

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

**STATE EX. REL DAVID YOST,
ET AL.**

Plaintiffs,

v.

**NATIONAL VOTING
RIGHTS INSTITUTE, ET AL.**

Defendants

And

KERRY-EDWARDS 2004, INC.

Intervenor-Defendant

**NATIONAL VOTING
RIGHTS INSTITUTE, ET AL.**

Counter-Plaintiffs,

v.

**DELAWARE COUNTY BOARD
OF ELECTIONS**

And

J. KENNETH BLACKWELL,

Counter-Defendants

**Civil Action No. C2-04-1139
(ES/TK)**

**DEFENDANTS/COUNTER-PLAINTIFFS' MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR A PRESERVATION ORDER AND
FOR LEAVE TO TAKE LIMITED EXPEDITED DISCOVERY, AND IN
REPLY TO THEIR MOTION FOR A PRELIMINARY INJUNCTION**

The integrity of the election records necessary to prosecute this case is before the Court on this motion. At the conference held on December 10, 2004, the Court stated that, should the conduct of the recount raise Constitutional issues, then Defendants/Counter-Plaintiffs could seek discovery and a hearing to determine appropriate relief. The recount has in fact raised such issues. Not the least of them is the revelation that voting machines in multiple counties may have been tampered with during the recount by an employee of Triad Governmental Systems, Inc. – the company whose computer program tallied the punch-card votes cast in 41 Ohio counties on November 2, 2004, for President of the United States.¹

To preserve evidence in this case, and to assess the evidence that may already have been irretrievably damaged or lost, Defendants/Counter-Plaintiffs request that the Court order all election records preserved and permit them to seek discovery from Triad regarding its role in the recount and its apparent alteration, manipulation and destruction of election records. They suggest that a hearing should follow this and any additional discovery, as may be necessary, so that appropriate relief may be tailored to the facts of the recount conducted.

¹ Other issues unfolding from the recount that implicate the due process and equal protection rights of Defendants/Counter-Plaintiffs are described in the declarations of Lynne Serpe, Cobb Campaign Recount Coordinator, Genny Eberhard, a Cobb observer of the Fairfield County recount, Jeanne Wilson, a Green Party observer of the Washington County recount, Philip F. Fry, Jr., a Green Party observer of the Champaign County recount and Judy Hanna, a Green Party observer of the Summit County recount. Several of these issues concern other arbitrary and intentional measures taken to prevent a full hand recount, including instructions from Counter-Defendant Secretary of State Blackwell to various county boards of election not to conduct a 100% hand recount of the ballots cast for President of the United States notwithstanding circumstances that under his own recount procedures require a full manual recount. *See* Declaration of Lynne Serpe (December 22, 2004) ¶ 6.; Declaration of Genny Eberhard (December 22, 2004) ¶¶ 14 and 16.

**I. ELECTION RECORDS HAVE BEEN COMPROMISED
AND ARE VUNERABLE TO FURTHER
TAMPERING AND DESTRUCTION.**

On December 10, 2004, in the midst of the recount of the ballots cast in Ohio for the 2004 Presidential election, a technician from Triad Governmental Systems, Inc. (“Triad”), Michael Barbian, Jr., appeared that the Hocking County Board of Elections, asked for the identity of the precincts selected for the recount, and then proceeded to take apart the computer used for vote tabulation and reprogram it. While there, Mr. Barbian instructed the Hocking County Board of Election on how to create a “cheat sheet” to avoid a full hand recount of the votes cast there for President. *See* Affidavit of Sherole Eaton, Deputy Director of the Board of Elections of Hocking County (December 13, 2004). Following Mr. Barbian’s visit, the recount by hand and machine of 3% of the ballots cast there matched and on that basis Hocking County did not perform an 100% hand recount of all the ballots cast.

On December 20, 2004, Mr. Barbian publicly acknowledged that during the recount he made visits to five or more other counties, including Lorraine, Muskingen and Clark County, and that none of these counties had to do the full hand recount. *See* Provisional Transcript of Hocking County Board of Elections Proceeding and Press Interview with Triad Employee – Michael Barbian, Excerpts (December 20, 2004), pp. 14-17, attached to Declaration of John Bonifaz (December 22, 2004).²

² The Barbian interview transcript reads in relevant part:

Mr. Burkett: When you were telling [the Hocking Board of Election] about the under and overvotes, it seems to me now that I’ve heard what you said that you were just trying to help them so that they wouldn’t have to do a full recount of the county, to avoid that.

....

Mr. Barbion: Right.

....

Triad also apparently is capable of remotely accessing and reprogramming voting machines. Declaration of Lynne Serpe, David Cobb Campaign Manager (December 22, 2004) at ¶ 22 (“Serpe Decl.”). Because of this remote access capability, additional counties may have received reprogramming or other technical adjustments without observation by witnesses.

Defendant/Counter-Plaintiffs further have learned that:

- ?? In Union County, the hard drive on the vote tabulation machine serviced by Triad Systems failed and had to be replaced. The hard drive was returned in response to a subpoena. *See* Serpe Decl. ¶ 23.
- ?? In Monroe County, after the 3% hand recount failed to match the 3% machine recount following several attempts, someone contacted Triad and requested that the machine be replaced instead of conducting the full hand recount prescribed in Secretary Blackwell’s 2004 Outline for Recount Procedures. *See* Serpe Decl. ¶ 13.
- ?? In Lucas County, recount observers had to wait to resume the recount after lunch while a technician from Diebold reprogrammed the machine. *See* Serpe Decl. ¶ 16.
- ?? Belmont County brought in an independent contractor to reprogram their tabulation machines prior to the recount. *See* Serpe Decl. ¶ 21.

I Mr. Burkett: So when you heard there was a recount, what did you think your job was going to be: mean did you know were going to have to –
Mr. Barbion: Same job as always.
...
Mr. Burkett: How many counties did you go to personally?
Mr. Barbion: I don’t remember offhand: probably six – oh, for the recount, you mean?
Mr. Burkett: Yes.
Mr. Barbion: About six.
Mr. Burkett: Which counties? Do you know?
Mr. Barbion: Lorraine County, (inaudible), (inaudible), Muskingen, and Clark County. I’m not sure (inaudible).
...
Mr. Burkett: Did any of your counties have to do a full recount that you’re aware of:
Mr. Burkett: Not that I’m aware of.

Id. The video from which the provisional transcript excerpt is available for viewing at www.truthout.org/docs_04/122404x.shtml.

- ?? It appears Triad may be capable of reprogramming voting machines from a remote location. This potential capability came to light during the recount in Fulton County. *See* Serpe Decl. ¶ 24.
- ?? In Fairfield County, a technician from ES&S, a voting machine company, spent time alone in the room with the tabulator and provided the county with a new tabulator for the recount. *See* Declaration of Genny Eberhard, Green Party Election Observer for Fairfield County (December 21, 2004) ¶ 18 (“Eberhard Decl.).
- ?? In Harrison County, a representative of the Triad company reprogrammed and retested the tabulator machine and software prior to the start of the recount. The Harrison County tabulating computer is connected to a second computer which is linked to the Secretary of State’s Office in Columbus. The Triad technician handled all ballots during the machine recount and performed all tabulation functions. *See* Serpe Decl. ¶ 22.

Moreover, in many counties, the ballots and voting machines were not secured following November 2, 2004, making them vulnerable to tampering and destruction. For example:

- ?? In Ashland County, ballots cast in the presidential election were stored by precinct in open cubicles along one wall in the employee lunchroom/meeting room, completely open and visible to anyone who enters the room. Piled on top of the cubicles were bags of Doritos, mugs, cleaning products, Glad Wrap and other miscellaneous items. Board of Elections officials said the room was kept locked, except when used. *See* Serpe Decl., ¶ 17.
- ?? In Greene County, the door to the Board of Election office was left unlocked on the Saturday prior to the recount. Police responded. *See* Serpe Decl. ¶ 18.
- ?? In Cochocton County, ballots were stored intermingled with blank unused ballot forms in partially opened boxes that appear to have never been sealed following November 2, 2004. Although the ballots were stored in a locked room at the Board of Election, all board employees and board members have keys to the room where the ballots were stored. *See* Serpe Decl. ¶ 19.
- ?? Hocking County placed ballots in a storage area with both a “Democratic Lock” and a “Republican Lock,” presumably so that both the Democrats

and Republicans could only gain access if the other party were present. One opened both locks. *See* Serpe Decl. ¶ 20.

Furthermore, ballots and other election records will be lost if voting machines and the central tabulators used in the 2004 Presidential election are not preserved. To illustrate, the majority of counties in Ohio employ punch card voter machines, which use a mechanical stylus to punch a hole in a paper ballot to record a vote. Malfunctions by these machines can result in failure to count votes. For example, the punch card voting machines used by voters can create “undervotes” -- i.e., failure to mark the ballot sufficiently clearly to be picked up by automatic counting machines -- because of difficulties caused by chad buildup, improper maintenance of the rubber guides on the side of the path of the stylus, improperly machined templates, and other issues. Failure to preserve the punch card voting machines in the condition in which they were found at the close of the election may preclude determination of whether such malfunctions occurred during the election such that a full hand count of the ballots is required. *See* Affidavit of Douglas Jones (December 23, 2004) ¶¶ 7-8; *see also id.* at ¶¶ 15-19, regarding Direct Recording Electronic (DRE) and ¶¶ 33-36, regarding optical scanner voting machines.

In this regard, five counties in Ohio have publicly announced special elections to be held on February 8, 2005. They are the counties of Cuyahoga, Butler, Trumbull, Geauga, and Wood. *See* <http://boe.cuyahogacounty.us/boe>, <http://www.butlercountyelections.org/>; <http://www.electionohio.com/trumbull/>; <http://www.co.wood.oh.us/boe/>; and http://www.auditor.co.geauga.oh.us/realestate/levycalc/brochures/TaxFacts_2005-02-08.pdf. Trumbull further has announced its intention to accept absentee ballots beginning

January 4, 2005. It has not publicly stated whether absentee ballots would be cast on voting machines.

During the hearing on December 10, 2004, the Court invited Defendants/Counter-Plaintiffs to bring irregularities in the recount to the Court's attention for consideration and appropriate relief, including possibly a new recount that accords with fundamental fairness. Even Counter-Defendant Blackwell, in his December 16, 2004, response, acknowledges that, "if any constitutional problem arises as a result of the recount, the appropriate way to address such a situation is through a full-fledged hearing with discovery." Secretary of State's Memorandum Contra Counter-Plaintiffs' Motion for a Temporary Restraining Order (December 16, 2004) at page 5.³

II. ARGUMENT

A. A PRESERVATION ORDER IS REQUIRED IN THIS CASE.

Pursuant to Federal Rule of Civil Procedure 26, Defendants/Counter-Plaintiffs seek a preservation order to ensure that evidence is available for trial of this action. *See Danis v. USN Communications, Inc.*, 53 Fed. R. Serv. 3d 828 (N.D. Ill. 2000) (federal discovery rules imply a duty "to preserve documents and other information that may be relevant in a case."). In considering an order to preserve evidence, "[t]he reviewing court, as well as the parties, should be focused upon maintaining the integrity of the evidence in a form as close to, if not identical to, the original condition of the evidence." *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 435 (2004). A preservation order is always required where there is a likelihood of destruction

³ Counter-Defendant Blackwell has moved to dismiss this case, in response to which Defendant/Counter-Plaintiffs will address the Secretary's jurisdictional assertions. *See* Motion to Dismiss for Lack of Jurisdiction by Counter Defendant J. Kenneth Blackwell (December 22, 2004).

of evidence, irreparable harm and not too much additional burden on a party. *Madden v. Wyeth*, No. 3-03-CV-0167-R, 2003 U.S. Dist. LEXIS 6427 at *2 (N.D. Tex., Apr. 16 2003). This standard for a preservation order is easily met here.

Here, evidence has already been destroyed and the preservation procedures and practices of Counter-Defendant Blackwell already proven inadequate. *See* Section I above. Defendants/Counter-Plaintiffs will be irreparably harmed in their ability to prove the recount unconstitutional if evidence from the vote, the initial count or the recount is destroyed or otherwise tampered with before discovery and trial are had. The preservation order would not burden a party inasmuch as Counter-Defendant Blackwell and the Delaware County Board of Elections already are obliged to preserve and cause to be preserved the information requested. *See* 42 U.S.C. § 1974 (requires election officials to preserve all voting materials for 22 months following the election); *see also* O.R.C. § 3505.31 (requiring preservation of voting materials). Accordingly, a preservation order should issue forthwith.

B. EXPEDITED DISCOVERY IS REQUIRED IN THIS CASE.

Defendants/Counter-Plaintiffs also move this Court pursuant to Federal Rule of Civil Procedure 26(d) for leave to take limited expedited discovery. Federal Rule of Civil Procedure 26(d) provides for federal district courts, in their discretion, to permit immediate discovery upon a showing of good cause. *See Whitfield v. Hichsheid*, No. C-1-02-218, 2002 WL 1560267 at *1 (S.D. Ohio July 2, 2002). The need to preserve or prevent the destruction of evidence, especially electronic data, is in and of itself good cause for granting expedited discovery. *See, e.g., Qwest Communications Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003) (opining that good

cause for expedited discovery can include situations where documents may be destroyed); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 651 (D. Minn. 2002).

Expedited discovery here is required to avoid loss of evidence due to further tampering or other destruction of evidence. Such loss may come from unlawful destruction. *See* Section I above. It may also come in ways seemingly legal ways, including the loss of evidence from voting machines that are reset for new elections. *See generally* Second Jones Decl. Several Ohio counties have scheduled special elections on February 8, 2005. *See supra* page 6.⁴

Defendants/Counter-Plaintiffs discovery motion seeks only depositions of Triad, its President, Brett Rapp, and its technician, Michael Barbian. As the facts unfold, it may be necessary for Defendants/Counter-Plaintiffs to conduct additional discovery. This information is necessary in order to establish the breadth and depth of the possible evidence tampering by Triad in the recount.

⁴ Defendant/Counter-Plaintiffs submit that counties conducting new elections, while the 2004 Presidential election records must be preserved under 42 U.S.C. Section 1974 and well as any order of this Court, should use for those elections voting machines other than those used in the 2004 Presidential election.

CONCLUSION

For all the foregoing reasons, Defendants/Counter-Plaintiffs' motion for a preservation order and for leave to take limited expedited discovery should be granted, with the hearing on the motion for preliminary injunction held after discovery is completed.

Dated: December 23, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 23rd day of December, 2004. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Richard M. Kerger