



Committee on House Administration, Subcommittee on Elections

United States House of Representatives

Statement of

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The Center for Election Integrity of Cleveland State University appreciates the invitation to participate in this Hearing on Federal Election Auditing. Since August 2006, our Center has held the appointment as Public Monitor of Cuyahoga County Election Reform. In October, we initiated and obtained Cuyahoga Board of Election approval to conduct an unprecedented Collaborative Public Audit of the November 2006 General Election. This independent audit was conducted jointly by the county Democratic Party, the county Republican Party, and three election reform organizations. I have also been a part of the Brennan Center's Post-Election Audit Work Group.

I. Center for Election Integrity's Work to Improve Election Administration and Cuyahoga County Elections

The Cleveland State University Center for Election Integrity was founded in early 2005 in a unique partnering of the colleges of law and public administration. Unlike other election law research Centers then existing, our Center's founders perceived that achieving election administrative excellence in Ohio and elsewhere would require expertise blended from both the law and public administration disciplines.

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Our Center's expertise has been recognized by a variety of public appointments and contracts. The U.S. Election Assistance Commission awarded the Center one of the HAVA research contracts, specifically the college poll worker recruitment and training study. After the May 2006 primary debacle in Cuyahoga County, our Board of Elections (BOE) appointed me to serve as a member of its three-person study panel to investigate the causes and cures of that highly problematic election. In August 2006, the Center received a joint appointment from the Cuyahoga County BOE and the County Commissioners to serve as Public Monitor of Election Reform in Cuyahoga County through 2008. Under the appointment as Public Monitor, we proposed the structure of the Collaborative Public Audit and have facilitated the audit.

The Center for Election Integrity, a nonpartisan entity, has been dedicated to three interconnected missions: (1) to assist Ohio in becoming a national leader in transparent, legal, efficient and accurate elections by 2008 (an ambitious aspiration, admittedly); (2) to help ensure that all citizens trust that their elections are fair, lawful and accurate; and (3) to undertake scholarly studies and offer recommendations on election administration and legal reform at all levels of government.

In pursuing these missions, our Center has been guided by a principled commitment to federalism as the basis of our elections system. My own scholarly and consulting background prior to undertaking work on election reform issues focused on the Tenth Amendment and Supremacy Clause. In the mid-1990's, for instance, the U.S. Senate's Judiciary Committee, Subcommittee on the Constitution enlisted me to work on legislation to stem federal preemption of State law.

I have not advocated federal legislation as the solution to all electoral administration problems, and indeed, do not believe that federal legislation can cure the vast range of current inadequacies in the electoral system – in Ohio or elsewhere. But even as a strong proponent of State powers and federalism, I would urge that federal election legislation plays a critical though as yet underutilized role in achieving quality elections throughout the nation. The elections system should be a prime example of cooperative federalism. Thus I am very pleased that this Subcommittee is dedicated to improving election performance and reliability via well-grounded federal legislation.

Given the expertise present to discuss election audits today, rather than reiterate valuable overview points on election auditing that Lawrence Norden has offered in his written testimony, I would like to address in depth only three:

1. The importance of requiring *independence* of the election auditing structure;
2. The need to ensure that essential administrative duties for achieving valid, trustworthy federal election audits will be fulfilled; and,
3. The need to add a specific set of questions that federal auditors should answer in each audit report.

II. Center for Election Integrity Recommendations in Detail

Cuyahoga County's experience pioneering election auditing in Ohio has produced some valuable on-the ground lessons about what is needed in order to initiate and conduct an expeditious, high quality audit of a federal election. I would like to share what seems most critical to your task of structuring federal election audits. In doing so, I would stress, however, that I am speaking only as the Center Director of the entity under which the audit was being conducted, and not speaking for the Cuyahoga Collaborative Audit Committee. I would request permission to supplement my testimony with the Committee's final Audit Report so that you may hear their collective views on the impediments to the audit process, and their conclusions and recommendations for reform.

Recommendation 1: Ensure that Federal Election Auditing is *Independent*.

Questions have risen as to whether power and administrative control over federal election auditing should be vested in an independent body or within the State's chief election officer. Two pending bills, the Count Every Vote Act and The Voter Confidence and Increased Accessibility Act, would establish in each State an independent Chief Auditor or independent Audit Board, respectively.¹ Both bills thus endorse the critical need for the independence of the auditing authority. Some Secretaries of State, however, have taken the position that they should be vested with the federal power to conduct audits of federal elections.

This difference of opinion can be characterized as a debate on whether "internal" audits are sufficient, or whether "external" auditing should occur by a body independent of the administrators under whom control of elections is vested. Which approach is most appropriate for election auditing turns on understanding the differing objectives and outcomes of these audit structures.

The Brennan Center's Lawrence Norden has presented in his testimony to the Subcommittee the five core goals that should motivate the design of election auditing: increasing public confidence in the results of an election; deterring fraud against the voting system; detecting large-scale systemic errors; providing feedback that will allow jurisdictions to improve elections and machinery in future years, and confirming to a high level of confidence that a 100% manual recount would not change the outcome of the race.² We agree strongly with this statement of election auditing design goals. In order to achieve these five goals, we have concluded, as has Mr. Norden, that the independence of the auditing entity is essential.

Public confidence in the electoral system has not ebbed simply in Cuyahoga County, Ohio or Sarasota, Florida. Surveys show that the voting public nationwide harbors doubts about

¹ H.R. 1381, 110th Cong. § 102 (2007); H.R. 811, 110th Cong. § 5 (2007).

² Lawrence D. Norden, Statement to the U.S. House of Representatives, Committee on House Administration, Subcommittee on Elections, March 20, 2007 at 2.

the accuracy and reliability of the electronic voting equipment widely in use today. Media coverage of State and local election officials aligning themselves with the voting machine vendors when questions have arisen have only exacerbated the worries. Additionally, a number of jurisdictions have experienced electoral administration problems that sometimes have included non-disclosure of public records or outright misrepresentations of election accountings, for instance, for the number of ballots cast per precinct as compared with the number of voters registering to vote.

Voter confidence in the integrity of our elections is a prerequisite to the effective functioning of our democracy. Participation via voting depends on citizens' beliefs that their votes will be counted. To achieve voter confidence that all valid ballots were counted, and counted accurately, auditors' independence from the election officials conducting the election is required. Federal election audits can be structured so that rigorous examination by competent and objective auditors occurs. If the auditors lack distance from those having power over the conduct of the election, their objectivity will be questioned. And if election auditors are perceived as lacking objectivity or as influenced by conflicts of interest, voters are likely to view an election audit report that contains good news as nothing more than a whitewash. Thus, an election audit conducted without auditor independence from the election administrative apparatus portends the prospect of being viewed as merely a sham. Any such effort will waste taxpayers' time and money, and will retard rather than augment voter confidence.

The other goals of election auditing, especially that of promoting sound feedback needed for the improvement of the elections system, will best be achieved by instituting a "separation of powers" system of checks and balances, if you will, between the election administrative system and the election auditing authority. One does not impugn the integrity of any sitting Secretary of State (SOS) to reach this conclusion any more than one impugns congressional integrity by advocating the continued separation of the federal judiciary from the federal legislative power. Our nation's Framers were wise in perceiving that certain benefits flow from structural separation of powers. It is not a far stretch to suggest that the Secretaries of State may be stimulated to achieve higher standards of election performance and accountability if they know that federal election audits are beyond their scope of control.

One mystique that can confuse policymaking on auditing is the erroneous perception that auditing is merely a mathematical science with no role for judgment. As the Securities and Exchange Commission has admonished, high quality auditing is "not mechanical, but requires numerous subtle judgments."³ This perception is as equally true for election audits as for financial audits of publicly held corporations. Because judgment is required at numerous junctures throughout the audit process, control over the audit must be vested in an entity that will foster fair and objective judgments – returning us again to the importance of the independence of the auditing entity.

Given the key role of judgment, externally directed independent audits serve the public interest by reducing extraneous factors that might inappropriately influence an auditor's

³ Securities and Exchange Commission, *Revision of the Commission's Auditor Independence Requirements*, Nov. 21, 2000 reprinted in L. CUNNINGHAM, *INTRODUCTORY ACCOUNTING, FINANCE AND AUDITING* at 405.

judgment. If the auditors were employed by or under the control of the SOS, such factors might include the perception that “good news” should be the primary objective in the audit report. The auditing profession recognizes that, by contrast, to be an effective auditor, each audit must be undertaken with healthy professional skepticism; as the SEC has noted, the auditor “must have the capacity and the willingness to decide issues in an unbiased and objective manner.”⁴ Obviously, the independence of the auditors is essential if the election audit is to be conducted with integrity according to the norms of the profession and also to be viewed as reliable by the voting public.

Independence rules, then, should be seen as a genre of conflict of interest rules. As the Securities and Exchange Commission has observed, independence rules, like conflict of interest rules, proscribe certain relationships or circumstances, regardless whether a showing can be made that biased behavior inevitably results from the conflict.⁵ “The independence rules are preventive both because of the difficulty in proving the link from circumstance to state of mind, . . . and because of the need to act in the public interest and protect [public] confidence before it has been significantly undermined.”⁶

Congress should not wait for an even more serious erosion of voter confidence before requiring independence in federal election audits. While “bad news” election audit reports might suggest impartiality and thoroughness to some members of the public despite lack of independence, we should hope that election audit reports will move toward “good news” as improvements occur. Notably, by providing the public with independent audits now, you additionally protect the public’s ability to trust when “good news” audit reports are issued. Unless the election audits are truly independent, undoubtedly any audit reports containing “good news” will be undermined by charges that the report cannot be trusted because the auditors lack independence. Or the audit will be assailed as politically or vendor influenced. I cannot identify any supportable reasons for eroding the foundation of legitimacy for election audit reports that contain good news about the election system.

Because many Secretaries of State hold some administrative supervisory power over local elections, auditing under the SOS cannot completely avoid conflicts of interest that are incompatible with rigorous objectivity and full public accountability. Often, the SOS and their local designees selected the voting systems in use. The SOS often has some power to select or supervise the administrators of elections. With these duties and powers, concerns will be raised that the States’ chief election officers will not be as vigorous and unflinching in the audit if the conclusions might impugn the SOS’s administrative handling of the election.

At least two reasons have been proffered in support of SOS supervised, as opposed to independent, federal election audits: (1) the SOS knows the nuances of elections as opposed to financial institutions, nuances that can make a difference in the conduct of a valid election audit;

⁴ *Id.* at 397.

⁵ *Id.* at 404.

⁶ *Id.*

and (2) a separate system of federal auditing would duplicate and undermine the SOS efforts already underway.

Any value that the SOS can bring in the proper structuring and conduct of election audits can be achieved without injuring the independence that is requisite for the validity of the audit. In particular, I would recommend that the Audit Board approach be utilized, but include a new provision that would permit the SOS to send a non-voting representative to participate. The advantages of elections knowledge and coordination with the SOS where needed can thus be achieved without injuring the independence of the auditing entity.

Where an SOS has already initiated election auditing under its own auspices, that effort likely would be classified as an internal audit rather than as an independent external audit. As the auditing profession would counsel, these two types of audits cannot serve as substitutes for one another. Given that federal elections occur only biennially, the federal auditing structure will generally not be activated except in a federal election year. For all other elections conducted in the State, the SOS-defined auditing system, if any, will control election audits. Where an SOS would prefer that the federal government not erect a different auditing structure because it will impliedly cast aspersions on the auditing structure that lacks independence from the election administrative authorities, my hope would be that you rise to the occasion. Specifically, you can teach via federal legislation a better set of norms for election auditing, and implicitly prod the States into adopting independent election auditing as the baseline for their efforts. By no means should your design of federal audit legislation become less effective – as by eliminating independence – simply so that some Secretaries of State will not be embarrassed by the weak audit efforts underway in their States. The federal government should articulate as close to a “gold standard” structure for election auditing as is feasible, and lead the way out of the current election wilderness.

I would thus urge that you adopt an approach similar to that outlined in H.R. 811, section 5 with the possible addition of a representative of the State’s chief election officer as a nonvoting representative.

Recommendation 2: Ensure that Essential Administrative Tasks for Achieving Valid, Trustworthy Federal Election Audits Will be Fulfilled

In Cuyahoga County, our Collaborative Audit was constructed so that the audit policy decisions and the choice of races to be audited were vested collectively in the participating political parties and advocacy organizations. The Center for Election Integrity was to identify the audit materials needed and to work with the Cuyahoga Board of Elections to ensure the logistics for the secure chain of custody of all needed materials. In three public Board of Election Meetings prior to the commencement of the audits, the audits had received unanimous support from the Board Members. We expected staff cooperation and few problems. We believed it was a relatively straightforward process.

But I was surprised by the number of impediments that were interposed by:

- (1) existing administrative procedures for processing the Election Day materials upon arrival in the BOE;
- (2) software design and electronic data availability issues;
- (3) hardware design issues; and
- (4) staff nonperformance.

Taking each area in turn, here are some examples of difficulties we faced despite dealing with only one local Board of Election:

(1) Existing administrative procedures and storage equipment did not meet the requirements for a secure chain of custody for DRE (voting device) long reports. We had to educate the local officials on the meaning of a “secure chain of custody,” identify election night procedures that needed to be modified to reach these standards, ensure that appropriate staffing was available for re-sealing the DRE Long Reports in envelopes, and supervise the Election night placement of the Long Reports envelopes in sealed bins until the audit was authorized to begin two days later.

(2) Software design and electronic data availability issues: Well before Election Day, we identified in writing in clear generic terms exactly what electronic election results data were needed to complete the audit. The Ballot Department staff assured us that this would be provided to us immediately upon the close of the unofficial tabulation. I stayed up over 36 hours to be present when the election closed so as to receive immediately the data files and to protect the chain of custody. Despite these efforts, however, the electronic files proved not to contain the data that we needed for the audit.

In a series of follow-up conversations, the BOE managers (who consulted with their vendor, Diebold Election Systems, Inc.) informed us that no one or two files would have the data that we needed. Instead, they informed us that a variety of files would be required, and that we would have to engage in a series of mathematical steps in order to extract the data that would permit a comparison of the DRE units’ and optically scanned ballots as against the central tabulation data.

As a result of the conversations and representations, we ultimately filed a request for eight separate electronic files.⁷ To this day, we have no knowledge of whether a far less

⁷ GEMS is Diebold’s election tabulation software. The eight files we requested after extensive discussions were:

- a. GEMS Statement of Votes Cast (SOVC) Report run on the database backup after absentee ballots were tabulated, but *BEFORE* DRE memory cards were uploaded.
- b. Database file from after central count optical-scan absentee ballots were uploaded, but before GEMS tabulation was performed.
- c. GEMS data export from after absentee ballots were uploaded but before the GEMS tabulation was performed.
- d. Database file after DRE uploading was complete.
- e. GEMS data export after DRE uploading was complete.
- f. GEMS SOVC Report after all absentee ballots performed on DREs.
- g. Database file after all absentee ballots performed on DREs were uploaded .

complicated route was available for obtaining the requisite data for the audit, and we have no way to obtain reliable information on this question. We do not know if the information we were given was actually deliberate disinformation by an election department that did not support public verification of election results, and thus gave us a run-around to obstruct the completion of the audit. We lack reliable information on whether Diebold's GEMS software actually does not accumulate and report election data in a manner that easily facilitates an election audit, or whether the Cuyahoga Ballot Department staff handled election tabulations in a manner that obscured the data needed.

(3) Hardware design issues: A little known secret about current generation major brand optical scanners is that they do not count *ballots* but only ballot *pages*. Thus, even if we know the total number of optical scan ballots that the BOE received for tabulation, we have no easy way to determine whether all the ballots were part of the tabulation. In Cuyahoga County, for instance, in the General Election in November, among our 59 separate jurisdictions, ballots were as short as 3 pages or as long as 6. To determine whether all the ballots had been counted, the BOE executives simply averaged the number of ballot pages and *estimated* that all the optical scan ballots had been counted.

By contrast, with punch cards the BOE was able to determine with complete accuracy whether all the ballots that had been received had been counted. The optical scan hardware (and firmware) design, however, does not include features that are essential to determining whether all ballots are counted. So now, as a result of this new, supposedly HAVA-compliant equipment, we have reduced rather than augmented the accuracy and reliability of our elections results. This reduction in reliability apparently owes to an engineering design omission, one that must be redressed via expensive auditing procedures since the equipment opens this cavernous hole in election reliability.

(4) Staff nonperformance or opposition: In my experience in Cuyahoga County and elsewhere, I have found that many elections officials approach their jobs with a high commitment to achieving the best possible elections administrative record, with a verifiably accurate and legal set of results. But unfortunately there is a "group 2" – pockets of election officials who enjoy the historically unchecked, broad discretionary authority they exercise over election performance and reported electoral results. Members of this second group tend to disfavor public accountability and independent verification of election results, and thus view audits as inimical to their interests.

If, as in Cuyahoga County, some "group 2" officials have control over some audit documents or electronic files that are needed to conduct the audit, or the staffing needed to supervise the hand count, the result may be what we experienced: repeated delays and extra costs for completing the audit tasks. And if the executive management is also not enthusiastic about the audit, excuses can continue to pile up for why certain activities cannot be scheduled, or

h. GEMS data export after all absentee ballots performed on DREs were uploaded. See the forthcoming Cuyahoga Collaborative Audit Report on the November 2006 Election for further details.

why staff had to cancel at the last minute, or why certain files and documents will not be released for the audit.

I bring these experiences to your Subcommittee because you may have assumed, as did we, that if an audit is formally authorized and directed, then the local or regional election staff will cooperate in fulfilling the federal audit directives. You may expect, as we did, that the requisite election data is already present and (other than conducting some hand counts) would require only some quick comparisons in order to conduct the audits. Neither assumption is necessarily sound. Importantly, cooperative federalism offers solutions that should solve the problems and redound to the benefit of all concerned.

Defining the Key Roles of the Secretaries of State

(1) Mandating Documents and Local Support In light of the obstacles we encountered, the expressed desires of some Secretaries of State to be involved in the audit process, and in the spirit of cooperative federalism, we would recommend that the federal legislation specify that the States' chief election officers should mandate what procedures and information (including data files) elections officials should provide to the auditors.

The mechanism that I would recommend is a conditional preemption approach, which would not implicate Tenth Amendment issues and thus spawn litigation.⁸ The federal legislation would thereby offer the SOS a choice: determine and mandate, in light of the election technologies in use in your State currently and any other considerations, what documents, files, procedures, and access and support need to be provided and in what time frame in order to achieve compliance with the federal audit requirements, or, lose the right to determine these directions and have this power vested for the next four years in either (1) the Audit Board, or (2) the U.S. Election Assistance Commission. In fashioning the State directives, the legislation should direct the SOS to consult with the Audit Board. You might also consider conferring an explicit right for the Audit Board to compel recalcitrant SOS action via mandamus if the Board believes it necessary for achieving its charge.

(2) Further investigation and remediation Given the short period of time for achieving remediation if errors are discovered, SOS should specify in advance the protocols for further investigation and remediation of the errors if discrepancies are found.

(3) Training election officials in values of auditing Currently among election officials the movement toward auditing is frequently viewed to be playing a game of "gotcha" – as if auditing were primarily motivated by distrust of the elections officials. At least in Ohio and maybe elsewhere as well, there has been little effort to teach the underlying objectives and values of auditing– especially the five goals that Mr. Norden outlined. This omission in election official training should be rectified by each SOS, although I doubt that it would be wise to mandate the training in federal elections legislation. Perhaps other mechanisms can be identified.

⁸ See *New York v. United States*, 505 U.S. 144 (1992).

Administrative planning by the Audit Board or other Audit Entity

In order to be ready to conduct and complete an audit immediately after the unofficial tabulation, a great deal of logistical and other planning will need to be completed well in advance of the election. The Audit protocol should have been determined, and test runs should have occurred. Qualified personnel will need to be identified and retained to conduct the audit. Notice must be provided to the local elections officials concerning the need to plan and provide appropriate staffing. A protocol or format for the audit report should also be established well in advance to allow for quick submission of audit results and any corrections to the certified count procedures.

Recommendation 3: Add a Specific Set of Questions that Federal Auditors should Answer in an Audit Report

Consistent with auditing principles, the federal statutory charge on auditing federal elections should require answers to four standard auditing questions (which can be answered using scientific sampling methodology).

In considering the tabulated and reported election results:

1. Was every valid ballot *counted*?
2. Was every valid ballot counted *only once*?
3. Were the votes recorded on valid ballots *accurately* reflected in the announced totals?
4. Were *more votes* recorded in the totals than those reflected by valid ballots?

Currently, the conceptions for federal audits represented in the Count Every Vote Act and The Voter Confidence and Increased Accessibility Act do not encompass all of these questions. Yet each question is essential in order to determine whether all valid ballots and votes were tabulated and not simply the accuracy of the ballots that have been tabulated. Where an election audit cannot reliably answer one or more of these questions, some administrative procedure or even voting equipment design changes may be needed.

CONCLUSION

Mandatory election audits are a critical step for restoring public confidence in the electoral system and for learning what problems exist (in equipment, systems, and personnel) so that they might be effectively corrected. Unfortunately, the promise of auditing will be severely undermined if the federal auditing entity lacks independence from the election administrative authority. Secretaries of State can play a number of crucial additional roles that will facilitate efficient and effective election audits, but because of the appearance of conflicts of interest should not be supervising and conducting federal audits. The federal audit effort will be greatly enhanced if the legislation will require each audit report to answer the above four key questions.