

Supplement to Testimony in Support of HB 1390, Jan. 28, 2020

Voting rights implicit in our constitutional right to self-government: to have our votes publicly counted and reported accurately; free and fair elections; election officials accountable to the people; public's duty to participate in election oversight on election night.

Government duty (local, state and federal) to protect rights of voters and candidates and show evidence it is protecting our rights, votes and elections.

Relevant court cases:

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 US 1 - Supreme Court, 1964

"The right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." *United States v. Mosley*, 238 U.S. 383, 386

"[e]very voter's vote is entitled to be counted once. It must be correctly counted and reported." *Gray v. Sanders*, 372 U.S. 368, 380 (U.S. 1963)

NH CONST. pt. II, art. 32 requires that the moderator "sort and count" votes in "open meeting" in the presence of the town clerk, selectmen and "all others who may take an interest in the election, and be able and willing to detect and expose any error, and obtain a correction of it immediately, when it can be most easily corrected." Opinion of the Justices, 53 N.H. 640, 1873

Chronology of Erosion in Protecting NH Voting Rights/ Election Integrity and Public Trust

Ballot Law Commission (BLC) was created in 1940s "to help make sure that state elections were carried out according to the law and to resolve certain disputes involving the manner and mode of state elections."
Source: Legislative history of HB 693. 2003

According to SoS Gardner (Aug. 6, 2008 minutes of Electronic Ballot Counting Device Advisory Committee) Hand counting until 1949; Portsmouth first to use lever machines, Nashua, Manchester and Exeter by mid-1970s

1979 Many laws in Chapter 659 under Chapter LXIII were passed

1986 BLC banned levers and punch card machines

1987 BLC approved use of electronic scanners (first one did not have paper trail so couldn't do recounts)

Early 1990s Role of BLC updated

1992 Diebold optical scan (AccuVote) and ESS Op Tech approved for use

1994 NH law required voters vote on paper ballots (recounts done by people in public)

2002 BLC approved upgrades of optical scans

2003 HB 693 removed additional jurisdiction from BLC(RSA 665:7) because it "provides seemingly open-ended authority." Anyone who had reported a non-criminal election law complaint not handled by the Attorney General or Secretary or State, could go to the Ballot Law Commission BEFORE hiring a lawyer/going to court. "...the commission shall hear and determine all disputes involving alleged violations of NH election laws of a non-criminal nature for which no specific statutory appeal procedure has been provided."

In 2003, the House ELC voted 10-6 OTP to support the change. Minority opinion by Buckley "The BLC has the responsibility to ensure that every person's vote is counted and every candidate has an equal opportunity to run for public office, destroying that sanctity to ensure one party rulings is nothing short of an abuse of power by the majority."

HB 627 and HB 577 passed to bring NH into compliance with federal Help America Vote Act (HAVA) 2002, Pub. L. 107-252 to be eligible for a potential 20 million dollars in federal funds. Section 301 (a) required that voters be notified if computer read an over voted ballot and be given a chance to correct it.

That was NOT included in HB 627. Instead, Deputy SoS Scanlan and assistant AG Fitch asked the chair of the

Sen. Internal affairs Committee to add a non-germane amendment (in violation of Senate rules) to HB 627 that exempted ballots from public records law. According to court discovery, then Attorney General Peter Heed did not know about the ballot exemption and PROBABLY Secretary of State Bill Gardner didn't know. Highly unlikely more than a few House members knew it was even in the bill.

2006 NH Legislature approved ballot design change, and the SoS claimed he discovered afterward that ONLY the AccuVote could read this design. Subsequently, the state paid to replace the Op Techs with AccuVotes.

After the March 10 public hearing, where the following information was presented, the BLC voted 4-1 to approve an upgrade with these KNOWN vulnerabilities. (Copy of Transcript available)

An attack could bypass the pre-election ballot testing and, during an election:

- manipulate the electronic tallies in any way desired. These manipulations could be performed at any point during the day. They could be performed selectively, based on knowledge about running tallies during the day. For instance, the attack code could wait until the end of the day, look at the electronic tallies accumulated so far, and choose to modify them only if they are not consistent with the attacker's wishes.
- print fraudulent zero reports and summary reports to prevent detection.
- modify the contents of the memory card in any way, including with the electronic vote counts and electronic ballot images stored on the card.
- erase all traces of the attack to prevent anyone from detecting it.
- turn off under-and-overvote notification. It could selectively disable over vote notification or selectively provide false overvote notification for favored or disfavored candidates.

“It is even conceivable that there is a way to exploit these vulnerabilities so that changes could persist from one election to another. For instance, if the firmware or software resident on the machine can be modified or updated by running code, then the attack might be able to modify the firmware or software in a permanent way, affecting future elections as well as the current election. In other words, these vulnerabilities mean that a procedural lapse in one election could potentially affect the integrity of the subsequent election.” Source: VSTAAB Report, Feb. 14, 2006

BLC rule in 2006 (which reportedly expired in 2006 and no new rules have replaced them) Source: Deputy SoS Scanlan.

Rule 608.01 Approval. “Any person desiring to have the ballot law commission approve the use of a voting machine or other device not previously approved may submit a written application for approval to the commission. The request shall include the name of the manufacturer, model number and other information to identify the device. **The commission shall approve the request following a public hearing if the commission finds that adequate safeguards have been provided to ensure the integrity of election results and the machine or device complies with these rules and the election laws of the State of New Hampshire.**”

Statement by Chairman Gary Francoeur: “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.”

2008 HB 285 established Electronic Ballot Counting Device Advisory Committee to advise the BLC and Legislature. Link to minutes and final report below:

<http://sos.nh.gov/ballotcountdev.aspx>

2009 Among EBCDA Committee's recommendations:

p.14 "Over the long run, public confidence relies on the state and local history of accuracy, security, transparency, and reliability in the ballot counting process. **One of the most effective and least expensive ways to achieve these goals is to conduct random hand-counted audits of tabulator counts immediately after the election. Such audits are valuable because they check the accuracy of the initial counting method from end to end.**" Moderators should continue to have the option of checking "closely contested high-profile races for immediate on-site post-election hand counts as checks on the tabulator."

2010 Deputy Secretary of State began actively discouraging moderators from performing their legal duty to oversee a publicly observable vote count and ensure accurate election night totals. RSA 659:59, RSA 659: 64, RSA 666:2, RSA 659:77

Then Assistant Attorney General Matthew Mavrogeorge confirmed in Nov. 2010 that moderators DID have the authority to do this check, although no law specifically required it. Source: email of Nov. 1

"Moderators are given significant authority to determine what procedures at their polling place are necessary to ensure an accurate count. "

Violations of two election laws and a possible third reported to Attorney General Dec. 17, 2010. No action taken.

2012 Ballots I requested through court order reportedly destroyed by Jaffrey Town Clerk before the judge could issue a ruling. Federal penalty up to \$1,000 fine and a year in jail. The Attorney General issued a cease and desist order telling her not to do it again or action might be taken against her. NO investigation of WHEN the ballots were destroyed or if anyone had advised her to destroy them.

2016 NH Supreme Court opinion (Deborah Sumner v. New Hampshire Secretary of State, 2015-0340) that hiding evidence of possible fraud/significant error in our elections is a "political" decision of the Legislature.

Deputy Secretary of State interfered with moderator's legal duty under RSA 659:77 to ensure an accurate count and Assistant Attorney General Brian Buonamano agreed that Dillon's Rule required the legislature to give permission. (Legal opinion of another lawyer was that "Authority to audit is a function necessarily implicit in the broad responsibility placed on election moderators by existing laws, and no further law is required for the performance of that function.")

Oct. 27, 2016 complaint to the Attorney General of the Secretary of State's alleged violation of **RSA 666:3** was ignored.

Official Misconduct. – Any public officer upon whom a duty relating to elections is imposed who shall knowingly fail to perform such duty or who shall knowingly perform it in such a way as to hinder the objects thereof shall be guilty of a misdemeanor if no other penalty is provided by law.

2017 On a voice vote, the NH Senate denied giving that permission. SoS Gardner opposed approving SB 109.

I discovered that a key argument used by the state to defend the ballot exemption from public records (case decided 2016) was false. The state claimed that ballots had never been available to the public as public records.

In legislative history for HB 577, May 2, 2003 request from David Scanlan and Bud Fitch saying, "The Department of State in consultation with the Attorney General's Office requests the following amendments:"

"#9 Add a new section to HB 627, exempting ballots used for elections from RSA 91-A. This proposed amendment is **prompted by a recent Superior Court Order declaring that the ballots cast in an election are not exempt from the right-to-know law and requiring a town to provide a person making a 91-A demand to have access to all the ballots preserved from a recent town meeting.** The integrity of ballots and the finality of election results requires that there be limited and highly controlled access to the ballots used for elections. The existing recount and recount appeal provisions provide adequate access to ballots under circumstances"

http://gencourt.state.nh.us/SofS_Archives/2003/senate/HB577S.pdf (see p. 54)

Reported to the Attorney General and various departments in the courts.

On Aug. 31, I reported to my select board that NH had evidently been in violation of federal law re: over voted ballots since 2003 and asked them to bring this to the new attorney general's attention so he could address it.

Included this information re: known reasons for over votes:

- 1. Voter confusion (if a voter changes his/her mind, makes an error or crosses out one vote and fills in another oval, voter intent could be determined by visual inspection, but not by the computer)**
- 2. Creases on absentee ballots counted as "votes"**
- 3. Voter intent not recognized by computer**
- 4. Stray marks/dust counted as "votes"**
- 5. Computer or programming error**
- 6. Specks on the paper due to the printing process**
- 7. Two KNOWN possibilities for fraud (let me know if you want to know what they are).** Note: am now aware of four possibilities.

Response from Select Board: "Since NH is not a home rule state and every municipality is a division of the state, the board will not contact the Attorney General regarding election laws."

Sept. 9 communication from three citizens asking the AG to enforce federal law was ignored. I followed up Dec. 7, Dec. 20

Dec. 20 I recommended:

"1) that an equivalent of an inspector general review past election law complaints and AG procedures and identify the "problem" for policy makers to address. That law students be included in that review so they can see what happens when EVERY check in the system breaks down and results in the NH AG and NH Supreme Court being complicit in hiding evidence of possible election fraud.

"2) use a restorative justice approach in dealing with this specific issue (and any follow up on related issues included in this communication)."

2018 three bills filed (HB 1486, 1520, 1582) to begin getting NH back on track, to bring election practice into compliance with the spirit and intent of NH CONST. and current election laws and protect rights of voters and candidates, our votes and our elections, None gained support in the House Election Law Committee.

2019 Third attempt to codify moderator's constitutional duty illegally removed by SoS and AG in 2016 failed to gain legislative support. (HB 554), further eroding informed voters' trust in our elections and in our government.

Asked City and Town Clerks Association to get new memory card approved by BLC. CT audits had found problems with the old memory card and failure rate of up to 15%, pushing the vendor to create new design. Luther Weeks of Connecticut Voters Count reported improved audit results with new card. NH continues to use old one.

More than 30 citizens requested legislative leaders to authorize an independent investigation into the SoS and AG action against the Derry moderator, which would have likely resulted in restoring her authority and disciplinary action against the Deputy SoS. No response.

AG ignores evidence I sent him and WITHOUT ASKING ME A SINGLE QUESTION, says that NH is in compliance with federal HAVA over-vote notification. Sends a copy to Bill Gardner.

I confirmed that NH has been knowingly and willfully violating HAVA law re: election day over vote notification since Jan. 2006. Asked AG/Legislative leaders who should investigate. No response. Have provided evidence of what looks like fraud and knowingly misleading the federal government to the USDOJ and Election

Assistance Commission. Have requested federal representatives to initiate a formal review of why no one in the federal government noticed this non-compliance.

2020 The Presidential Primary will be illegally disenfranchising an unknown number of voters and allow at least four known possibilities for election fraud in the AccuVote NH now uses to “count” 89% of all NH ballots, with no public oversight, in clear violation of our state constitution and election laws. That information has been shared with citizens, chairs of the House and Senate Election Law Committees, the NH Municipal Association, Executive and Legislative Committees of the City and Town Clerks Association, the Executive Council, national voting rights advocates and the media.

Compiled by Deborah Sumner
474A Great Rd.
Jaffrey, NH 03452

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Links

1 2016 Supreme Court Opinion

<https://www.courts.state.nh.us/supreme/opinions/2016/2016024sumner.pdf>

2 HB 627 (2003)

http://www.gencourt.state.nh.us/bill_status/bill_docket.aspx?

[lsr=294&sy=2003&sortoption=&txtsessionyear=2003&txtbillnumber=hb627&q=1](http://www.gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=294&sy=2003&sortoption=&txtsessionyear=2003&txtbillnumber=hb627&q=1)

3 Michigan

A. AccuVote error rate

<http://michiganelectionreformalliance.org/AlleganAudit.pdf>

B. Recommended Action

<http://michiganelectionreformalliance.org/BlueRibbonCommission.pdf>

4. Ohio AG Opinion/ Ballots Are Public Records

<http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/47/47137eb6-270b-4868-968b-f63a4a4e2a90.pdf>

5. Michigan AG Opinion/Ballots Are Public Records

<http://michiganelectionreformalliance.org/AG%20Opinion%207247.pdf>