

January 31, 2017

Re: authorizing moderator to conduct a verification count of computer-counted ballots

### **Written Testimony Submitted in Support of SB 109**

To Honorable Members of the Election Law and Internal Affairs Committee

I ask for your support for SB 109. Ex. A shows one way moderators have been doing these verification counts. Ex. B includes suggestions for strengthening this bill.

I have been involved with election integrity/voting rights issues in our state since early 2008. I am a former teacher and reporter and am currently an engaged citizen.

I voted with the majority in my 2003 Town Meeting to purchase the AccuVote with the intent of making things easier for our trusted election officials. We did not know of the many vulnerabilities of this computer at that time and that its use (as currently used in Jaffrey) violates NH CONST. pt 1, art. 8, pt. 1, art. 11, pt. 2, art. 32 and the inalienable right of all Jaffrey citizens to a free and fair election where we have an evidence-based reason to trust the reported election results.

The Ballot Law Commission (BLC) first became aware of the computer's vulnerabilities in 2006. As Attorney Paul Twomey warned during that public hearing, "...if you create an opening, somebody's gonna take advantage of it....If you create a situation in which people can hack elections, they will. Sooner or later, they will. "

In approving an updated version of the technology previously approved, BLC Chairman Gary Francoeur made clear, "Even in the towns that have the machines, they can still turn around if they want to and hand count these things. Nothing is stopping this Committee today from allowing them to do that.

"They choose to use this electronic machine if they want to. They don't only have to use that. They can also hand count them."

<https://www.youtube.com/watch?v=3ysheRLXuhA>

It is consistent with RSAs 659:60, 659:63, 659:42, 659:64 and 659:77 that moderators publicly check the computer results to verify that the computer is working properly on election day and there has been no tampering. In my understanding of the law, moderators would be REQUIRED to do so.

HB 192-FN in 2007t attempted to require this oversight at each polling place. Inexplicably, the Deputy Secretary of State objected to the bill, saying, "We are concerned with the requirement of having to hand count. This will place increased

costs to municipalities [unfunded mandate]....And a discrepancy in the count is of concern.”

<http://www.gencourt.state.nh.us/legislation/2007/HB0192.html>

Huh? Isn't the Executive Branch supposed to make sure election laws are followed and rights of voters and candidates protected? The Secretary of State and Attorney interpreted following election laws as “discretionary.” Former US Supreme Court Justice Louis Brandeis and I strongly disagree with this current practice.

“If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.” - Justice Brandeis, 1928

However, Danville Moderator Wally Fries (who died last February so cannot not be here to share his method, Ex. A, with you) believed, ***“I have always stressed the importance of public confidence in the process and suspect most moderators would share that sentiment upon careful reflection.”***

His “parallel hand count” procedure, which he believed was being used in a number of towns, 1) fulfilled his duty to the public to be reasonably sure of an accurate election night count; 2) was in keeping with the spirit and intent of election laws consistent with NH CONST. pt. 2, art. 32; 3) didn't require additional money from the state or town. Former Deputy Attorney General Orville “Bud” Fitch supported his procedur, calling it an example of NH common sense.

Senators Birdsell and Gray may remember his testimony to the House Election Law Committee in 2014 re: HB 1605.

<http://www.gencourt.state.nh.us/legislation/2014/HB1605.html>

Before the November 2010 election, Jaffrey officials and a group of citizens agreed it was a good idea to do this kind of hand count verification. Both the moderator and I confirmed with the Attorney General he could do it. However, because of the strong objection from Deputy Secretary of State Scanlan, the moderator changed his mind.

In 2010 I had complete confidence in the Jaffrey election system. I have 0 confidence now and will spare you the details of what has happened since. Public officials chose (and continue to choose) to be on the “wrong” side of the law in fulfilling their public duty and instead choose to be on the “right” side of the Secretary of State. Your support of this bill will prevent this split from occurring in other towns. Once sacred trust between citizens and our government is broken, it can be difficult to repair.

Wally has said there may be better ideas than his. Please support this bill and confirm that moderators have a legal duty to the public under our constitution and laws to ensure an accurate count and encourage towns/city wards using the AccuVote to develop “best practice” procedures consistent with law that works best

for their situation. They can share then share them with other election officials, as Wally did. The procedure election officials develop could require a vote from their local governing authority and or voters to ensure the needed check and balances are in place.

Thank you to Senator Clark and the bill's co-sponsors for bringing this forward. Your support will be an important step in showing NH's commitment to election integrity and protecting the rights of voters and candidates and our right to free and fair elections.

Deborah Sumner  
474A Great Rd.  
Jaffrey, NH 03452  
603-532-8010

### **Exhibit A**

#### **Parallel Hand Counts—Example of New Hampshire Common Sense**

Former Danville moderator Wally Fries (who retired in 2010) always oversaw hand counting of 1-3 contests/ballot questions on election night to ensure an accurate computer count.

#### **Why:**

1. had worked with computers for years and knew there could be breakdowns and their reliability needed to be checked. As a member of several state advisory groups he also knew the pre-election ballot testing wasn't enough. The hand count check made it more likely any error would be detected and accurate results would be reported to Concord (as NH Constitution and state law require).

2. knew there had been reported instances of tampering and wanted to discourage any possibility of that happening in his town's elections.

3. wanted the public to have confidence in his town's election results.

#### **How:**

1. Selected sampling—he chose contests based on a) expected closeness b) vulnerability to tampering c) importance. (For example, he would hand count just the competitive races in Presidential Primaries. and reconcile the "other" piles with total ballots cast and number of voters.) UNH statistician confirmed the validity of this kind of sampling.

2. Double count hand count using "sort and stack method." (Election officials sort into piles, first counter cross stacks 25 ballots at a time, second counter verifies count or team determines voter intent, reconciles discrepancy). Public could observe.

3. Verified hand count checked with computer total. Reconcile any differences.

If Wally believed three races might be close, he'd check all three. Recounts cost money, he reasoned and at least candidates would know that one jurisdiction had an accurate count.

**Cost:** No additional cost for town or state

## **Exhibit B**

### **Suggestions for Improving SB 109**

1. Include two categories of discovered discrepancies that should be followed up, by local election officials and/or with help from the Secretary of State (so candidates can request recounts, if needed, before final election results are certified)

A. "Significant" as defined in an earlier draft of this bill "659:60-A:1d Significant Discrepancy; Definition. As used in this chapter, 'significant discrepancy' means any percentage if applied to all votes counted by an electronic ballot counting device for that race would have changed the outcome of the race."

B. Threshold to trigger more local investigation of WHY the discrepancy occurred and that might lead election officials to count another race before the state results are certified (additional verification count would likely have to occur after election night). The trigger number used in a number of states, including Minnesota is .5% (.005)

C. Clarify that voter intent (RSA 659:64) be honored, so any vote that can be determined (such as a voter circling the oval instead of filling it in) be added to the total reported to the Secretary of State for that/those contest(s) but that type of error not be included in the .5% discrepancy.

Here's the language they use in Minnesota to clarify that distinction:

Minnesota Statutes, section 206.89(4), Postelection review of voting systems.

<https://www.revisor.mn.gov/statutes/?id=206.89>

"Subd. 4. **Standard of acceptable performance by voting system.** A comparison of the results compiled by the voting system with the postelection review described in this section must show that the results of the electronic voting system differed by no more than one-half of one percent from the manual count of the offices reviewed. Valid votes that have been marked by the voter outside the vote targets or using a manual marking device that cannot be read by the voting system must not be included in making the determination whether the voting system has met the standard of acceptable performance for any precinct."

2. Direct the Secretary of State to develop:

A. standardized forms (see below for example) and require the results of the verification count to be available to the public. (Massachusetts requirements below)\*

B. protocols (to add to the Election Procedure Manual) to ensure secure ballot chain of custody procedures for 1) multiple polling place jurisdictions and 2) if, in determining the reason for a .5% or higher computer/independent verification discrepancy, election officials would need to access ballots AFTER they have been sealed for storage AND provide public notice for that continued investigation.

C. for those local officials who use a random selection procedure, a “best practice” procedure for ensuring publicly observable truly “random selection” and adequate public notice for the public and candidate representatives to observe the verification process, consistent with current open meeting laws.

\*2A See what the Massachusetts form looks like by opening any link here:

<https://www.sec.state.ma.us/ele/elepostelection/postelectionidx.htm>

Here is what the Legislature directed their SoS to include on the hand count verification forms (See section e, i-v.)

<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/Section109A>