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ONE HUNDRED EIGHTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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December 21, 2004

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Dear Candidates:

I write to you with an urgent request that you forward to my House Judiciary Committee staff any reports of irregularities or deviations from accepted law or practices during the ongoing recount in Ohio. Initial reports coming from various precincts across the state of Ohio indicate a widespread lack of compliance with the standard recount policies and procedures by individual Board of Elections officials and recount workers.

I am concerned that the disparate rules for the recount, which vary county by county, and ballot by ballot, may very well violate both the Due Process and Equal Protection Clause of the Constitution.<sup>1</sup> As the U.S. Supreme Court held in 2000, "Having once granted the right to vote

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<sup>1</sup>U.S. CONST. amends. V, XIV.

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on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”<sup>2</sup>

I am sure you are aware of Secretary of State Blackwell’s Directive 2004-58 (enclosed), which details recount procedures. As you know, it was distributed to the Boards of Elections last week, and represents your rights as witnesses and participants in the recount. I am concerned, however, that many of these procedures are not being followed, and have received reports to that effect (described below). I hope that your volunteers do not encounter similar problems, but if they do, they have my full support in exerting your rights and I would like to be advised of such problems.

Tampering.

- Triad employees possibly accessed computers and tabulating machines before the recount and out of the presence of board members and witnesses in at least 41 counties.<sup>3</sup> You have the right to have ballots secured until witnesses and board members are present.<sup>4</sup>
- At least one precinct in Medina County that would not have voting anomalies was both carefully pre-selected and pre-counted, so that the initial 3% recount that is mandated by the Ohio Secretary of State would not return a mismatch between the initial tally and the recount.<sup>5</sup> You have the right to have the 3% randomly selected.<sup>6</sup>

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<sup>2</sup>Bush v. Gore, 531 U.S. 98, 104-05 (2000).

<sup>3</sup>Tom Zeller, Jr., *Lawmaker Seeks Inquiry Into Ohio Vote*, THE NEW YORK TIMES, Dec. 15, 2004. Brett Rapp, President of Xenia, TRIAD, said it is standard procedure to prepare the machines for a recount and that TRIAD representatives went into all locations containing the equipment in approximately 41 counties. *Id.*

<sup>4</sup>OHIO REV. CODE § 3515.04 (West 2004).

<sup>5</sup>Report by Green Party Regional Coordinator, Dec. 13, 2004, posted at [http://www.votecobb.org/recount/ohio\\_reports/counties/medina.php](http://www.votecobb.org/recount/ohio_reports/counties/medina.php). According to Mr. Thomas E. Wolfe, Chairman of the Medina County Board of Elections, “I took two Medina precincts because I knew they had a high vote. ... I could have taken five precincts, but then we’d be counting for another hour... .

<sup>6</sup>J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 5.

- Ballots were altered during the 3% recount in Lucas County to make sure the machine and hand counts coincided, therefore avoiding a recount of the entire county.<sup>7</sup> You have the right to ensure that ballots are not altered.<sup>8</sup>

Secrecy.

- Recount workers and observers were not permitted to view the preparation of the test ballots, the count of the test ballots, or the pretesting of the ballots and machines.<sup>9</sup> You have the right to observe the testing of the equipment prior to the recount.<sup>10</sup>
- In Medina, no testing of the punch card machines were allowed.<sup>11</sup> You have the right to observe the testing of the equipment prior to the recount.<sup>12</sup>
- Uncounted provisional and absentee ballot envelopes were not available during the recount process in Medina.<sup>13</sup> You have the right to observe all ballots.<sup>14</sup>

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<sup>7</sup>Report by Green Party Regional Coordinator, Dec. 15, 2004, posted at [http://www.votecobb.org/recount/ohio\\_reports/counties/lucas.php](http://www.votecobb.org/recount/ohio_reports/counties/lucas.php). A witness for the 3% recount held in Toledo witnessed at least 3 ballots physically altered. “The apparent reason for this was to ensure that the vote count produced by the optical scan machine matched the hand count, and thus avoid hand-counting all of the ballots in the county. At least one of the election officials stated that she did not want the hand count and the machine count to be different because they did not want to do a complete hand count.” *Id.*

<sup>8</sup>OHIO REV. CODE § 3599.16 (West 2004) (providing felony penalties for board members that mutilate any election records).

<sup>9</sup>See Report, *supra* note 4.

<sup>10</sup>OHIO REV. CODE § 3515.03-04 (West 2004), J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 3-6.

<sup>11</sup>See Report, *supra* note 4.

<sup>12</sup>OHIO REV. CODE § 3515.03-04 (West 2004); J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 3-6.

<sup>13</sup>See Report, *supra* note 4.

<sup>14</sup>OHIO REV. CODE § 3515.03-04 (West 2004); J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 3.

- On more than one occasion, ballots with votes in both positions (Kerry/Edwards and Bush/Cheney) were not being rejected as overvotes, but were counted as votes for George Bush; and recount workers were not permitted to examine these ballots.<sup>15</sup> You have the right to observe all ballots.<sup>16</sup>
- The proper procedure with respect to having a recount worker from each side count half of the ballots and then trade halves was not being followed in Medina.<sup>17</sup> You have the right to inspect all ballots.<sup>18</sup>

#### Counting Violations.

- In Medina County, if the tabulator count did not match the hand count, the ballots were not hand counted a second time, as required by the Ohio Revised Code.<sup>19</sup> You have right to have inconsistent results rechecked.<sup>20</sup>
- The proper procedure with respect to the opening of the sealed containers that hold the ballots to be recounted in the presence of the recount workers and observers was not followed in Medina or in Jefferson County.<sup>21</sup> You have the right to ensure that ballots are secure between the election and the official recount. Ballots may not be handled by anyone besides Board members and their staff, and may not be handled outside of the presence of the Board and qualifying witnesses.<sup>22</sup>

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<sup>15</sup>See Report, *supra* note 4.

<sup>16</sup>OHIO REV. CODE § 3515.03-04 (West 2004); J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 3.

<sup>17</sup>See Report, *supra* note 4.

<sup>18</sup>OHIO REV. CODE § 3515.03-04 (West 2004); J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 3.

<sup>19</sup>See Report, *supra* note 4.

<sup>20</sup>OHIO REV. CODE § 3515.03-04 (West 2004); J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 5-6.

<sup>21</sup>See Report, *supra* note 4.

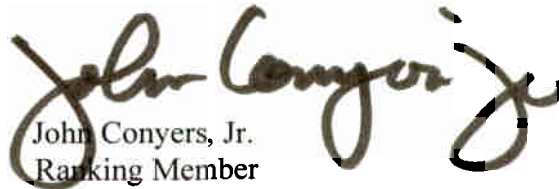
<sup>22</sup>OHIO REV. CODE § 3515.04 (West 2004); J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 5-6.

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- Disputed ballots were not being held out to be reviewed by the board, but were reviewed by one person.<sup>23</sup> You have right to have ballots inspected by the bipartisan board.<sup>24</sup>

As you continue your participation in the recount of the Ohio vote and we continue our investigation of the voting irregularities, we hope to keep an open dialogue. Our objective here is not to overturn the election, but to win back the confidence of the electorate in the accuracy of voting methods and the fairness of voting procedures. If you have any irregularities to report, please contact the House Judiciary Committee Democratic Staff at (202) 225-6504 (phone), (202) 225-7680 (fax).

Sincerely,



John Conyers, Jr.  
Ranking Member

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<sup>23</sup>See Report, *supra* note 4.

<sup>24</sup>J. Kenneth Blackwell, Directive No. 2004-58, Dec. 7, 2004 at 3.