

February 22, 2006

The Honorable Bruce McPherson  
Secretary of State  
1500 11th Street  
Sacramento, CA 95814

Dear Secretary McPherson:

I strongly urge you to reverse your February 17th decision to re-certify Diebold's voting machines for use in California. Your decision contradicts your earlier commitment not to review Diebold's re-certification request until it had been approved by the federal Independent Testing Authorities (ITA) and your commitment not to certify any system that doesn't comply with all standards established by the federal Help America Vote Act (HAVA). Furthermore, your decision violates state law. While your decision may be good for Diebold and its shareholders, it is not in the best interests of California's voters or our democracy.

#### Federal ITA and HAVA Issues

On December 20, 2005, you announced that you would not consider reviewing the Diebold systems until the ITA had acted. Specifically, you stated, "During a thorough review of the application for the Diebold system currently pending certification, we have determined that there is sufficient cause for additional federal evaluation. I have consistently stated that I will not certify any system for use in California unless it meets the most stringent voting system requirements." Attached to your statement was a letter from the chief of your Elections Division to Diebold, written presumably at your direction, stating, "We require this additional review before proceeding with further consideration of your application for certification in California. Once we have received a report from the federal ITA adequately analyzing this source code, in addition to the technical and operational specifications relating to the memory card and interpreter, we will expeditiously proceed with our comprehensive review of your application." The ITA has yet to conclude its review of the Diebold memory cards, yet you have re-certified the machines in direct contradiction of your December 20, 2005, commitment to the voters.

On August 3, 2005, you announced that "[a]ll systems certified by the Secretary of State's Office shall comply with the standards and requirements of the Help America Vote Act of 2002 (HAVA) [Public Law 107-22, 106th Congress], including all requirements, standards and regulations promulgated pursuant to authority derived from HAVA, as well as complying with all other applicable requirements and standards explicit in federal and state laws, and any requirements, standards and regulations deriving authority from federal and state laws." As you know, the 2002 Voting System Standards adopted by the Federal Election Commission (FEC) were adopted by the Election Assistance Commission (EAC) as the first set of guidelines adopted under HAVA. Those guidelines recommend that voting machines not be certified for use if they contain interpreted code. The Diebold machines that you re-certified on February 17 contain interpreted code, which is in direct violation of your August 3, 2005, commitment to follow the higher standards set forth by the EAC and the FEC.

#### Violations of California Law

Your decision to re-certify Diebold's machines violates California Elections Code Section 19250(a), which precludes the Secretary of State from approving the use of any direct recording electronic (DRE)

voting system unless it has received federal qualification. You sent the memory cards back to the Independent Testing Authorities (ITA) in December 2005 because, as you noted in the letter from the chief of your Elections Division to Diebold, “. . . this component was not subjected to federal source code review and evaluation by the Independent Testing Authorities (ITA) who examined your system for federal qualification. It is the Secretary of State’s position that the source code for the AccuBasic code on these cards, as well as for the AccuBasic interpreter that interprets this code, should have been federally reviewed.” If it was your position on December 20, 2005, that certain components of the system had never been federally reviewed, how could you lawfully certify a system on February 17 under Elections Code Section 19250(a) that contains these uncertified components?

Your decision to re-certify Diebold’s machines also violates Elections Code Section 19251(a). As you know, as of January 1, 2006, all DRE voting systems have to come with an accessible voter verified paper audit trail (AVVPAT). The AVVPAT must be “provided or conveyed to voters via both a visual and a nonvisual method, such as through an audio component.” The Diebold TSx doesn’t comply with this provision of the law. Instead, it provides an audio read-back of how the voter’s ballot was recorded electronically, not how it was captured on the AVVPAT, which makes the AVVPAT on the Diebold DRE useless for blind or visually-impaired voters. Given that fact, it appears Diebold’s voting systems don’t comply with Elections Code Section 19251(a) and therefore can’t lawfully be certified for use in California.

#### Required Public Process Not Completed

Finally, there is a significant legal issue that needs to be addressed regarding the lack of public notice and absence of a public hearing that should have preceded your decision to re-certify the Diebold machines. Although the report is dated February 14, 2006, the fact is this report wasn’t released publicly until after you issued your decision to re-certify the Diebold machines on February 17. The argument that the November 21, 2005, hearing you held on Diebold obviates the need for a new hearing under Elections Code Section 19204 doesn’t suffice, because your decision to re-certify Diebold’s machines was based solely on a report that wasn’t available, completed, or even envisioned at the time of the November 21, 2005, hearing. To hold a public hearing without providing the public with the information on which you based your decision to re-certify the Diebold machines only serves to undermine the public hearing requirement of the law.

For all of these reasons, I call on you to restore transparency to the voting machine certification process, which begins by reversing your decision to re-certify Diebold’s machines for use in California.

Sincerely,

Debra Bowen, Chairwoman  
Senate Elections, Reapportionment & Constitutional Amendments Committee

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