

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,
Plaintiff

**DECLARATION OF
NANCY TOBI**

v

Case No. 06-CV-0263
(GLS)

NEW YORK STATE BOARD OF ELECTIONS;
PETER KOSINSKI and STANLEY L. ZALEN,
Co-Executive Directors of the New York State
Board of Elections, in their official capacities; and,
STATE OF NEW YORK,
Defendants

Pursuant to 28 U.S.C. sec 1746, **NANCY TOBI**, declares as follows:

1. My name is Nancy Tobi and I am filing this declaration on behalf of myself and the New Hampshire Fair Elections Committee, of which I serve as Chair. I am a founder of Democracy for New Hampshire (DFNH), the Chair of the New Hampshire Fair Elections Committee, and the Legislative Coordinator for Election Defense Alliance (a national organization). All of these organizations are nonpartisan, 100% grassroots organizations. Democracy for New Hampshire was founded in February, 2004, and its Fair Elections Committee was founded one year later, fulfilling the second part of the DFNH mission statement:

Democracy for New Hampshire is a nonpartisan big-tent organization that promotes grassroots community involvement in the democratic process in New Hampshire. *DFNH works to protect the foundations of our democracy and the integrity of our political process* and supports fiscally responsible, socially progressive candidates who speak honestly about policy choices.

The Fair Elections Committee statement of purpose is:

The New Hampshire Fair Elections Committee is dedicated to protecting, preserving, and enhancing those aspects of the NH election system that are unique, transparent, secure, and exemplar. The FEC aims for open and accessible election processes, while implementing processes to prevent, pursue and prosecute proven instances of election fraud.

2. I have been involved in grassroots activism promoting election integrity since 2003. I serve as citizen representative on the New Hampshire HAVA State Plan Committee and Disability Task Force. In my home state of New Hampshire, I have worked with other citizens, legislators, and the NH Department of State to improve our election integrity including drafting and successfully lobbying for passage of legislation, implementing new procedures, and promoting, leading, and participating in numerous citizen educational forums and events. I have been invited to speak at national conferences, including Keene State College's recent November 2007 Citizenship Forum, a Summer 2007 Election Integrity Forum in New York, DemocracyFest 2006 (California) and 2007 (New Hampshire), the WeCount2006 Conference (Ohio), and the 2005 Third Party Conference (New Hampshire), at which I was invited to speak about HAVA. I have been interviewed on radio shows in New Hampshire, Ohio, Pennsylvania, Texas, and Oregon.

I was invited to speak on a panel about New Hampshire's election systems on New Hampshire's political television show "Political Chowder". I organized an election integrity track at the 2007 DemocracyFest, which featured nationally known authors, activists, New Hampshire's Secretary of State Bill Gardner, and representatives from the NH Departments of State and Justice. I organized an election integrity forum in December 2006 in New Hampshire, also featuring nationally known authors and our New Hampshire Secretary of State. I have met with election activists around the nation to discuss and dialog solutions to our national, state, and local election problems. I have organized and led nonpartisan working groups consisting of grassroots activists, election officials, and lobbyists, towards the improvement of proposed national election reform legislation. I have written numerous op-eds, essays, and booklets about the Help America Vote Act, democracy and elections, and New Hampshire election systems and methods for hand counting. Most recently, I have released the Hands-on Elections Handbook (2007), which includes hand count administration and reconciliation methodologies developed by the New Hampshire Department of State.

3. New York's State Constitution of 1777 makes the observation that a vote cast on a tangible ballot preserves democracy better than one cast in the air:

"VI. And whereas an opinion hath long prevailed among divers of the good people of this State that voting at elections by ballot would tend more to preserve the liberty and equal freedom of the people than voting *viva voce*..."

The New York Constitution has since been amended to allow lever machines. But in 1777, the framers of New York's Constitution, engaged in a war against an oppressive unitary power, understood the need for checks and balances to ensure integrity of the mechanism of

democracy: the vote. They further prescribed the ballots be placed in boxes, with a chain of custody overseen by sheriffs to the secretary of state, and the ballots canvassed by a joint committee of the legislature, until March 27, 1799, when the system of inspection and canvassing by local wards was introduced, ensuring more citizen oversight of the process.

Computerized voting equipment began to be used in America's elections in the mid-1960s; it exploded in use after the 2000 election, due to the infusion of HAVA monies to states, which used these funds to purchase billions of dollars of computerized voting equipment.

With the advent of computerized voting, a new form of *voting viva voce* has made its way into the nation's elections, with the lion's share of America's total ballots now being counted – and often cast – in the Ethernet. Adding to the non-tangible nature of this system, computerized elections brought the privatization of our elections as well. Eighty percent of the nation's ballot and votes—the mechanism by which all other rights are secured—are now the private property and trade secrets of corporate computerized voting machine corporations.

These for profit corporations counting 80% of the nation's ballots, use secret and proprietary vote counting technology. In other words, instead of publicly observable vote counting, as recommended in New York's original Constitution, and still guaranteed in numerous other state constitutions, and as required by Section 8 of the federal Voting Rights Act, most of the nation's votes are being counted in secret, outside of the public's oversight. With DRE

technology, this situation is exacerbated because both the casting and the tabulation of the vote are transformed into proprietary Ethernet data, owned by the corporation that manufactures and programs the DREs.

But even with optical scan technology, which uses voter marked paper ballots, the count itself is secret and proprietary, in direct violation of the Voting Rights Act, many state constitutions, and the very tenets of democracy itself. A democracy requires citizen oversight and checks and balances. With proprietary and privatized elections, this is lost. Citizens and even candidates are denied access to inspect and verify the public votes now transformed into privatized election data.

This lack of citizen oversight would be egregious in any voting system, including in a hand count voting system. It is particularly egregious in a computerized system, where the risks for tampering are magnified by the very nature of computer programming. With one line of code in the Ethernet *viva voce* election, the outcomes for entire elections can easily and invisibly be changed, especially when those computerized systems also control the final central tabulation, as is the case in most places in the country (New Hampshire uses optical scanners, but manually tabulates the central vote count).

News accounts in every national, state and local election since the proliferation of computerized voting are rampant with stories of election “glitches”. This benign and rather cute sounding word obscures the very real dangers of relying on computerized voting.

Computer “glitches” are not programming hiccups. They are either programming errors, bugs, or deliberate fraud. Because of the tenuous nature of Ethernet viva voce elections, it is difficult to tell the difference. But regardless of whether or not a computerized election “glitch” is intentional, the ramifications are enormous. These “glitches” cause the wrong people to be seated in office, given power over the voters whom they don’t actually represent (because they were not actually elected). These “glitches” have prevented schools and fire departments from receiving the funding desired by voters. These “glitches” have changed the course of human events in incalculable ways. And despite the plethora of documented cases across the nation, we really have absolutely no idea how often these “glitches” occur or have occurred. This situation is not just antithetical to a system of democracy with checks and balances, it is unconstitutional.

The combination of computerized Ethernet viva voce elections and the loss of citizen oversight due to the privatized corporate control of elections is serving a death blow to our nation’s very system of democracy. This is not to be taken lightly. Further expansion into computerized and privatized elections should be avoided at all costs. Fortunately for our nation and our democracy, there is another way.

Despite the countless news stories of election outcomes called into question because of computerized voting equipment failure, or worse, suspicions of tampering and fraud, and despite the millions and billions of American taxpayer dollars have already been spent, and continue to be spent, on computerized voting equipment, we don’t hear a lot about major problems happening on the hand count election front.

HAND COUNTING IN AMERICA

So it may be surprising to learn that a significant percentage of the nation's voting jurisdictions still enjoy hand-counted paper ballot elections. The Election Assistance Commission's 2004 Election Day Survey reports the following data regarding national use of hand counting on election night.

- 1,734 hand count jurisdictions among 6,568 jurisdictions (defined as "administrative unit for managing elections") nationwide (26.4%)
- 2% of the nation's counties are hand counting their elections
- Hand counting is used for about 1% of ballots in the nation

Hand count elections are being held across the nation. Significant hand count states include the following:

- Wisconsin
- Maine
- Vermont
- New Hampshire
- Texas
- Massachusetts
- Nebraska
- Montana
- Kansas

Many opponents to hand counting cry “chaos will ensue!” But unlike computerized elections, which call for expensive programming, indeed create chaos at the polls with breakdowns, lack of sufficient machines (due their high costs), and which alienate many poll workers in their complexity, running a hand count paper ballot (HCPB) election can be the most orderly and respectable method for administering elections. Proper hand count elections simply require good management: you manage *process*, you manage *people*, you manage *paper*, and you manage *numbers*. Hire a good manager and a good accountant for every district, and your hand count elections will be orderly, secure, accurate, reliable, and dependable.

With the right methodology and management in place, election costs come down and the integrity of the election goes up. New Hampshire has identified two accepted and widely used methods for hand counting paper ballots. The sort and stack method is considered more effective and efficient than the read and mark method. With hand counting, as long as you have 2-4 people on a team you have built in double checks. You don't necessarily need to rely on post count audits because you are doing simultaneous verification then and there on election night.

Many local election officials are afraid to give up their machines because they fear they will not have enough help to hand count our elections. Or they fear even if they have enough people, they will be the “wrong” kind of people. But our communities are filled with the “right” kind of people. We just need to reach out to them. In fact, many of our communities have built-in recruitment centers. In every city and town, there are community organizations.

Church groups, Rotary Clubs, Neighborhood Watch groups, PTA's, High School social action or community service groups, these are just a few that come to mind. With seventeen year olds eligible to be poll workers in most states, and community service often a high school requirement, this is a match made in heaven.

Usually, in New Hampshire, all it takes is 25 people to help count up to 3,600 ballots with roughly 15-20 contests in any given polling place to run a hand count election. This is an easy number to recruit, and in New Hampshire community members line up to volunteer for this honored tradition of being sworn in as ballot counters on Election Night.

In New Hampshire we have learned that it is possible to hand count large numbers of paper ballots, even complex ballots. One New Hampshire town counts up to 3600+ ballots on election night. This is an important data point because the national average number of ballots in any precinct is less than 1000. In other words, New Hampshire hand count towns can manage up to 3 or 4 times the national average of ballots processed in any given precinct. (In New York, election law restricts elections districts to no more than 1,150 voters.) Because of our large legislature, New Hampshire also has some of the more complex ballots in the nation (many multi-member districts). For instance, a New Hampshire multimember House district might have up to 26 candidates running for 13 seats in a single district.

Using New Hampshire numbers and estimates derived from decades of experience, we are able to estimate what it would take to hand count the two federal races in the New York State

2008 General Election. The management and staffing estimates for hand count elections may be found in the NH Department of State training presentation available on the Democracy for New Hampshire website.

The NH Department of State estimates that it takes six seconds per contest to hand count ballots using the accurate and efficient sort and stack method. For the 2008 General Election in New York, with only two federal races, this translates to twelve seconds per ballot. At 100% turnout for any given district, this would mean 1,150 ballots counted at twelve seconds each, for a total time of 13,800 seconds, or 3.8 hours. A team of four people, which provides two counters and two observers, could complete such a count in less than two hours.¹

Voter turnout is rarely 100%, so this number could be adjusted based on turnout estimates.

Additionally, another team of four people could simultaneously manage reconciliation activities, counting number of blank ballots at poll opening, number of ballots cast, number of votes cast, and number of voters checked in. This four person team would also allow for two accountants and two observers. All of these counting and reconciliation processes could easily be accomplished publicly in full citizen oversight, at one long table, and in much less than two hours upon closing of the polls.

¹ Rady Ananda and Dave Berman have analyzed New York's statistics and conservatively allowed for 10 second to hand-count each vote (twenty seconds/ballot for the two races in the 2008 federal elections) in order to accommodate the fact that New Yorkers will be less experienced hand counters. Even at that more generous amount of time, they estimate New York could hand count the Federal races in four hours, see Ananda and Berman declarations.

As mentioned previously, New Hampshire does manual central tabulation, to ensure checks and balances of that part of the election process. At close of the count and reconciliation, local jurisdictions communicate their numbers to the Secretary of State's office for centralized tallying, where the reported results from each city and town are manually entered into a spreadsheet.

An important thing to note about hand count systems is they are self-authenticating.

With proper management, you can hand count your ballots using teams of 2-4 people, meaning 2-4 sets of eyes on every count, every tally mark, every contest, every ballot.

Using the sort and stack method, this means that 3-4 sets of eyes have the chance to see every mark on every ballot twice: once during the sorting process and once again during the counting process. The ballot markings, therefore, are seen 4-8 times under this system. This means that even a two-person team has an opportunity to review the ballot markings four times, making the sorting and counting members of the team simultaneous observers.

With this type of self-authenticating system, you do not need the complex and expensive audit protocols proposed for computerized elections. In a well run hand count election, post election auditing is best implemented by making recounts accessible and financially feasible.

Because these hand count methodologies integrate reconciliation into the process of counting, the self-auditing mechanisms are quite advanced and ensure a high level of integrity for the system overall. In this way, the "auditing" occurs during the first count itself, when it matters, because this, after all, is the count that declares the winner (as opposed to machine "audits" promoted in some national legislative proposals, and in various state laws, which are intended, albeit weakly, to identify problems with the system but not intended to affect outcomes).

Lastly, the feasibility of running hand count elections is proven in the State of New Hampshire and elsewhere in the nation. Specifically, five or so well managed self-auditing teams of 2-4 people can count roughly 1000 ballots with 15-20 contests in less than 2 hours. For New York districts, with no more than 1,150 voters, this is eminently do-able.

All told, with final reconciliation of registration checklists, number of ballots in and out, etc. the whole process is complete in less than 3 hours on election night. In terms of cost, the fact is that many New Hampshire counters are community volunteers (all sworn in to office on election night). It is considered an honor to be a vote counter. But even when paying its counters, New Hampshire has found the local hand count method - using teams of three - costs 7 cents per contest on a ballot, meaning \$1.05/ballot for a typical 15 contest general election ballot. The State of NH, which conducts 10-30 manual recounts every election cycle, estimates cost for hand counting at around 7 cents per race on the ballot. This assumes 3-person teams, each person getting paid \$10/hr.

What this means is that it doesn't matter how large is the population of a state or county.

What New York needs to consider is how many ballots are processed in any given district, and whether or not there is the political and community will and the infrastructural integrity to conduct hand count, observable, self-authenticating, elections.

4. **In New Hampshire, we have more than 200 years of experience successfully administering hand count paper ballot elections. 45% of New Hampshire's polling places still count our ballots by hand. The New Hampshire Department of State has generously shared their expertise in this methodology, and it is included in the Hands-on Elections Handbook**, released in the summer of 2007. This Handbook, and accompanying PowerPoint presentations given by the NH Departments of State and Justice may be freely downloaded at the website: www.DemocracyForNewHampshire.com and used to train election workers in the proper methods for hand counting paper ballots. This fully HAVA-compliant method for running elections is very manageable if the right conditions and methods are implemented.

To prepare for a hand count election, consider the following elements in your planning process:

- Planning (staffing, cost, methods, management)
- Recruiting and maintaining a list of community members for hand counting and other poll worker responsibilities
- Hand count methodology and procedures
- Hand count management
- Training

- Printing and distribution of paper ballots
 - Voting booths
 - Preliminary organizational work
 - Oath of office for community poll workers handling ballots
 - Working with paper ballots
 - Reconciliation of checklists, votes, ballots
 - Supporting laws for paper ballot elections
 - Uniform procedures for determining voter intent
 - Uniform procedures for dealing with discrepancies
5. Today, Americans around the nation are lining up to restore our democracy.

Organizations like the NH Fair Elections Committee will assist in sending volunteers to New York to help hand-count New York's elections, should the Court direct same, and will gladly provide any training assistance if desired.

I declare under penalty of perjury that the foregoing is true and correct.

/s/

Executed on December 12, 2007

NANCY TOBI