

# Senate Election Law and Internal Affairs Committee

*Kelly Flathers 271-3091*

**SB 109**, authorizing a moderator to conduct a verification count of machine-counted ballots.

**Hearing Date:** January 31, 2017

**Time Opened:** 9:00 a.m.

**Time Closed:** 10:05 p.m.

**Members of the Committee Present:** Senators Birdsell, Gray, Sanborn and Woodburn

**Members of the Committee Absent :** Senator Soucy

**Bill Analysis:** This bill authorizes a moderator to conduct a verification count of machine-counted ballots.

**Sponsors:**

Sen. Fuller Clark

Rep. Porter

Rep. J. Schmidt

Rep. Ward

Rep. Burton

Rep. Massimilla

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**Who supports the bill:** Rep. Jim McConnell - Cheshire 12; Michelle Sanborn - Self; Diane St. Germain - NHCRN; Janice Sevene; Kenneth Sevene; Sen. Fuller Clark - District 21; Rep. Timothy Horrigan - Strafford 6; Mary Till - Derry, NH; Patricia Waterman - Merrimack, NH; Raymond Waterman - Merrimack, NH; Jean Barnes - Concord, NH; John Carroll - Nashua, NH; Rep. Michael Cahill - Rockingham 17; Olivia Zink - NH Rebellion; Peter Bixby - Strafford 17

**Who opposes the bill:** Bill Gardner - Secretary of State

**Who is neutral on the bill:** None

**Summary of testimony presented in support:**

**Sen. Fuller Clark (Prime) – District 21:** I have an amendment for this bill. There are shortcomings in our current ballot counting process, which will be further spoken to by others here today.

**Mary Till – Derry Town Moderator:** I am speaking in support of this bill. The purpose of this bill is to address some of the shortcomings of the current vote counting process in NH. It provides for a simple, cost effective method with a limited time commitment on the part of local election officials. It codifies the right of moderators to

conduct a verification count of machine-counted ballots prior to attesting to the accuracy of the vote count as required by law. The moderator can limit the verification count to one or more offices and one or more machines; it is not a requirement and does not supersede the right of any candidate to request a recount.

I will provide you with affidavits from experts in computer science and voting technology. They address many of the failings of our current system. Even voting systems with an identifiable “air gap”, no direct connection to the internet or other electronic devices, can be hacked. Voting machine software interacts with computers during updating of the software long before the memory cards reach the clerk. Safeguards, such as tamper evident seals, protective counters, and test desks, are not sufficient to protect against a cyber attack. This last presidential election confirmed that Russians are not above meddling in our elections. It is my understanding that the software used in our voting machines have not been updated to be more secure against the sophisticated attacks possible today. Errors can enter in at various parts of the election process and lead to an inaccurate count. Doing a random review of paper ballots will defeat attempts to hack into our voting system. The knowledge that a verification count can occur will act as a deterrent.

The audit testing conducted by moderators before elections cannot prevent issues from happening during Election Day. There has not been a recount for a presidential or state-wide race here since 2008. Most recounts are for State Representatives. In the NH Election Procedure Manual, the manual quoted a statutory study committee’s recommendation that post-election audits of randomly selected races be conducted for electronic ballot device towns. The U.S. Presidential Commission on Election Administration gave a similar recommendation in 2014. In the last election, I performed a partial random verification count in Derry and the Secretary of State declared in writing that I did not have the authority to do so. This bill is a step in the right direction and gives moderators the authority to conduct such verification accounts.

Sen. Fuller Clark provided an amendment that requires the moderator select the race randomly and in public, so that no particular candidate has the ability to influence that selection. It also protects the moderator from allegations of tampering with the hand counted results, as it requires the moderator to report the results of the verification count directly to the Secretary of State and the candidates involved, so that those candidates can request a recount if desired. The amendment also requires that the reasons for discrepancies to be investigated and that steps be taken to minimize those discrepancies in the future.

**Sen. Sanborn:** You said you’re concerned about the machines being hacked. What technology exists in the machines today that would make this possible?

**Mary Till:** Here in NH, we have isolated the voting machines from any other technology. We insert a memory card, which is the brain of the machine. Unfortunately, that memory card is programmed by LHS or ESNS, and they use

computers that are connected to the internet. If you read the affidavits, they talk about a situation where Iran had their nuclear facilities isolated from the internet and still got hacked.

**Sen. Sanborn:** In the nuclear facility situation, there was a program on the card that was able to control their computers. Do these cards have programs or just databases of the candidates?

**Mary Till:** There is actual programming on these cards.

**Janice Sevene – Swanzey, NH:** I am speaking in support of this bill today as a concerned citizen. We are dealing with computers counting our votes. When Mr. Gardner spoke about choosing the machines, they were not aware of potential vulnerabilities. Pre-testing provides a false sense of security. It only shows that the pre-test was working on the day it was conducted; it doesn't say anything about the election itself. We are using proprietary software in a public election. It could be tampered with at any point. We don't know what it's been programmed to do. Common sense says we should be looking more closely. In Swanzey, there is nothing in place to check the accuracy of the machines on Election Day. Our moderator, clerk, and selectmen sign off on the results without knowing if the machine has a correct total. These machine counts are performed out of public view, using proprietary software, all without verification. Our moderator should be able to perform a random check for us.

**Kenneth Sevene – Swanzey, NH:** I am speaking in support of this bill. In 500 B.C., the Greeks voted using white and black stones and casting them into a pit. Our ancestors used a ballot box and counted the ballots by hand. If someone threw a blanket over the ballot box and handed them a piece of paper with the results, they would not have accepted this. That's what they're doing today—a secret vote count. It's good that we have pre-testing, but it means nothing. It will work perfectly when in test mode, but it's a different story when it's in election mode. I love technology, but it does not belong in our elections.

**Diane St. Germain – NH Community Rights Network:** I am speaking in support of this bill. We would like to see this bill require moderators to conduct a verification count of machine-counted votes, but we still support this bill because it empowers moderators to fulfill their constitutional duty, clarifies for moderators their authority within the law, and raises voter confidence in the election process. NH citizens have a fundamental right to vote and receive a verified accurate vote count. This responsibility is held within each community and constitutionally assigned to town moderators. Nearly 90% of NH communities use proprietary software in vote-counting devices without any specific clarity or method to a moderator's responsibility to verify its accuracy.

Moderators openly oversee the counting of votes on election night and make a public declaration of the vote count. They are chosen locally by voters and serve their

interests. These devices are neither elected by nor responsible to the voters. Town moderators have had their authority challenged and it needs to be explicit in law that they have this duty. With vote counting devices it is not possible for votes to be openly counted unless the moderator verifies the machine count. It spits out a receipt and voters are asked to trust the proprietary software to be accurate. There has been an increasing unease among voters in the election process and the accuracy of the vote count. Measures that increase this confidence are sorely needed.

**Michelle Sanborn – Alexandria, NH:** I am speaking in support of this bill. I am employed by Community Environmental Legal Defense Fund, which partners with NHCRN, but today I am speaking to you as a citizen. The Secretary of State referred to moderators, selectmen, and other officials having equal authority under the Constitution in our election process. Selectmen are to be present, but only moderators govern that process. We see that reiterated in state law. Pre-testing is not the audit process; it is performed after the fact to verify accuracy. According to the 2010 consensus, Alexandria has 1,600 residents. I have participated in the hand counting of our votes in almost every election for the past three years. Hand counting makes each vote feel personal and significant. Everything written on those ballots is examined, cross-checked, and overseen by our moderator. The process does not take as long as one would expect. This bill is not requiring or demanding that every vote be hand counted. This bill as amended empowers moderators to carry out their responsibility and perform audits, potentially reducing calls for recounts.

**John Carroll – Nashua, NH:** I am speaking in support of this bill. Electoral integrity relies on openness and verifiability. This bill is a small step in that direction.

#### **Summary of testimony presented in opposition:**

**Bill Gardner – Secretary of State:** I am speaking in opposition to this bill. The cities and towns in NH that have electronic ballot counting devices have it not because the state has asked, but because they chose to have that kind of ballot counting device at the local level. We've had electronic ballot counting devices since the 1988 presidential election. The law has very stringent provisions that require the moderators, before they actually use the device in an election, to certify that all of those testing procedures have taken place before the machine can be used. We have a state law that says if, on Election Day, the moderator notices that a seal on the counting device has been tampered with, they shall refrain from using the device in the election and shall report the tampering to the Secretary of State. That's one way the moderator can opt to not use the machine and count the ballots by hand. In this recent election, there was a candidate who was listed on the absentee ballots when they were printed but dropped out due to medical reasons. A new person was chosen by the party and put on the updated ballot. If those ballots were counted by the machine, votes for the person on the ballot before would get counted for the new person. In this case, the moderator would opt to count those votes by hand and not with the machine. Towns must give the date and time of the testing for the electronic ballot counting device. We give them 50 test ballots that are fed into the machine in

different directions and marked with votes for every candidate in as many combinations as possible. There are multiple pages in the law, in addition to the manual, that talk about this. If the tally doesn't match the count of the clerk, it must be reported. Any computer problems must be reported to both the Attorney General's office and the Secretary of State's office immediately, and to LHS. The Clerk must test all the devices being used in the election. The machines aren't put into use unless this process is done publicly. If there are any issues, the moderator cannot use the machine. If the machine stops working when it is put into use at the polls, the moderator has the discretion to count all ballots by hand.

This legislation would make us the laughing stock of the nation. We would have to change a number of our existing election laws, starting with our Constitution, which says moderators, clerks, and selectmen are responsible for elections. All of them are elected to those positions. Together, they determine how a ballot is to be counted. In towns without these devices, ballots in question are examined by the elected officials. We did a recount in Derry and every single candidate had a different vote. The machine will only count the vote if the voter marks the ballot according to the instructions. At recounts, we get to see that. This legislation says that if the verification count is different, which it almost always will be, it can be continuously recounted. Any person, except the candidate, can request a recount. The clerks have to bring in the documents the next day. This says the moderator's assistants will perform the recount, not the elected officials as stated in existing law. In NH, the clerk, moderator, and selectmen are mandated in the Constitution to perform these duties. In Derry during this past election, we sent a letter to the moderator saying they couldn't do the audit because it was technically a recount. The audit is what happens just before the election, when the machine is looked at. Candidates came up to me asking what the count was because there was some confusion about the ballots being counted again at a different location. The law says you have to submit the returns by 8:00 the next morning and the Secretary of State has to summon all legislators for Organization Day. If the moderator can conduct a verification count whenever they want, it will never end. You can only have a recount if a candidate requests it and they're willing to pay the extra fees. There is no reason for this bill.

**Neutral Information Presented:** None

**Future Action:** Pending

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