

Testimony in Support of HB 491, Overvoted Ballots

To Honorable Members of the House Election Law Committee:

I am Deborah Sumner, a former teacher and reporter, member of Right to Know NH and the NH Community Rights Network. I have been involved with NH voting rights and election integrity since 2008. I helped count ballots before Jaffrey began using the (formerly Diebold) AccuVote in 2004 and served two years as a ballot clerk. Because ballots were exempted from public records law in 2003, I have been to state court twice to ask to review ballots in my town (for November 2010 and November 2012). The second time was to find out why 2.5% of Jaffrey ballots contained overvotes.

Basis in NH law: "The goal must be the ascertainment of the legally expressed choice of the voters. **The object of election laws is to secure the rights of duly qualified voters, and not to defeat them.**" *Appeal of McDonough*, 149 N.H. 105, 112, (2003).

The Problem: Currently, NH has two contradictory policies, RSA 659:64 (voter intent as legal standard) and Secretary of State's policy (since Jan. 1, 2006). Mr. Scanlan, Mr. Fitch and I interpret the federal requirement differently, but I believe we agree that neither the NH AG nor the USDOJ is enforcing the law, saying this is a policy question for the legislature to decide.

Research and anecdotal evidence show less-experienced voters, those of lower income and education are more likely to be disenfranchised by overvoted ballots. That has been known since the 2000 general election and reported by the Election Assistance Commission.¹ (Specific example from Jaffrey if interested.)

A number of voters won't know that computers can't read their votes as marked unless we teach them. As a former teacher who wants everyone's vote to count and be counted, I see the system failing in that educational responsibility. The message: In NH, our votes and voters don't matter.

Why you should support this bill: Requires a simple programming change, no cost, more voters will have their votes counted, eliminates 3 of 4 known possibilities of election fraud (see HB 1486 testimony below), brings us into compliance with both federal HAVA and state election laws (RSA 659:77, RSA 666:2, RSA 656:42, RSA 659:40). A no-brainer: this bill should have unanimous support from this committee.

The data: Please see the request for the AG to investigate the high overvoted ballot rate in Derry, particularly with one computer counting only absentee ballots (**572 overvoted ballots, 14.2%**). <https://groups.google.com/g/jaffreyvoices/c/eLQQSh5AH0o>

¹ *2004 Election Day Survey Report*, Election Data Services, Inc., Sept. 27, 2005
<https://www.eac.gov/research-and-data/2004-election-administration-voting-survey>, p. 142, chap. 10, p. 1

Michael C. Herron and Jasjeet S. Sekhon, "Overvoting and Representation: An examination of overvoted presidential ballots in Broward and Miami-Dade counties," Sept. 28, 2001.
<http://sekhon.berkeley.edu/elections/election2000/HerronSekhon.pdf>

As I reported to you in my Feb. 23 email the AG has taken no action on this.

Compare Derry overvotes with:

1) our small sample of three towns, Keene and 2 Nashua wards (1,246 overvotes of 48,953 ballots tabulated by the AccuVote,) an overvoted ballot rate of 2.6%.

2) VT that reports overvotes for every race and location; MA identified only 7 overvotes (.007%) for ALL races in its 3% hand-count audit of 100,349 ballots.

NH doesn't even require overvote information to be printed for the general election. **We have no way to know how many voters are being disenfranchised or if some races are impacted more.**

Nov. 2016 top races: Mr. Scanlan acknowledged in his testimony on SB 79, that 2-3% of ballots not read by the scanner are legal votes. See testimony on HB 1486 re: margin of victory in President, US Senate and Governor's race, % of ballots showing no recorded vote for that contest (could have been invalidated as overvote, scanner not reading vote, or voter choosing not to vote for that office). All of them are within that 2-3% possibility that legal votes were NOT included in the reported results and the wrong candidate was declared "winner."

What I hope you will improve:

1) Eliminate word "vendor" from the bill.

2) Require:

A) programming for overvote AND completely blank ballot notification for all elections as CT, VT and MA do. That would give us a nearly failsafe mechanism of using the scanners, applying the same legal standard as hand count towns and recounts, and complying with election laws re: voter intent, counting all legal votes, not counting illegal ones, etc.

B) reporting of overvotes for all races and locations as VT does. Then a high overvote rate such as we saw in Derry could be investigated.

What you should know: Instead of asking the legislature to codify this HAVA requirement in 2003, DSOS Scanlan and then assistant AG Fitch asked the legislature to exempt ballots from public records law (non-germane amendment to HB 627, a HAVA-required bill). This is the "normal" way laws are passed in NH, Mr. Scanlan assured the court. PROBABLY true, but not inspiring my trust in the SoS, AG, our elections or government.

I have provided you with 1) 2018 testimony on HB 1486; 2) two examples of common overvotes that would be legal votes in handcount towns and recounts 3) information from VT and CT shared with the Town and City Clerks Association that represent best practices in ensuring voter intent is honored as much as possible.

Conclusion: In your orientation meeting, Bill Gardner told you that NH elections belong to the people and you represent US. It is YOUR constitutional responsibility to make sure that statement is true.

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1) Testimony in Support of HB 1486, Jan. 23, 2018

I'm Deborah Sumner from Jaffrey and you know from my earlier testimony on HB 1520 that I went to court asking to review ballots from my town's Nov. 2012 election to make sure the 2.5% of ballots reported as "over votes" weren't caused by fraud. That wouldn't have been necessary if NH was complying with Section 301(a) of the Help America Vote Act of 2002, which requires all over voted ballots including a federal contest to be returned to voters for possible correction and RSA 659:64 (determining the intent of the voter).

In 2016, Philip Stark, statistics professor and associate dean of mathematical and physical sciences at UC Berkeley, testified in court that "There are documented instances where scanners have high rates of erroneously inferring that valid votes are over votes." This legislation is needed to bring NH into compliance with state and federal law and eliminates these known possibilities for legal votes to be invalidated as 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 Three KNOWN possibilities for fraud (Note 1/29/21 4th. fraud possibility added as reported to NH AG, Governor Sununu, SoS and USDOJ.)

A. An attack could bypass the pre-election ballot testing and, during an election: turn off under-and-over vote notification. It could selectively disable over vote notification or selectively provide false over vote notification for favored or disfavored candidates.

VSTAAB, 2006 <http://nob.cs.ucdavis.edu/bishop/notes/2006-inter/2006-inter.ps>

B. Someone with access to ballots could add a tiny spot of invisible/ultraviolet ink to the oval for the PREFERRED candidate. The voter wouldn't notice it. If he/she voted for ANOTHER candidate, the scanner would read it as an over vote and be it would be invalidated. A vote for the PREFERRED candidate would likely be counted as valid.

C. Prior to recounts, over vote marks could be added to ballots (also possible in locations not using the AccuVote).

D. Voters might mark malicious patterns on the ballot that could trigger a dormant Trojan horse and cause a compromised computer to start cheating. (p. 71, *Source Code Review of the Diebold Voting System*)

My research shows that in a 2004 draft plan, NH intended to comply. It says, "The state will require optical scanning systems to reject ballots with over votes....affording voters the opportunity to correct [them]."

I'm not aware of any other state that doesn't program computers to give voters another chance with over voted ballots. Vermont and Massachusetts also program to reject completely blank ballots, which are probably the result of voters using ink the scanner can't read or circling the ovals. Returning blank and over voted ballots to voters for possible correction would make it less likely they would make the same error in the future.

LINKS to election official instructions for MA and VT (which also use the AccuVote, programmed by LHS Associates, headquartered in Salem, NH).

<https://www.town.rehoboth.ma.us/sites/rehobothma/files/pages/ma-accuvote-pollworkertraining.pdf>

<https://www.sec.state.vt.us/media/71327/electiondayprocedures.pdf>

Other states also program to return over votes for state and local elections because the same possibilities for “lost votes” are possible there. I hope you choose to add that to this bill.

2010 law required reporting of over votes to Concord and that was changed before November 2012. We have no way to know how many legal votes have been invalidated or if election fraud with over votes has occurred.

In Jaffrey, the AccuVote reported 48 over votes and 1 completely blank ballot of 2,867 cast in November 2016 (1.7%). IF that was typical state wide, with the potential of 87.5% of all NH ballots now “counted” by the AccuVote with no public oversight, **it is possible that more than 11,000 voters “lost” their votes for one or more contests in November.** That could have made a difference in some of our very close races.

The margin of victory in these contests and the percentage of voters either NOT voting in this race OR having their votes invalidated as over votes:

President: .39% / 1.5%

US Senate: .14% / 2.2%

Governor: 2.27% / 4.1% (may be off slightly since based on total federal ballots cast and some overseas voters don’t vote for state offices)

I believe this federal requirement is the result of the debacle in Florida in 2000. Since ballots are public records there, a news consortium looked at all voted ballots and found that voter intent could have been determined for 3% of the 113,820 over voted ballots they found, 2,182 for Gore and 1,309 for Bush. We should learn from Florida’s experience and not allow this unacceptable disenfranchisement of NH voters.

http://www.sptimes.com/News/111201/Lostvotes/Without_overnotes_Gor.shtml

Now, the only way over votes can occur in Florida is with an absentee ballot. Even then, election officials will examine it for voter intent. That’s what HB 1486 will require.

<http://jacksonville.com/news/metro/2016-01-01/story/dont-worry-america-florida-has-learned-how-vote-election-2000>

With passage of HB 1486, NH will show its commitment to “enfranchise as many citizens as possible and to count their votes whenever possible. RSA 659:64” (2016 EPM, p. 41), educate voters to eliminate potential for over voted and blank ballots, and eliminate three known possibilities for election fraud with ballots tabulated by the AccuVote. Thank you.

2) Examples of common over votes (invalidated by scanner but legal votes in handcount towns and recounts)

3

Commemorating the 100th Anniversary (1916-2016) of the New Hampshire Presidential Primary

REPUBLICAN

Official Ballot

DIRECT PRIMARY ELECTION

FEBRUARY 9, 2016

Name of Town _____

[Signature]
Secretary of State

CANDIDATE OF THE REPUBLICAN PARTY FOR PRESIDENT OF THE UNITED STATES

I hereby declare my preference for candidate for the Office of PRESIDENT of the UNITED STATES to be as follows:
NOTE FOR NOT MORE THAN ONE:

John Kasich (New York)

Bill Clinton (New York)

Chris Christie (New Jersey)

Stephen B. Cook, Jr. (Massachusetts)

Tim Cook (New York)

Paul Ryan (Indiana)

Donald S. Cook (Illinois)

Paul J. Ryan (Indiana)

Mark J. Felt (New York)

Richard J. Rothman (New York)

John J. C. O'Leary (New York)

Samuel J. Griffin (New York)

Gregory J. Mann (New York)

Scott Brown (New York)

George Pataki (New York)

Frank Lautenberg (New Jersey)

Robert L. Casey (New Jersey)

Andy Martin (New Jersey)

Stephen John McCarthy (California)

Peter Wincek (New York)

George Pataki (New York)

David Paterson (New York) *meant this*

Clint H. Ferguson (Missouri)

Joe Biden (New York)

Matt Bevin (New York)

Mark Warner (Virginia)

Paul Ryan (Indiana)

Donald J. Trump (New York)

Richard P. Mills (New York)

9

Commemorating the 100th Anniversary (1916-2016) of the New Hampshire Presidential Primary

REPUBLICAN ABSENTEE

Official Ballot

DIRECT PRIMARY ELECTION

FEBRUARY 9, 2016

Name of Town _____

[Signature]
Secretary of State

CANDIDATE OF THE REPUBLICAN PARTY FOR PRESIDENT OF THE UNITED STATES

I hereby declare my preference for candidate for the Office of PRESIDENT of the UNITED STATES to be as follows:
NOTE FOR NOT MORE THAN ONE:

John Kasich (New York)

Bill Clinton (New York)

Chris Christie (New Jersey)

Stephen B. Cook, Jr. (Massachusetts)

Tim Cook (New York)

Paul Ryan (Indiana)

Donald S. Cook (Illinois)

Paul J. Ryan (Indiana)

Mark J. Felt (New York)

Richard J. Rothman (New York)

John J. C. O'Leary (New York)

Samuel J. Griffin (New York)

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Mark Warner (Virginia)

Paul Ryan (Indiana)

Donald J. Trump (New York)

Richard P. Mills (New York)

Ted Cruz

3) “Best practice” protocols to ensure voter intent honored whenever possible:

A. VT/ election-day ballots Vermont Tabulator Guide

<https://sos.vermont.gov/media/se2ja4em/vermont-vote-tabulator-guide.pdf>

C. “Overvoted race”

1 means the voter marked more candidates for an office than the “Vote for Not More Than #” for that race, OR

2 a stray mark or fold on the ballot may have been read as an extra vote.

3. Discreetly explain to the voter that too many choices were marked for one race.

ASK the voter to review the ballot to see if too many candidates were marked for one office or to look for stray marks. If the voter can’t see the error, feed the ballot again.

If the ballot is returned again with “over voted race” on the LCD screen,

- i. Ask the voter if they want to return the ballot to the entrance checklist officials to obtain and mark a new ballot.
- ii. If the voter chooses not to mark a new ballot, explain that the machine will count all properly marked races but will not count the vote in the “over voted office.”

The election official can use the plastic key to open the upper front panel access door and hold the YES button while instructing the voter to insert the ballot **OR** the voter may place the ballot in the Auxiliary compartment.

B. CT/Absentee Ballots:

In CT, there are teams that ONLY deal with absentee ballots.

1. If a quick look at the ballot shows the computer won’t read voter intent, put it in the auxiliary bin to be counted later.

A. If it contains an actual overvote (ovals filled in for both Biden and Trump, for example), you can use the override button and the AccuVote will read other votes and invalidate that one as an overvote.

2. If computer rejects a ballot, try inserting another way.

3. If it is still rejected, put in auxiliary bin to be counted by people.

<https://portal.ct.gov/-/media/SOTS/ElectionServices/Handbooks/2013ABCountersManualpdf.pdf>

Step 10. Set aside ballots to be handcounted.

B. Ballots with obvious marking errors.

Before feeding the ballots into the tabulator, take a quick look at them. Any ballots which obviously cannot be processed by the tabulator (e.g., mutilated, completed in red ink, non-No. 2 pencil, etc.) should be set aside for hand counting. **Also** set aside any ballots which contain markings that will obviously result in lost votes (e.g., some races marked with a check or an “X”; candidate name circled; name written in on the write-in line but the oval is not filled in). The point of this quick look is to spot obvious errors, not to substitute a hand count for tabulator processing. **Remember:** all offices and questions will have to be hand counted on these set aside ballots.

Step 11:

If the tabulator indicates that a ballot contains an **overvote**, check the ballot to be sure it is a true overvote (see: EXAMPLE 3) and not a stray mark through one of the ovals. Unless the ballot clearly shows an attempt by the voter to cast more than one vote for an office, the ballot should be put aside to hand count all offices. Subtract from the number of Absentee ballots machine counted. If the ballot does contain a true overvote, reinsert the ballot and press and hold the "**yes**" key at the same time to perform an *override*. When the tabulator performs an *override*, it does not count any votes for the office in which an overvote occurs, but *does* count all other properly marked votes.

To avoid unnecessary lost votes and to give effect to the intent of the voter, **WHENEVER** an "**overvote**" message is displayed while processing **absentee ballots**, the official processing the absentee ballot should inspect it to be sure that it is a genuine overvote--an attempt by the voter to vote for more candidates than allowed for an office. If it is a genuine overvote, such as the one shown in Example 3, the *override* procedure described in 11a above should be used. Unless you are sure that it is a genuine overvote, the ballot should be put aside for hand counting.

p. 44 Closing procedures:

1. Process any remaining ballots that were set aside during the day. If there are any ballots that continually reject, and the ballot is marked correctly, but contains an over-vote, over-ride the ballot in the tabulator by pressing and holding the YES button while feeding the ballot through the tabulator.
2. If there are any ballots that continually reject, and the ballot is mis-marked, hand count these ballots in accordance with the this Handbook.