DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO. 80202,	
David Hustvedt, Wesley Gullette, and the Senate Majority Fund, LLC, Plaintiffs, vs. **Joan Fitz-Gerald, Lois Tochtrop, and Ginette Dennis in her official capacity as Colorado Secretary of State,** Defendants.	▲ **COURT USE ONLY** ▲ Case Number: **05CV9557** Ctrm: 5

ORDER AND JUDGMENT

This matter comes before the Court on the cross claim filed by Defendant Fitz-Gerald against Defendant Dennis, pursuant to §1-1-113, C.R.S., which has been fully briefed and which was the subject of a full hearing before the court on January 20, 2006. Being, thus, fully advised in the matter, the court enters the following Order and Judgment.

INTRODUCTION

This case presents a dispute about whether Senator Joan Fitz-Gerald is barred by the applicable term limits provision of the Colorado Constitution from running for and serving another term of office. To resolve the dispute, the court must interpret certain language contained in the initiative passed by the voters of Colorado in November 1990. If a person who is appointed or elected to fill a vacancy in the state senate serves "at least one-half of a term of office" in their partial term, he or she "shall be considered to have served a [full] term in that office" for purposes of term limits. Senator Fitz-Gerald was elected in 2000 to fill the vacancy created by the death of Senator Tony Grampsas, was re-elected in 2002 and is currently serving her own full term. If her partial term was "at least one-half" of Senator Grampsas' term, she is barred by term limits from running for re-election in November 2006 and serving another term.

PROCEDURAL POSTURE OF THE CASE

Secretary of State Dennis is of the opinion that §1-1-113, C.R.S. provides the exclusive procedural avenue for the resolution of the dispute among the parties presented in this case.

The court explained at the beginning of the January 20, 2006 hearing that it is inclined to agree with Secretary Dennis on this point, and may well grant a motion to dismiss the other claims pending among the parties if one is filed. The court further explained that it agrees with Secretary Dennis that the claims asserted by the Plaintiffs are, in substance though not in form, claims against her under §1-1-113, C.R.S., and invited Plaintiffs to make an oral motion to amend their Complaint to state such a claim expressly. Plaintiffs made such a motion to amend and, after establishing that no party objected to it, the court granted the Plaintiffs' motion to amend and proceeded to hear the claims asserted by Senator Fitz-Gerald and by Plaintiffs against Secretary Dennis under §1-1-113, C.R.S. At the conclusion of the hearing, all parties also agreed that the court should enter final judgment on its decision, pursuant to C.R.C.P. Rule 54(b), thus permitting immediate appellate proceedings. The court determines that there is no just reason to delay the entry of final judgment on the §1-1-113 claims among the parties and directs the entry of judgment thereon. The matter decided in this Order and Judgment affects the substantial rights of the parties with respect to an upcoming election, with critical pre-election matters coming up very soon, making the case extremely time sensitive.

FACTS

The facts are essentially undisputed and most of them are the subject of a formal, signed document entitled, "Stipulated Facts," which was presented to the court at the beginning of the January 20, 2006 hearing. Some of the stipulated facts relate to Senator Lois Tochtrop's circumstances. Because she is not a party to any claim under §1-1-113, C.R.S. and because she will not be affected directly by this court's decision for another four years, if at all, this Order and Judgment does not address the facts about her. The following facts have been stipulated to by all parties as true.

In November, 1998, Tony Grampsas was elected to serve a four-year term as Senator for Colorado Senate District 13.

Senator Grampsas began his term on January 6, 1999, but passed away on February 8, 1999. His death created a vacancy in Senate District 13.

The vacancy in Senate Distsrict 13 was temporarily filled by appointment under C.R.S. §1-12-203, pending an election in November, 2000.

Senator Fitz-Gerald is a registered elector of Jefferson County.

On November 7, 2000, Senator Fitz-Gerald was elected to become Colorado State Senator for Senate District 13.

Senator Fitz-Gerald began her service as senator on the first day of the 2001 regular session, which began January 10, 2001.

In early 2002, the Colorado Reapportionment Commission re-designated Senate District No. 13 as Senate District No. 16.

Senator Fitz-Gerald's partial term expired on January 8, 2003.

Senator Fitz-Gerald won election as state senator for Senate District 16 in November, 2002, and began serving a four year term on January 8, 2003. Her term will end in January, 2007.

Senator Fitz-Gerald's term that ends in January, 2007 will constitute a full term for purposes of Colorado's term limits provisions under Colo. Const. art. V, §3.

Senator Fitz-Gerald is currently a candidate for Senate District No. 16.

Defendant Ginette Dennis is the current Secretary of State.

Secretary Dennis was appointed on August 29, 2004, to fill a vacancy in that office and took office on September 26, 2005.

John Suthers is the current Colorado Attorney General.

Attorney General Suthers was nominated to be Attorney General on December 9, 2004, to fill a vacancy in the office of Attorney General.

Attorney General Suthers resigned from his position as United States Attorney for the District of Colorado, effective December 31, 2004.

Attorney General Suthers was appointed Acting Attorney General. Following the resignation of his predecessor on January 3, 2005, Attorney General Suthers took office as Acting Attorney General on January 4, 2005.

Attorney General Suthers became Attorney General on February 7, 2005, following confirmation by the Colorado State Senate by a vote of 34 to 1.

Plaintiff David Hustvedt is a registered voter residing in Colorado Senate District No. 16.

Plaintiff Wesley Gullette is a registered voter residing in Colorado Senate District No. 24.

Plaintiff Senate Majority Fund, LLC (the "Fund") is a Colorado limited liability company and a voluntary membership association that includes individuals registered as electors in Colorado.

The Fund's members include voters residing in Senate Districts 16 and 24.

The Fund's members include candidates, or those interested in becoming candidates, for Colorado State Senate District 16 and Colorado State Senate District 24.

The Fund's purpose is to influence the selection, nomination, election, or appointment of any individual to the Colorado State Senate.

The following facts were established by a preponderance of the evidence, including exhibits stipulated into evidence, and calculations and inferences based upon the stipulated facts and exhibits.

The duration of the senate term for which Senator Grampsas was elected ("Senator Grampsas' term") was 1,463 days (January 6, 1999 through January 8, 2003).

Senator Fitz-Gerald served 728 days of Senator Grampsas' term (January 10, 2001 through January 8, 2003). Her partial term began on the first day of the third regular legislative session in Senator Grampsas' term and included two entire regular legislative sessions.

On January 26, 2005, in response to an inquiry by Senator Fitz-Gerald, former Secretary of State Donetta Davidson issued her written opinion that the partial term served by Senator Fitz-Gerald (728 days) was less than one-half of a term of office (1,463 days) and, therefore, did not count as a full term for purposes of term limits. The language at issue was interpreted by Secretary Davidson to call for calculation of the duration of the 'term of office' involved, calculation of 'one-half' that duration, and comparison of the resulting number of days to the actual number of days served in the partial term at issue. In Secretary Davidson's opinion, Senator Fitz-Gerald was eligible to seek re-election in November 2006 and serve another term if re-elected.

On September 26, 2005, Secretary Dennis replaced Secretary Davidson. On October 18, 2005, Attorney General Suthers issued Formal Opinion No. 05-7, concluding that the partial term served by Senator Fitz-Gerald was at least one-half of a term of office and that she was, therefore, ineligible to seek re-election in November 2006. The Attorney General interpreted the subject language to mean that "a State senator serves 'at least one-half of a term of office' if that person takes the oath of office on or before the first day of the third legislative session of the term being completed." Also on October 18, 2005, Secretary Dennis informed Senator Fitz-Gerald that she intended to follow the legal advice of the Attorney General.

CONCLUSIONS OF LAW

The legal standards that instruct a court in its interpretation of the Colorado Constitution are well-settled and few. The "court's duty in interpreting a constitutional amendment is to give effect to the electorate's intent in enacting the amendment. [Citation omitted.] Courts must give words their ordinary and popular meaning in order to ascertain what the voters believed the amendment to mean when they adopted it. [Citation omitted.] Courts should not engage in a narrow or technical construction of the initiated amendment if doing so would contravene the intent of the electorate. [Citation omitted.] Thus, when the language of an amendment is clear and unambiguous, the amendment must be enforced as written. [Citation omitted.] Language in an amendment is ambiguous if it is 'reasonably susceptible to more than one interpretation.' [Citation omitted.] If the intent of the voters cannot be discerned from the language, 'courts should construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment.' Courts may determine this 'by considering other relevant materials such as the ballot title and submission clause and the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature.'" Davidson v. Sandstrom, 83 P.3d 648, 654-55 (Colo. 2004). It is not for the court to

make policy decisions about the wisdom of the word choices made by the drafters of legislation or voter initiatives, or to impose its own ideas about word choices that might have been preferable. See generally, Farmers Insurance Exchange v. Allstate Insurance Company, 961 P.2d 465, 469 (Colo. 1998).

When the same language appears in more than one place in the constitution or in statutes, courts should interpret the language consistently and should not interpret the language to have different meanings, unless such an interpretation is unavoidable. See, e.g., People v. Cooper, 27 P.3d 348, 349 (Colo. 2001) (statutes); Bruce v. City of Colorado Springs, __P.3d__, 2005 WL 3434626 (Colo. App. 2005) (constitutional provisions).

Secretary Dennis argues that her interpretation and that of the Attorney General are entitled to deference by the court. This argument is misplaced. The rule upon which she relies for this argument applies to interpretations of statutes by the agencies charged with enforcing them. It does not apply to interpretation of constitutional provisions, which is "peculiarly within the province of the judiciary." Grossman v. Dean, 80 P.3d 952,961 (Colo. App. 2003). Moreover, even if this case involved interpretation of a statute instead of the constitutional amendment at issue, deference is not appropriate where, as here, the Secretary of State's interpretation is directly at odds with the interpretation of her predecessor. Even when statutory interpretation is involved, deference is only due when the officer's or agency's interpretation is consistent and uniform. Colorado Common Cause v. Meyer, 758 P.2d 153, 159 (Colo. 1988). Indeed, the statute conferring upon the Secretary of State the authority to interpret the Election Code specifically provides, "[w]ith the assistance and advice of the attorney general, to make *uniform* interpretations of this code…" §1-1-107(1)(c), C.R.S. (Emphasis added.) Finally, the law does not provide that the opinion of the Attorney General is entitled to deference by the courts. Rather, it provides that the Attorney General's opinion is entitled to "respectful consideration," but that the court "must engage in an independent analysis in resolving an issue of statutory construction." Colonial Bank v. Colorado Financial Services Board, 961 P.2d 579, 584 (Colo. App. 1998).

Applying the above legal standards to the constitutional provision in this case, the court concludes that the words at issue, "serves at least one-half of a term of office," are clear and unambiguous, and must be given their plain, ordinary and popular meaning. Secretary Davidson's analysis was correct. The express language calls for the decision maker to determine the duration of the specific term of office at issue, then to divide that period of time in half, and then to compare the resulting "one-half of a term of office" to the duration of the partial term actually served by the office-holder. If the partial term actually served is "at least" as long as the calculated "one-half of a term," then the partial term is considered a full term for purposes of term limits. If not, then the partial term is not counted as a term for purposes of term limits.

The parties are all in agreement that "a term of office" means the actual term involved in any particular case - Senator Grampsas' term in this case. The duration of that term was January 6, 1999 through January 8, 2003 (1,463 days). See Colo. Const. Art. V, §7 and §2-2-303.5, C.R.S. for a description of how the opening date of each legislative session is set, which can be by joint resolution of the general assembly, by the executive committee of the legislative council, or by statute if both bodies fail to set the opening date of the next session by November 1.

The primary dispute concerns the meaning of "one-half." Senator Fitz-Gerald argues, consistently with Secretary Davidson's view, that "one-half" means one of two equal parts of something, in this case a term of office. Secretary Dennis and the Attorney General argue that "half" can also mean one of two parts that are not precisely equal, and in this case it means two of four unequal parts (legislative sessions) of a term of office. The court concludes that "one-half" is a plain English term whose ordinary, popular meaning is "one of two equal parts." The dictionary definition of "half" is, "either of the two equal parts of something." *Webster's New World Dictionary,* Fourth Edition (2003). See also, *American Heritage Dictionary,* New College Edition (1981) ("one of two equal parts that together constitute a whole."); *Black's Law Dictionary,* Seventh Edition (1999)("one of two equal parts into which a thing can be divided."). Secretary Dennis argues that some dictionaries have secondary or tertiary definitions of "half" that contemplate approximately equal parts. The court's task, however, is to give effect to the plain, ordinary and popular meaning of the words, not to stretch for a more obscure meaning. That the words, "one-half," mean one of two equal parts is even more clear than if the amendment had used only the word, "half;" the addition of the prefix "one-"implies the fraction ½, a precise mathematical formulation. Moreover, where "one-half" appears in the Constitution and is intended to have a less than precise meaning, that intention is made expressly clear. Article V, section 5 states, "[t]he senate shall be divided so that one-half of the senators, as nearly as practicable, may be chosen biennially." If "one-half" means approximately half, then the qualifying phrase, "as nearly as practicable," is surplussage.

The interpretation advocated by Secretary Dennis and the Attorney General is inconsistent with their interpretation of exactly the same language as it applies to executive branch officers. As implied in their brief and as expressly confirmed at the January 20, 2006 hearing, they interpret the words, "who serves at least one-half of a term of office," in the part of the initiative setting term limits for executive officers, to mean the same thing those words meant to Secretary Davidson when she wrote her January 26, 2005 letter to Senator Fitz-Gerald – divide the total number of days in the applicable term by two and compare that number to the actual number of days served. It is well-settled that identical language in two statutes or constitutional provisions should be interpreted to have the same meaning, unless a clear contrary intention appears. See, e.g., People v. Cooper, 27 P.3d 348, 349 (Colo. 2001) (statutes); Bruce v. City of Colorado Springs, __P.3d__, 2005 WL 3434626 (Colo. App. 2005) (constitutional provisions). Here, the identical language appears repeatedly in the same initiative and there is nothing anywhere in the language of the initiative to suggest that it should mean different things with respect to executive term limits than it means with respect to legislative term limits. Certainly, no voter would have any reason to expect such an odd result. Secretary Dennis argues that the executive branch provision appears in Article IV of the Constitution, whereas the legislative branch provision appears in Article V of the Constitution, so a different interpretation is logical. That argument ignores two things: first, the rule of law cited above applies to identical language found in two separate statutes or constitutional provisions, which may be distant from each other in the statute books or Constitution. Second, the term limits provisions for the executive and legislative branches were presented to the voters side by side in a single initiative and were voted on simultaneously. Identical language in the two paragraphs must be interpreted to have the same meaning.

Secretary Dennis argues that, even though the words used are identical, the method for determining term limits should be different because executive terms of office are fixed while legislative terms of office are not, which makes it possible for the general assembly to manipulate term lengths to affect term limits. As a threshold matter, this is less a constitutional interpretation argument than it is a policy argument explaining why she thinks different methods for the two branches would be preferable. But it is not for the court, after an initiative has been passed, to second guess the drafters and the voters and impose its own ideas, even "better" ideas, about preferable outcomes. Such arguments are better made to advocate for preferable language in a different initiative. The court's job is a much more modest one: to interpret and give effect to the language of the initiative as written and voted upon.

In addition to disregarding the language of the initiative, Secretary Dennis' policy arguments exaggerate the differences between executive and legislative terms and the risk of manipulation. Executive terms begin and end on the second Tuesday of January. Colo. Const. art. IV, §1. Legislative terms begin and end on the first day of the legislative session, which must be "no later than the second Wednesday of January of each year." Colo. Const. Art. V, §7. The general assembly, or if it fails to act, the executive committee of the legislative council, can set the first day of the session anywhere between January 1 and the second Wednesday of January. If both bodies fail to act, the first day of the session will be the second Wednesday of January. Section 2-2-303.5, C.R.S. Thus, both executive and senate terms of office, though generally described as four year terms, are actually of slightly varying durations. The executive term beginning on January 12, 1999, for example, was a week shorter in duration than the executive term beginning on January 7, 2003. For this reason, an executive officer serving a partial term beginning on January 9, 2001 would have served more than one-half of a term for term limits purposes, while an executive officer serving a partial term beginning on January 11, 2005 will have served less than one-half a term for term limits purposes. The former would be permitted to serve 10 years, while the latter would be permitted to serve only 6 years. This is the kind of disparate result that the Secretary and Plaintiffs label "absurd" when legislative office holders are involved. It is not an "absurd" result for either executive officers or senators; it is simply and clearly the result called for by the language of the initiative. Wherever the line is drawn, there will be very little, if any, difference between the circumstances of the office holders who fall just to one side of the line or the other to justify the different term limits outcomes, but the line must be drawn somewhere. The question for the court is, where did the language of the initiative passed by the voters draw the line? It is not, where should the line be drawn?

The Secretary relies heavily on the argument that her predecessor's interpretation of legislative term limits permits manipulation of term limits. There are three problems with this argument. First, it is also a policy argument rather than an interpretation argument, bearing no relation to the language of the initiative. Second, the only evidence presented to the court showed that neither the general assembly's majority parties nor individual senators have, in fact, engaged in such manipulation. Indeed, Senator Fitz-Gerald is the beneficiary of opening days set by a Republican majority, which caused her partial term to be less than one-half of a term. Third, the rule advocated by the Secretary does not eliminate the risk of manipulation, it merely shifts the power to manipulate from the general assembly as a whole to the individual legislators who will be directly benefited by such manipulation. This would seem to increase rather than decrease the risk of manipulation. If "one-half a term of office" meant a partial term

beginning on or before the first day of the third regular session in a term of office, all a legislator would have to do to avoid having his or her partial term treated as a full term for term limits purposes would be to take the oath of office one day or more after opening day. Such conduct seems at least as likely as the hypothetical conduct by a majority of the general assembly setting opening days in order to hurt or benefit a particular legislator or legislators. As Senator Fitz-Gerald correctly points out in her brief, "[o]ne thing is certain about term limits: they were not intended to apply just to those officeholders who opt in."

Another argument advanced by Secretary Dennis, which is related to the language of the initiative, is that the voters intended to shorten legislative terms and, therefore, the court should adopt the interpretation of the initiative that results in the shortest legislative terms. There is no explanation of why this argument should apply to legislative terms and not to executive terms. More importantly, it is overly broad and simplistic. The initiative does not say that one who serves "any part" of a term, or "roughly half" of a term, or "any part of a legislative session" or even "a full legislative session", shall be considered to have served a full term. It says, one "who serves *at least* one-half of a term" shall be considered to have served a full term. The plain language of the initiative makes clear that, while the voters intended to limit terms, they did not intend to limit terms as much as possible.

Plaintiffs have advocated an interpretation that is different from both Secretary Davidson's interpretation and Secretary Dennis' interpretation. They agree with the other parties that the term of office at issue is Senator Grampsas' term, and they agree with Senator Fitz-Gerald that "one-half" means precisely "one-half." But, rather than determine the actual length of that term of office and then divide by two, they divide four years by two to determine that one-half of a term is always "two years." Senator Fitz-Gerald served less than two years in her partial term if "year" means calendar year, twelve consecutive months, or 365 ¼ days. However, Plaintiffs argue that "year" in the legislative portion of the initiative has a specialized meaning, "legislative year," meaning the period of time from the opening day of one regular legislative session to the opening day of the next regular legislative session, a period that can range between 352 days and 379 days. Plaintiffs are unable to point to anything in the language of the initiative, or any statute, or any case, or the Bluebook, to support this specialized meaning, which the Secretary and the Attorney General dismiss as a "legal fiction." A similar argument for a specialized meaning of "year" was rejected by the Colorado Court of Appeals in Anderson v. Denver Public School Employees' Pension and Benefit Association, 935 P.2d 31, 33 (Colo. App. 1996). The issue in Anderson was the meaning of the word "year" in a deceased teacher's contract with the school district. The teacher died after completing five "academic years" or "school years" of service, but before reaching his fifth anniversary of service. The teacher's survivors were entitled to certain benefits if he was continuously employed by the district for five years. In deciding against the teacher's survivors, the Court of Appeals stated, "Although the retirement and benefit plan does not specifically define "year," we conclude that the plain and ordinary meaning of "year" is one calendar year or twelve months."

JUDGMENT

For the reasons set forth above, judgment hereby enters in favor of Senator Fitz-Gerald and against Secretary Dennis on the cross claim brought pursuant to §1-1-113, C.R.S. and ORDERS Secretary Dennis to desist from taking any action inconsistent with the conclusion that

Senator Fitz-Gerald is not ineligible to run for re-election in November 2006 or to hold the office of Senator for another term beginning in January 2007 due to the term limits provisions set forth in article V, section 3 or the Colorado Constitution. Judgment further enters in favor of Secretary Dennis and against Plaintiffs on their cross claim against her. The court expressly concludes, pursuant to Rule 54(b) of the Colorado Rules of Civil Procedure, that there is no just reason for delay of entry of judgment on the cross claims among the parties under §1-1-113, C.R.S.

Done this 25th day of January, 2006.

BY THE COURT:

CATHERINE A. LEMON
District Court Judge