed to read all of the votes cast in seven different precincts.

Optical Scan systems have been used for voting since the 1980's and are referred to as a "mark sense" or "bubble" ballot system that requires the "voter to darken a box or oval or complete an arrow corresponding to each candidate choice" on a paper ballot that is then scanned by a computer device that senses and records the marks made by the voter. *See Hearing Transcript* at 8. Optical scan systems are either "precinct count" or "central count" systems. With "precinct count" optical scan systems, the scanners are placed at each polling place and the ballot is fed into the scanner by the voter or election officials. If there are problems with the ballot such as "overvotes," the scanner ejects the ballot, and the voter may then correct it. With "central count" systems, scanners are not placed in the polling place. Paper ballots are collected by election officials and delivered to a central counting location to be scanned and counted by the optical scanners. In Boulder County, during the 2004 election, "central count" optical scan systems were used. All paper ballots, whether absentee, provisional or regular, were delivered to the Clerk's office on 33<sup>rd</sup> Street for scanning and counting.

(5)     Electronic Voting Machines ("DREs"-Direct Recording Electronic):

DREs were first introduced in the 1970's and represent the first completely computerized voting systems. DREs are "an electronic version of the lever voting machine, in which a voter's choice is recorded not on paper or by a mechanical counter, but electronically by the computer." Hearing Transcript at 8. There are various types of DREs in use around the country. In some DREs, the ballot is posted on the DRE and the voter pushes buttons next to the candidate's name, and in other DREs, the ballot page is displayed on a computer screen, and the voter either pushes arrow keys or buttons or touches the name of the candidate ("touchscreen" DREs). *See* Fischer Report at CRS-4.

DREs are considered to be the most user-friendly voting systems and have the advantages of speed in counting. Furthermore, DREs can easily be adapted to accommodate visually impaired voters (via audio devices) and can be programmed to display ballots in different languages. See Fischer Report at CRS-4. As for write-in candidates, if the DRE contains a keyboard, voters may type in the name, and the vote will be recorded electronically. *See Hearing Transcript* at 8. However, as explained in Section 10.1 above, there are unresolved problems with security, verification, and "lost votes" that cannot be recovered.

**Note 17**

Duplication of Ballots

Generally, ballots were duplicated by hand by the Duplication Board in three circumstances: (1) ballots that could not be read by the scanners because of damaged physical condition, either damaged by the optical scanners or damaged under some other circumstances (e.g., absentee ballots); (2) provisional ballots that were cast in the wrong precinct and the voters had not been misdirected there such that only the presidential race was to be counted; and (3) ballots that were missing a page ("orphan ballots").

In the case of orphan ballots that were missing a page, the software was not programmed so that the computer could recognize the missing page later and reconcile it with the first page(s). In the event that a ballot was scanned without all of its pages in consecutive order, the scanner would reject the ballot for counting as documented on the report printed out at the conclusion of the scanning process for each batch of ballots. If the workers could not locate the missing ballot page(s), the page(s) present would be placed in a basket for duplication of the entire ballot. If the missing page was scanned later, the scanner would reject that page as well, and the duplication process would be repeated.

In the duplication process, page 1 would have been duplicated and a blank page would have been attached as page 2. Later, when the original page 2 was subjected to the duplication process, page 2 would have been duplicated with a blank page 1 attached to it. As a result, one ballot would then be turned into two separate ballots to be scanned and counted later, even though the total number of votes did not change. Thus, even though there had been no attempt at the polls to "stuff the ballot box," at the central counting location the computer would have counted and recorded more ballots than were cast at the precinct.

This duplication of orphan ballots may have been a reason why certain precincts could not be reconciled with the computer count, but it cannot explain all the discrepancies.