

1 DISTRICT COURT
DENVER COUNTY
2 CASE NO. 06CV6072

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4 REPORTER'S PARTIAL TRANSCRIPT - COURT'S RULING
HEARING DATE: SEPTEMBER 22, 2006

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6 MYRIAH SULLIVAN CONROY, et al.,

7 Plaintiffs,

8 v.

9 GINETTE DENNIS, et al.,

10 Defendants.

11 _____

12 The Hearing in this matter was held
13 before the HONORABLE LAWRENCE A. MANZANARES,
14 Judge of the District Court, Courtroom 1, Denver
District Court, continuing on Friday, September
22, 2006.

15 This is a transcript of the Court's
16 Ruling.

17 Kathy L. Davis
18 Certified Realtime Reporter

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1 A P P E A R A N C E

2 FOR THE PLAINTIFFS:

3 PAUL F. HULTIN, ESQ.
4 ANDREW EFAW, ESQ.
5 MICHAEL WILLIAMS, ESQ.
6 Wheeler Trigg Kennedy, LLP
7 1801 California Street, Suite 3600
8 Denver, CO 80202
9 (303) 244-1800

10 LOWELL FINLEY, ESQ.
11 Law Offices of Lowell Finley
12 1604 Solano Avenue
13 Berkeley, CA 94707-2109
14 (510) 290-8823

15 FOR THE DEFENDANT STATE OF COLORADO:

16 MAURICE KNAIZER, ESQ.
17 MELODY MIRBABA, ESQ.
18 MONICA MARQUEZ, ESQ.
19 State of Colorado,
20 Office of the Attorney General
21 1525 Sherman Street
22 Denver, CO 80203
 (303) 866-5380

23

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1 COURT'S RULING

2 THE COURT: And your confidence
3 in knowing where I want to go is probably
4 misplaced, because I have not decided, and I'll
5 probably need a moment to -- at least on some
6 things, you're probably correct, that there's a
7 few things I think are just pretty clear. But
8 how to implement things and what a lot of the
9 details are, I'm still not sure of.

10 But let me start by making some factual
11 findings. I'm not going to go into too much
12 detail, because the parties are aware of all the
13 detail and know what's going on. I'm going to
14 try to give just enough to give some background
15 to the conclusions of law and the order that I'm
16 going to make in this case.

17 We have a system at this point in
18 Colorado that permits the use of DREs, electronic
19 voting machines, that are required to comply with
20 state and federal requirements and certified by
21 the Secretary of State; once they are certified,
22 can be used by counties.

23 Ms. Marquez has pointed out there's
24 been a three-tiered approach. They have to be
25 certified at a federal level, they have to be

1 certified at a state level, and certain
2 implementation of operational and security
3 requirements are then implemented at the county
4 level. It's the county, after all, who actually
5 run the elections and have machines in their
6 possession.

7 We've got four types of machines. I'm
8 not going to get into any specific models, but
9 they're manufactured by ES&S, Sequoia, Diebold,
10 and Hart.

11 The Plaintiffs have, through expert
12 testimony, pointed out a number of
13 vulnerabilities of those machines, and they
14 certainly are not perfect or immune from
15 tampering, which isn't to say that they're
16 terrible machines, only that they do have certain
17 potential vulnerabilities.

18 I think I made clear before this
19 hearing that I wasn't -- that the issue for the
20 Court was not to determine whether the machines
21 are adequate or compliant.

22 But I also told Plaintiffs that, you

23 know, whether the processes and procedures
24 followed by the Defendant were adequate could at
25 least be informed by the issue of the adequacy of

1 the machines.

2 If you had machines that were in every
3 way inadequate and they were certified anyway,
4 that would certainly tell me something about the
5 procedures used to certify them. So I did permit
6 some of that evidence and heard from some experts
7 on those issues.

8 The evidence showed that there was a
9 certification process for these machines that was
10 underway. It was under the auspices of the
11 Secretary of State's office, and at one point it
12 was -- what's his name? Was it Len Vest who was
13 running that? He at some point left.

14 His assistant, or second in command,
15 you might call him, was the person who then was
16 elevated to the position of being in charge of
17 essentially the certification process as well as
18 adopting the rules for certification which are
19 set out in Rule 45.

20 There was some time crunch to certify
21 machines, essentially because everybody was at
22 that point behind in getting it done. The

23 elections were coming up. There was also some
24 political and/or economic pressure to get it
25 done, because a lot of folks, apparently, had

1 machines that they were going to need to use and
2 had invested large sums in reliance on the
3 assumption that they'd be certified.

4 In particular, with respect to Mesa
5 County, it's been shown that there was pressure
6 because they had a lot of machines, and if they
7 weren't certified, they were going to be in a
8 world of hurt. And so there was certainly some
9 economic, political, and time pressure to get all
10 of this done. And Mr. Gardner undertook to get
11 it done. And he did.

12 In the case of ES&S, that required
13 actually going out of state and expediting the
14 approval or the certification process. It also,
15 at least according to the Plaintiffs, may have
16 involved certain shortcuts in acceptance or
17 certification.

18 Rule 45 does -- it, as I said, is the
19 rule, and it doesn't tell you very much about
20 what you have to do to get it certified, in terms
21 of certification standards.

22 We've heard that most of the testing

23 that was done is what we call functional testing.

24 I think that essentially is testing that -- to

25 make sure that it works, it does do what it says

1 it will do, and that it won't do what it's not
2 supposed to do.

3 There was not extensive testing, in
4 terms of exploration of the vulnerabilities or
5 subjecting it to the kind of scientific tests or
6 the kind of tests that computer scientists would
7 use to test the robustness of a system.

8 That type of testing has not been done
9 at the state level. Some of it has been done at
10 the federal level, although the evidence is that
11 there were pretty significant areas at the
12 federal level where such testing simply wasn't
13 done.

14 There's been some complaints that the
15 rules require a log, that the log, at least in
16 the sense that scientists use that word, was not
17 done; that instead, there was simply a checklist,
18 and that under that checklist, it listed the
19 conclusion but didn't tell you what test was done
20 or was performed. It did not allow for
21 repeatability. That certainly is true.

22 You cannot look at the forms and the

23 checklists on the back of these applications and
24 tell what test was done or how it was done or
25 repeat it. You'll basically only get somebody's

1 conclusions, sometimes a conclusion that was then
2 changed, for example, from a fail to a pass based
3 on a judgment and usually the judgment of Mr.
4 Gardner.

5 And so that's where we are today.
6 That's what was done. So let me address some of
7 the issues here. Let me start with the first
8 one, and that's the allegation that the Secretary
9 of State failed to comply with the requirement
10 that she appoint someone with the appropriate
11 credentials.

12 And 1-5-617, paragraph 2 says "The
13 Secretary of State shall appoint one or more
14 experts in the field of data processing,
15 mechanical engineering, or public
16 administration."

17 Mr. Gardner is the appointed expert.
18 He certainly has some data processing experience
19 as an IT manager in El Paso County; certainly has
20 some public administration experience, working at
21 the clerk and recorder's office as well as
22 Secretary of State. I don't think anyone would

23 argue that he had some mechanical engineering
24 expertise or experience.

25 The problem with that statute, of

1 course, is it doesn't say how much expertise you
2 have. It doesn't say minimum standards. It's
3 essentially a personnel decision to be made.

4 I could imagine that you could comply
5 with this requirement and have folks that are a
6 lot less qualified than Mr. Gardner. You can get
7 someone with a master's of public administration
8 who, you know, didn't know how to do anything
9 more than turn on a computer and had never worked
10 in the election field before, but they have a
11 master's in public administration.

12 So I guess the point is that there's
13 enough ambiguity in that statute and enough call
14 for discretion in that statute that I don't think
15 that the Court can substitute its judgment in
16 saying who's qualified and not qualified, which
17 is not to say that, you know, might not -- that
18 there are a lot of people we could think of with
19 qualifications in this particular instance who
20 might be a lot better at dealing with the issues
21 that Plaintiffs have brought before the Court.

22 But again, I think it's not for the

23 Court to go around second-guessing personnel
24 decisions made, particularly in light of the
25 statute that's pretty general and pretty

1 ambiguous.

2 I might add that there's been a lot of
3 criticism of Mr. Gardner and of his
4 qualifications. And again, I don't mean this at
5 all to suggest any criticism of him, because it
6 wasn't his job to appoint the position. And if
7 it turns out he doesn't have the expertise that's
8 required of the job, it's -- that's not his
9 fault. It's the person who did the appointing
10 that was supposed to make sure that was true, not
11 him.

12 And it appears to me that -- guess I'd
13 say two things: Would you like somebody with
14 different qualifications than Mr. Gardner looking
15 at some of these issues? Absolutely. But
16 nonetheless, he didn't have those skills and
17 probably did not a bad job, considering the
18 skills and experience and education that he has.

19 All right. The next issue I will take
20 up, I think, is probably the, for the Court, the
21 biggest issue and the most difficult issue, as
22 well, and that is whether the Secretary of State

23 failed to adopt minimum standards as required.

24 1-5-615 says that "The Secretary of

25 State shall adopt rules," skipping some language,

1 "that establish minimum standards for voting
2 systems regarding," and there's a list of things.
3 "Security requirements" is one of them.

4 Despite the arguments to the
5 contrary -- and we've talked about the language
6 of the rule and so forth -- I think I have to
7 agree with Plaintiffs, that a fairly read and --
8 well, a fair reading of the rule with respect to
9 security leads to the conclusion that there
10 simply are no minimum standards.

11 And therefore, the Court finds that the
12 Secretary of State did not comply with the
13 statute that requires the Secretary of State to
14 adopt minimum standards.

15 I can't tell you what those standards
16 should be, only that rather than require
17 standards, they primarily simply require
18 companies to provide documentation. And that's
19 not standards.

20 And it certainly is not meaningful to
21 say that you've met standards, when you have not
22 in any meaningful way adopted standards. And so

23 that's, I think, an area where the Secretary of
24 State has failed to do what's required by
25 statute.

1 The next issue is have they failed to
2 adequately test or evaluate security under the
3 rules and under the statute? And I suppose what
4 I'd say about that is that, one, it's difficult
5 to say that you've required machines to meet
6 minimum standards when you haven't established
7 such standards.

8 And let me back up. There's the
9 argument, well, we don't have to duplicate what
10 the EAC did and what the feds do in their terms
11 of their standards. But again, it's been shown
12 by the Plaintiffs that there are many areas where
13 the EAC or the ITAs simply did not do any testing
14 or just found that it was not applicable, even
15 though it clearly as a logical and practical
16 matter would have been applicable to a machine.

17 No reason why the Secretary of State,
18 by rule or otherwise, can't say, If you meet
19 federal minimum standards in this area, that the
20 rules say that's good enough. They can say that.

21 The problem is, even when the ITAs
22 never tested it and never said it was good enough

23 in that area, they didn't have a standard of
24 their own.

25 So again, I'm not telling them what

1 standards they have to be. That's for the
2 Secretary of State. But they do have to at least
3 have standards. They can rely on federal testing
4 and federal standards, but in the absence of
5 standards in security areas, they have to at
6 least have their own standards and perform
7 appropriate tests.

8 Let me talk about logs. And I'm kind
9 of going through my list here. I agree with the
10 Plaintiffs that measured by any scientific
11 method, the Secretary of State has done an
12 abysmal job of documenting their tests or of
13 logging their procedures and their tests.

14 Having said that, the "log" is a term
15 used in the rules under Rule 45. It's not
16 defined. And I don't know that I can say that
17 there's been a failure to comply simply because
18 they have not used good practice or followed
19 scientific methods.

20 I would certainly like to see them do
21 that, and if they could do it in such a way that
22 would allow others to replicate it and so forth,

23 that would be a very good idea.

24 But again, I'm not here to tell you

25 whether they did a good job or not. In fact,

1 they may have done a very poor job. But that is
2 not sufficient to say that it doesn't comply with
3 statutes or rules. It's their own rule, and they
4 -- they've said they have a log -- it's not
5 defined. And they have a checklist which they're
6 referring to as a log. And the fact that it's a
7 pretty poor documentation of what they did
8 doesn't mean that the Court can find that they
9 failed to comply with statutes or regulations for
10 the certification.

11 I think I -- and I've agree that there
12 certainly is evidence that political pressure and
13 time pressures and economic pressures affected
14 the judgments of the Secretary of State's office
15 in the certification process. And I think I've
16 been invited to hold that that renders the entire
17 process arbitrary and capricious. I don't think
18 I'm prepared to say that.

19 I don't think there are any rules or
20 any public officials who operate in a vacuum, and
21 that there's always political pressure, and
22 there's always economic pressure, and there's

23 usually time pressure, and it's impossible to
24 divorce yourself from those things.

25 And at some point those things may loom

1 large enough to say that there's -- that the
2 actions of an agency are arbitrary and
3 capricious, which is the standard.

4 In this case -- and we didn't hear
5 directly from the Secretary of State, but I don't
6 think it was necessary, because I'm finding, even
7 without her testimony, that some of that pressure
8 existed. I think the proper way to determine the
9 effect of that is to look at what happened.

10 And in this case, it appears to me that
11 the failures of the Secretary of State's office
12 that the Court can point to, although perhaps
13 affected by some of this, are not -- well, maybe
14 I'll just leave it at that I don't find them to
15 be arbitrary and capricious.

16 There's been allegations that there
17 were -- the machines have been certified despite
18 noncompliance. While I agree with the Plaintiffs
19 that some of the judgments made by the Secretary
20 of State's office -- guess that would be
21 primarily Mr. Gardner, since he was making those
22 judgments -- that some of those were not

23 documented very well, were contrary to the
24 statute.

25 On the other hand, on the issue of

1 substantial compliance, I think it is for the
2 Secretary of State to determine -- to make --
3 well, to determine that and to make judgments as
4 to what is substantial compliance. And even if I
5 would disagree with some of their judgments on
6 that, I can't say that that's not substantial
7 compliance.

8 Again, that takes me back to the
9 failure to adequately document what they did. It
10 would sure be easy to make some of those
11 judgments if we had that information, and I think
12 we'd all agree that good government requires such
13 documentation. And it's not there in this case.
14 But nonetheless, I'm not able to conclude that
15 those decisions render the certification invalid.

16 This wasn't discussed, I suppose, but
17 I'll raise it briefly, and that is there's also
18 an allegation that there's a requirement of the
19 voter-verified paper trail, that it has to be
20 permanent. I think the definition of "permanent"
21 in this case is 25 months, since that's, under
22 the statute, the period of time for which

23 election records must be kept.

24 There's been some suggestion that -- or

25 some evidence and studies to show that the

1 thermal rolls are not a very good solution to
2 that; that they're subject to degradation through
3 time, heat, and -- forget what the third was, way
4 they could degrade.

5 In any event, it appears -- well, I
6 think the evidence is insufficient to say at this
7 point that they won't last 25 months. There's
8 certainly a danger of that happening. There
9 certainly would seem to be better options, and
10 there certainly ought to be in place some
11 safeguards to make sure that those records last
12 25 months at a minimum. And the Secretary of
13 State certainly ought to do those things or have
14 the counties do those things, some of which are
15 already being done.

16 But again, that's -- I think that's for
17 the Secretary of State to determine, how to deal
18 with that issue. And if they're wrong,
19 Plaintiffs will say I told you so, but it's not
20 for the Court to say you have to change the paper
21 methods until there's better evidence that that
22 method will fail.

23 On the issue of -- disability access
24 issue, that is kind of an interesting issue. And
25 it appears that two things are true. One is that

1 these machines fail to meet, at least strictly,
2 the requirements for disability access; and
3 second, that the Court finds itself in a somewhat
4 ironic position, in that despite that being the
5 fact, that they are better than most other
6 methods for disability access.

7 And I guess, you know, perfect is the
8 enemy of good, and we could -- I could decertify
9 them because they don't meet disability access
10 minimum requirements, and that would have the
11 ironic effect of making it more difficult for
12 disabled voters to vote.

13 And lastly, the issue raised is that
14 what requirements are there that the Secretary of
15 State identify security vulnerabilities, and once
16 she -- once they are identified, what can she be
17 required to do about it?

18 That, I suppose, takes me back to the
19 issue of minimum standards, if you have minimum
20 standards. And I think in good faith the folks
21 at the Secretary of State's office are trying to
22 deal with some of these issues. But it's

23 difficult to do in the absence of minimum

24 standards.

25 And maybe the last thing I'll say in

1 that vein with respect to all that list of things
2 I just went through is that, again, what the
3 Court can do is require that the Secretary of
4 State comply with the law. What the Court cannot
5 do is make the Secretary of State do a good job,
6 nor can it substitute its judgment in areas where
7 the legislature has delegated authority for
8 judgments to the Secretary of State. And so I'm
9 trying to limit myself to areas where I can say
10 that the Secretary has failed to meet its duty as
11 required by statute.

12 So let's talk about remedies. As I've
13 mentioned, there are certain areas where I find
14 that the Secretary has failed to meet its
15 statutory requirements, failed to adopt rules
16 which set forth minimum standards and, therefore,
17 has failed to adequately test, in the area of
18 security, the voting machines.

19 That doesn't mean that they're
20 unreasonably vulnerable or that they're unsafe,
21 only that they have not adequately been tested or
22 put up against minimum standards.

23 The first request is that I, therefore,
24 decertify the machines. And despite the fact
25 that I disagree with the Secretary of State as to

1 whether the Court, if it found serious enough
2 noncompliance by the Secretary of State, whether
3 the Court could order that, I think that it's
4 self-evident that decertifying all the machines
5 in the state that are going to be used for
6 elections only six weeks before the elections
7 would create more problems than it would solve.
8 And I find that it would be an inappropriate
9 equitable remedy.

10 I, of course, have to weigh -- for
11 example, the fact that there might be some
12 vulnerabilities with those machines and potential
13 problems with those machines, I'd have to weigh
14 that against the process of having elections
15 based on a system that nobody expected to use
16 until a few weeks before the election.

17 And the potential for problems and for
18 issues, malicious tampering or otherwise, is
19 probably greater in an election where you don't
20 have an adequate opportunity to train folks and
21 to prepare for it than it would be under the
22 current system.

23 So I'm not going to entertain the idea
24 of decertifying for the upcoming election for the
25 voting machines that have been certified by the

1 Secretary of State.

2 I will note that the Secretary of State
3 recognizes that the problems with potential
4 vulnerabilities can be ameliorated through the
5 use of on-site security measures. And they've
6 employed some of those.

7 And the last thing I'll say on that
8 note is that I think the Plaintiffs have also
9 shown that the rules and regulations require the
10 Secretary of State to ensure that there is
11 adequate security at the local level.

12 There have been examples where security
13 plans that are noncompliant have nonetheless been
14 approved. I understand Ms. Marquez's statement
15 that, you know, that's not the whole plan, you
16 know, that the evidence is incomplete.

17 Nonetheless, I think it's apparent that the
18 Secretary of State has not necessarily ensured
19 compliance by all counties.

20 Now, we heard from some folks from the
21 county, and they seem to be doing a pretty good
22 job. But those were four. They were four big

23 counties that have significant resources.

24 And I can guarantee you that the kinds

25 of procedures and processes that are in place in

1 some of those big counties are not in place in a
2 lot of places around the state. And it is
3 incumbent by rule upon the Secretary of State to
4 require the counties to coordinate adequate
5 security measures, and I think that it is
6 particularly important where they may have done a
7 less than admirable job of determining what the
8 vulnerabilities of voting machines are.

9 So this is what my order is going to
10 require, having found that they have failed to
11 adopt an acceptable rule, including their own
12 standards; that they've failed to adequately
13 test; and that they have failed to adequately
14 impose on-site security measures at the county
15 level. It's going to require that they do all of
16 those things.

17 From the standpoint of timing,
18 obviously, they cannot, by the next election,
19 pass a new rule and adequately test and certify
20 these machines. And so no sense requiring them
21 to do that which can't be done.

22 The Court will order, however, that

23 they review their rule; that they enact rules
24 that have minimum standards; and that they then
25 put machines through the process again to

1 determine compliance with the rules once they've
2 established minimum standards.

3 We can talk about a reasonable time on
4 it. I think, given that it's not going to happen
5 before the next election, that our only time
6 constraint is that it happen before November of
7 2008, I guess. Or we can talk about what a
8 minimum time period for that should be or what
9 reasonable progress should be.

10 The one area where I think this problem
11 can be mitigated and can be mitigated soon is by
12 the Secretary of State requiring counties to take
13 adequate security measures at the local level.

14 Again, it appears that there are a lot
15 of counties that are already employing those
16 measures, but it's also apparent to the Court --
17 well, two things are apparent to the Court. One
18 is that there are some plans that are inadequate,
19 and that the Secretary of State has not
20 adequately required all counties to take
21 appropriate minimum security requirements.

22 I'm not going to tell you right now

23 exactly what I think those should be. We've seen
24 in California some examples of some measures that
25 have been taken. And I'm not going to say you

1 have to follow the California model, although it
2 would be foolish not to look at those, and some
3 of them are a good idea.

4 But I think it is reasonable to order
5 that the Secretary of State, in sufficient time
6 before the next -- before the upcoming elections,
7 essentially order county election officials to
8 take appropriate security measures.

9 And again, I believe that most of the
10 counties probably are complying. But it's
11 apparent to the Court that some don't have those
12 minimum requirements, and there's no reason that
13 the Secretary of State in mitigation of this
14 problem can't order that they do it.

15 So that shouldn't take very much time.
16 These folks are pretty up to speed at this point
17 on the issue, and they can essentially put
18 together an order from the Secretary of State's
19 office saying that, at a minimum, your security
20 plan should be able to do these things. Some of
21 that's been done, but they need to do a better
22 job of it at this point.

23 Questions?

24 MR. KNAIZER: Your Honor, one

25 question. Early on in your order, with regard to

1 passing of the rules, was that limited to the
2 security aspect of the rule? As I understand
3 your prior statements, it appears to be limited.

4 THE COURT: It is.

5 MR. KNAIZER: So just that one
6 aspect? Just the security? Thank you.

7 THE COURT: Let me make a
8 suggestion. There are other parts of the rule
9 which I think are not adequate, not good. But
10 again, it's not my -- you know, it's -- for me,
11 it's an on or off switch. It's like baseball
12 arbitration. You know, I can decide that there's
13 minimal compliance or not. Just because there's
14 minimal compliance doesn't mean that they're
15 good. There are a few other areas where I think
16 they are -- could sure be improved.

17 So obviously, it might be a good idea,
18 as you look at the rule anyway, to improve some
19 of those regulations that are not very good at
20 protecting the security of integrity of the
21 voting process.

22 But nonetheless, as far as the order

23 goes, I think that's the only one that I can say
24 that it fails to meet statutory requirements of
25 the statute minimum standards.

1 MR. KNAIZER: Excuse me. And
2 also with regard to the question of ordering the
3 counties, is there a time line the Court has in
4 mind?

5 THE COURT: Well, I thought we
6 would need to discuss that. I would think that
7 the counties ought to have 30 days to be able to
8 train folks on security or take appropriate
9 security measures. If that is the case, that
10 means we've got about two or three weeks to get
11 that done. If you-all think that a different
12 time line is more appropriate, I'm willing to
13 listen.

14 MR. KNAIZER: You know, we do
15 have some issues, as I understand it, with early
16 voting procedures. And early voting, I believe,
17 starts October 23rd.

18 THE COURT: That's right. But
19 the use of -- these machines won't be used in
20 early voting, will they?

21 MS. MIRBABA: Yes.

22 MS. MARQUEZ: Yes.

23 MR. KNAIZER: Yeah, they will.

24 This is where you go to the polling place.

25 THE COURT: Well --

1 MR. KNAIZER: So there just may
2 not be enough time.

3 THE COURT: -- I guess they will.

4 MR. KNAIZER: So basically, at
5 this point in time, you're talking about less --
6 you're talking about a month right now, 'cause
7 it's September 22nd. So

8 THE COURT: That's true. You
9 know, we need to make some sort of a compromise
10 between what's feasible and the need to get it
11 done before the elections. And you know, we
12 brought this upon ourselves by continuing the
13 trial and based on the fact that it, you know --
14 it would have been nice if this lawsuit had been
15 filed six months earlier, but we're all in the
16 same place.

17 MR. KNAIZER: So how would the
18 Court propose that we do that? You know, one of
19 our concerns, I think, is that we are going to
20 have to --

21 THE COURT: What I would suggest
22 is that Plaintiffs and Defendants today sit down

23 and talk about what's feasible and what we can
24 get done and what those measures would look like,
25 and that the Court will stick around, of course,

1 to give you guidance on that, and that we come up
2 with a plan, okay?

3 MR. KNAIZER: We'll try, Your
4 Honor. I think -- you know, obviously, we'd have
5 to talk to the --

6 THE COURT: You'll succeed. I
7 order you to succeed.

8 MR. KNAIZER: I'd like that order
9 in some other cases too. Okay. That's fine.
10 And so when should we report back to the Court,
11 then?

12 THE COURT: Again, I'm going to
13 suggest that we stick around here and work out
14 some of the logistics, and that's one of them.

15 MR. HULTIN: Your Honor --

16 THE COURT: Mr. Hultin.

17 MR. HULTIN: -- Paul Hultin. I
18 have several questions about your order. I guess
19 the first question is for the -- Mr. Knaizer. Is
20 there an election in 2007?

21 MR. KNAIZER: It is possible,
22 Your Honor. Right now, we don't know. We won't

23 know until the initiative process is completed.

24 There can be some TABOR issues on the ballot in

25 2007. That is possible, but --

1 THE COURT: But if there's a
2 TABOR issue, that's the case where there's a
3 danger of tampering.

4 MR. KNAIZER: I'm told it may be
5 a mail ballot election, so we wouldn't have the
6 issue of the DREs in this case.

7 THE COURT: Well, we need to
8 figure those things out.

9 MR. KNAIZER: Okay.

10 THE COURT: I'm not sure we need
11 to figure them out this instant.

12 MR. KNAIZER: Okay.

13 MR. HULTIN: Your Honor, you
14 found that there are no minimum standards for
15 security that were promulgated as required by
16 Section 616. You found that there was no
17 security testing done for the machines.

18 And my question is, in the absence
19 of -- and, of course, you can't -- if you don't
20 have any standards, it's impossible to test. Can
21 the machines be used in the general election,
22 notwithstanding that there were -- you found the

23 Secretary breached her duties and didn't do any
24 security testing on these machines?

25 THE COURT: Let's correct that a

1 little bit, and some of it is just understanding,
2 but I didn't find there was no security testing.
3 What I did find is that they failed to adopt
4 minimum standards as required by the statute.

5 MR. HULTIN: Yes.

6 THE COURT: So that's what I
7 found.

8 MR. HULTIN: But if there are --

9 THE COURT: In answer to your
10 question, can the voting machines be used, the
11 answer is yes. And which is -- as I said, I have
12 to weigh decertification against its alternative,
13 and I find that while there are potential
14 vulnerabilities, one, that doesn't mean these
15 machines won't work; two, they've been proven
16 that they do a pretty good job in at least one
17 election; and three, that the risks of
18 decertifying are greater than the risks of
19 continuing to use them.

20 MR. HULTIN: I understand, Your
21 Honor.

22 THE COURT: And I think

23 confidence in the vote requires that we don't up-
24 end the system only a few weeks before the
25 election.

1 MR. HULTIN: Your Honor, could I
2 ask for clarification on the admitted failure of
3 the ES&S system to comply with Section 704(e),
4 when the uncontested evidence at the hearing was
5 that the Secretary refused certification of the
6 ES&S Automark because of a failure of a different
7 subsection, mandatory subsection, 704.

8 THE COURT: Then we have an
9 inconsistent ruling. And, as I like to say,
10 foolish consistency is the hobgoblin of weak
11 minds.

12 MR. HULTIN: And we tried to call
13 the Secretary to seek clarification of whether or
14 not that was arbitrary or capricious, Your Honor.
15 Both subsection (d) and subsection (l)1 are
16 mandatory directions from the legislature, and
17 the facts aren't in dispute about that. I'd just
18 ask Your Honor to clarify that.

19 THE COURT: Well, let me ask --
20 let me ask what you're asking in a different way.
21 What are you asking me to do about that?

22 MR. HULTIN: Well, it seems to me

23 to be the essence of an arbitrary and capricious
24 action by the Secretary that there is two
25 mandatory directions from the legislature. One

1 is sufficient ground to decertify a system -- or
2 not to certify a system. The other is ignored by
3 the Secretary.

4 And in fact, the evidence, Your Honor,
5 the uncontested evidence, is that the Secretary
6 was not advised that she was overriding a
7 mandatory section of the statute. Mr. Gardner
8 said he didn't know whether he talked to her
9 about whether that was a violation of the
10 regulation or a violation of the statute.

11 THE COURT: Well, I guess I'll
12 say a couple things about that. One, when we
13 talk about the Secretary of State, we're talking
14 about the Secretary of State's office. And an
15 improper decision by the Secretary of State is no
16 different than an improper decision by Mr.
17 Gardner. That is to say, if either of them --
18 that it's acceptable for those decisions to be
19 delegated, and if they're wrong, they're wrong,
20 whether it's personally by the Secretary of State
21 or by Mr. Gardner.

22 So I don't take -- it's not real

23 important to me that it might be the Secretary of
24 State versus Mr. Gardner who made that decision,
25 although the motivations, as you've suggested,

1 can play a part in that.

2 The next issue is can I require strict
3 compliance? And I think it's pretty clear that
4 substantial compliance is what's required and
5 that, under the circumstances, the explanation
6 that was made by Mr. Gardner is -- you know,
7 whether I agree with it or not -- is enough to
8 say that, under the circumstances, that
9 constituted substantial compliance.

10 And what plays into that is the
11 alternative. That is to say, you know, you can
12 have -- you can say we're going to decertify the
13 machine because it doesn't do simultaneous audio
14 and video, and then you end up not having audio
15 or video because you don't have a machine that
16 has audio or video. And that's not a very
17 desirable result, at least not for the upcoming
18 elections.

19 MR. HULTIN: May I have a minute,
20 Your Honor?

21 (A discussion was had off the record.)

22 MR. HULTIN: Your Honor, I guess

23 we should sit down with Mr. Knaizer and come up
24 with a date for some enhanced directions to the
25 counties. Is that what you're asking us to do?

1 THE COURT: That's a good idea.

2 MR. HULTIN: Is that what you're
3 asking us to do?

4 THE COURT: Yes.

5 MR. KNAIZER: Could we have a
6 moment, Your Honor?

7 (A discussion was had off the record.)

8 MR. KNAIZER: Nothing further,
9 Your Honor.

10 THE COURT: All right. Well,
11 thank you for presenting me with what are at
12 least some interesting issues to deal with, even
13 if I'd rather not be the person making those
14 decisions.

15 And stick around, and let's do a little
16 scheduling and so forth and figure out how to
17 best implement the Court's order, okay?

18 MR. KNAIZER: Thank you.

19 (The hearing concluded at 3:16 p.m.)

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C E R T I F I C A T E

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STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, Kathy L. Davis, Certified Realtime Reporter and Notary Public in and for the State of Colorado, duly appointed as the Official Reporter of Division 1 of the Denver District Court for this hearing, certify that the proceedings were taken in shorthand by me at the time and place aforesaid and were thereafter reduced to typewritten form by me and processed under my supervision, the same consisting of 34 pages; and that the same is a full, true, and complete transcription of my machine shorthand notes. I further certify that I am not related to, employed by, nor counsel to any of the parties herein, nor otherwise interested in the events of the within cause.

IN WITNESS WHEREOF, I have affixed my notarial seal this 23rd day of September, 2005. My commission expires April 29, 2009.

Kathy L. Davis
Certified Realtime Reporter

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14 o.us

9

10

11 PAUL F. HULTIN, ESQ.
12 ANDREW EFAW, ESQ.
13 MICHAEL WILLIAMS, ESQ.
14 Wheeler Trigg Kennedy, LLP
15 1801 California Street, Suite 3600
16 Denver, CO 80202
17 (303) 244-1800

15 LOWELL FINLEY, ESQ.
16 Law Offices of Lowell Finley
17 1604 Solano Avenue
18 Berkeley, CA 94707-2109
19 (510) 290-8823

18

19 MAURICE KNAIZER, ESQ.
20 MELODY MIRBABA, ESQ.
21 MONICA MARQUEZ, ESQ.
22 State of Colorado,
Office of the Attorney General
1525 Sherman Street
Denver, CO 80203
(303) 866-5380

23

24

25

