

**IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY**

OHIO DEMOCRATIC PARTY, <i>et al.</i> ,	:	Case No. 06 CVH 09-11609
	:	
Relators,	:	
	:	Judge Angela P. White
	:	
v.	:	
	:	
J. KENNETH BLACKWELL	:	
SECRETARY, STATE OF OHIO,	:	
	:	
Respondent.	:	

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
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CLERK OF COURTS - CV

**RESPONDENT'S BRIEF IN OPPOSITION TO RELATORS'
AMENDED COMPLAINT FOR WRIT OF MANDAMUS**

I. INTRODUCTION

In this action, Relators seek a writ of mandamus that, if granted, would essentially place this Court in the position of controlling and dictating election procedures in all 88 counties in Ohio. However, the relief sought by Relators is not available through a request for a writ of mandamus. Relators do not seek to enforce a ministerial duty, but rather are attempting to control the Secretary's discretionary authority as Ohio's chief elections official.

The Relators are seeking to use this case to force the Secretary to instruct boards of elections through the issuance of directives and advisories addressing specific issues which they want for their benefit. However, the great writ of mandamus is not available to control the exercise of discretionary duties.

Moreover, as a result of their inexplicable delay in filing and prosecuting this case, waiting until virtually the eve of the election to file this action, Relators have failed to act with

the diligence requisite in elections-related matters, and their requested relief is barred under the doctrine of laches.

Relators should not be permitted to use this Court to disrupt the coordinated and comprehensive plans already in place for this election. Accordingly, this Court should deny their requested relief.

II. DISCUSSION

A. Standard for a Writ of Mandamus

Mandamus is an “extraordinary remed[y], to be issued with great caution and discretion and only when the way is clear.” *State ex rel Taylor v. Glasser* (1977), 50 Ohio St. 2d 165, 166, 364 N.E.2d 1. “The purpose of mandamus is to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.” *Id.*

To be entitled to a writ of mandamus, Relators must establish that (i) the Secretary has a clear legal duty to perform the acts requested; (ii) Relators have a clear legal right to the acts requested; and, (iii) Relators have no adequate remedy in the ordinary course of law to compel the Secretary to perform the requested acts. *State ex rel. Committee for the Proposed Ordinance No 146-02 v. City of Lakewood*, 100 Ohio St 3d 252, 2003-Ohio-5771.

All three of these requirements must be met in order for a writ of mandamus to be properly issued. *State ex rel Harris v. Rhodes* (1978), 54 Ohio St. 2d 41, 42. Furthermore, Relators have the burden of proof of establishing sufficient evidence on each of the three requirements. “The facts submitted and the proof produced must be plain, clear, and convincing before a court is justified in using the strong arm of the law by way of granting the writ [of mandamus].” *State ex rel Ekey v Rocky River Bd of Edn.* (1996), 110 Ohio App.3d 530, 534 (quoting *State ex rel Pressley v Indus. Comm* (1967), 11 Ohio St 2d 141, 161

B. The Secretary Has No Clear Legal Duty To Perform The Acts Sought To Be Compelled By Relators Herein.

“The duty to be enforced by a writ of mandamus must be *specific, definite, clear and unequivocal*” (Emphasis added.) *State ex re Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 205; *State ex rel Board of Tax Appeals v. Morgan County Budget Comm’n* (1963), 174 Ohio St. 297, 299 In this case, Relators do not satisfy this important requirement. Here, Relators simply point to the broad general powers of the Secretary of State, and attempt to provide their interpretation as to how these powers should be exercised. The writ of mandamus is not available to a Relator who simply disagrees with the course of conduct of a public official and seeks to supplant this discretionary authority of the public official with the Relator’s particular world view.

1. The General Legal Duty Of The Secretary Of State.

Relators claim that the “clear legal duty” of the Secretary underlying this action is found in the general authority given to the Secretary to issue directives to the local boards of election. The authority for the issuance of directives by the Secretary is found in R.C. 3501.04 and 3501.05.

R.C. 3501.04 provides, in pertinent part, that “[t]he secretary of state is the chief election officer of the state, with such powers and duties relating to ... the conduct of elections as are prescribed in Title XXXV of the Revised Code.” The general duties of the Secretary are established in R.C. 3501.05, and include the general duties to “[i]ssue instructions by directives and advisories to members of the boards [of election] as to the proper methods of conducting elections” and to “[p]repare rules and instructions for the conduct of elections.” R.C. 3501.05(B) and (C)

However, the foregoing provisions of the Revised Code do not establish a “specific, definite, clear and unequivocal” duty that may be subject to a mandamus action. Instead, these duties are extremely broad and general, and serve simply as a grant of authority to the Secretary to accomplish the implementation of other *specific* duties imposed upon the Secretary in other provisions of the Revised Code.

Relators do not seriously contend, nor have they presented any evidence, that the Secretary has failed to fulfill these general duties. Relators seek to have directives issued to implement their chosen personal plan for remedying claimed deficiencies relative to electronic voting machines and the election process. In short, Relators seek to compel very specific, detailed actions by the Secretary based upon a statute granting the Secretary broad and general duties and responsibilities. However, “a writ of mandamus may not be employed to compel the performance of general duties” *State ex rel. Struble v. Davis* (1939), 135 Ohio St. 593, 595; accord *State ex rel. Tillmon v. Weiher* (1992), 65 Ohio St.3d 468, 470 (“we will not issue a writ of mandamus to compel the observance of laws generally”). Indeed, as noted by the Ohio Supreme Court:

a court will not employ the extraordinary writ of mandamus to supplant every other form of remedy, for if it be employed to compel the observance of law generally, the court would thereby constitute itself the public conscience, and all others would become its agents through which the court would, within the law, exercise its will. The function of a court is to render judgment in actual controversies between adverse litigants, to command or restrain specific acts affecting existing rights of parties before the court, as distinguished from declaratory judgments affecting possible rights and potential controversies.

Cullen v State ex rel. City of Toledo (1922), 105 Ohio St 545, 551-552

2. The Secretary Of State Does Not Have A Clear Legal Duty To Issue Directives Addressing Specific Issues, With Specific Content, At A Specific Time.

Although the Secretary of State has a general duty to supervise elections, as the chief elections officer of the State of Ohio, the Secretary of State has discretion concerning the timing and content of his instructions to the boards of elections, and a writ of mandamus should not be available to control the exercise of that discretion. Nevertheless, Relators seek a writ of mandamus from this Court compelling the Secretary to issue directives with specific content, instructing the boards of elections regarding the following topics:

- 1) alleviate congestion at polling places, including the use of back-up paper ballots;
- 2) manage malfunctioning voting machines to ensure that votes already cast are not lost; and
- 3) assure the security of voting machines and related equipment so as to avoid accidental or willful adverse impacts on the voting process.

(Amended Petition, Prayer for Relief.)

The Ohio Supreme Court has previously rejected the Relators' argument that R.C. 3501.04 and R.C. 3501.05 can serve as a basis for the issuance of a writ of mandamus against the Ohio Secretary of State controlling the content of the Secretary's directives. In *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1, the Relator brought a mandamus case claiming that the Secretary of State had failed to comply with his legal obligations under R.C. 3501.04 and 3501.05(K) when he issued specific instructions to the county boards of elections concerning an initiative petition.

The Ohio Supreme Court initially noted that while "authority for the Secretary's rejection of petitions for improper or incomplete verification may be found in R.C. 3501.04 and 3501.05,

those statutes have not imposed a *specific* duty on the Secretary of State to do so. His authority is permissive.” *Id.* at 6-7. “*Though he is required to advise the boards, the content of his advice is discretionary. Mandamus will not issue to govern how discretion is exercised.*” (Emphasis added.) *Id.* at 8; see, also, *State ex rel. Sinay v. Sodders* (1997), 80 Ohio St.3d 224, 232 (“a writ of mandamus cannot be used to control the exercise of discretion”).

In this case, Relators are simply seeking to substitute their judgment for the judgment of the Ohio Secretary of State regarding the administration of elections. The great writ of mandamus is not available to enable Relators to substitute their judgment for the judgment of public officials.

3. **To extent any legal duties exist with respect to the issues raised by Relators, such duties are specifically placed upon the local boards of elections and not the Secretary; thu, the Secretary is not the proper Respondent for this mandamus action.**

In *State ex rel. Becker v. Eastlake* (2001), 93 Ohio St.3d 502, 2001-Ohio-1606, 756 N.E.2d 1228, the Ohio Supreme Court implicitly recognized that one of the requirements that a relator must satisfy in order to successfully prosecute a mandamus action is to name the proper respondent. See *id.* at 506 (“Relators’ complaint is defective because they did not name the proper respondent, and the named respondent does not have a duty to perform any of the requested acts”); see also *State ex rel. Greenlun v. Beightler* (1940), 137 Ohio St. 377, 30 N.E.2d 554.

In this case, the three issues that Relators raised in the Amended Petition and in Relators’ Brief in Support of Mandamus—to provide adequate voting supplies to maintain and repair the voting machines, and to secure the ballots—are duties that are imposed specifically upon county

boards of elections, not the Secretary. Hence, any mandamus action relating to these duties must be brought against the various county boards of elections, not the Secretary. The Supreme Court's decision in *Hodges, supra*, is instructive in this regard. *Hodges* involved a mandamus action against the Secretary of State challenging the review of initiative petitions, including the determination as to whether signatures of electors on such petitions are properly verified by their circulators and the decision of whether to reject such petitions for failure to contain a proper verification. Although R.C. 3501.04 and R.C. 3501.05 contained authority for the Secretary's rejection of petitions for improper or incomplete verification, the Supreme Court concluded that the Secretary did not have a "clear legal duty" because the relief which the Relator sought could only generally be ascribed to the overall duties of the secretary relating to the conduct of elections, and, that the Revised Code specific placed such a duty upon the *boards of elections*. In other words, the Secretary was not the proper respondent.

Against this backdrop, each of the alleged duties Relators have asserted the Secretary has and must fulfill are discussed below.

a. The Duty to Ensure Adequate Voting Supplies at Polling Places Is Specifically Enjoined Upon the Boards of Elections.

As developed in Relators' Brief in Support of Mandamus, the first issue that Relators raise concerns perceived inadequacies in voting supplies at polling places.¹ Although, Relators explicitly recognize that Ohio law clearly requires that the various county boards of elections supply sufficient voting materials and identify the specific statutory provisions underlying such duties imposed upon the boards of elections they have failed to include them as parties in this

¹ In the Amended Petition, Relators' prayer for relief includes the issuance of a Directive that will alleviate congestion at the polling place. In reviewing Relators' Brief in Support of Mandamus, Relators clarify that this issue concerns the "Duty to Provide Adequate Voting Supplies" and the focus of

action . (Relators' Brief in Support, at 5-6, citing R.C. 3501.29, R.C. 3501.30 and R.C. 3505.17.) Certainly, the Secretary has the general authority to provide directives and advice to the local boards. However, the *Hodges* decision clearly indicates that, in light of the specific duty the General Assembly has imposed upon the boards relating to providing adequate supplies at polling places, any remedy concerning any perceived deficiency in such supplies in order to avoid congestion at the polls must be sought against the boards of elections, not the Secretary. See *Hodges*, 64 Ohio St.3d at 7 (“... [a]s the General Assembly has ... specifically placed the duty to ascertain whether initiative petitions are properly verified on the boards of elections, we cannot find that the Secretary of State has a clear legal duty to perform it himself. Mandamus will not issue to compel him to do so in the absence of a duty”).²

The conclusion that the boards of elections are the proper Respondents (and not the Secretary) is further reinforced when consideration is given to the decision in *State ex rel Spencer v Montgomery County Board of Elections* (1956), 102 Ohio App. 51. *Spencer* involved

the relief sought concerns the adequacy or inadequacy of voting supplies at the polling places. (Relators' Brief in Support, at 5.)

² In any event, the Secretary of State has given Boards guidance on keeping election day lines moving efficiently. For example, on April 21, 2006, the Secretary issued Advisory 2006-04. See Affidavit of Judith M. Grady (Attached to this Memorandum as Exhibit A “Grady Affidavit”) Exhibit 1. This Advisory discusses and provides guidance to boards on enforcing R.C. 3505.23, Ohio’s law giving voters five minutes to cast their ballots when all the voting compartments or machines are in use and voters are waiting to occupy them. The Advisory recommends that boards be flexible in enforcing this provision and advises that if a voter appears to be taking an unusually long amount of time to cast his or her vote, two poll workers from different parties may want to politely and professionally ask the voter if he or she needs assistance. Additionally, on April 14, 2005, the Secretary issued Directive 2005-07, <http://www.sos.state.oh.us/sos/electionsvoter/directives/2005/mainDocs/Dir2005-07.pdf>. This directive required Boards using DRE voting systems to deploy the machines at a ratio of one machine for every 175 registered voters. Requiring Boards to have one voting machine for every 175 voters is another example of the Secretary taking steps to ensure that any congestion at the polls will be minimized.

The Secretary has also taken several other steps to reduce voter confusion and to ensure voters are prepared to cast ballots as efficiently as possible, thereby reducing the potential for long lines at the polls. For example, the Secretary of State’s website contains a feature that allows every voter to find out exactly what type of voting machine is used in his or her county. <http://www.sos.state.oh.us/sos/yvc/main/map.htm>. This link also provides voters with additional links to a free instructional video on how to use that particular voting machine. Voter education efforts like this, not only make voters more comfortable when using their counties voting equipment, but also help eliminate potential congestion at the polls.

a mandamus action to compel the respondents, the board of elections and its members, to provide in each polling place not less than one voting machine, or one cubicle in which paper ballots may be marked, for every 100 electors qualified to vote at each such voting place. Relators claimed that the Secretary of State was a necessary party because R.C. 3501.04 made the Secretary the chief election official of the state, with powers and duties relating to the conducting of elections. Nevertheless, the *Spencer* court recognized that the Secretary was not a necessary or proper party to the relief sought because “[t]he duties to be performed and the powers to be exercised in relation to the matter involved in this action are enjoined upon the board of elections of the county by the express provisions of the statute.” *Id.* at 53. Similarly in this case, the duty relating to providing adequate voting supplies at the polling places is clearly placed upon the county boards of elections. As such, in this case, one or more of the boards of elections would be the proper Respondent(s) in a mandamus; the Secretary is not the proper Respondent.

b. The Control and Management of Voting Machines Is Exclusively Within the Exclusive Province of the Local Boards of Elections

The next issue raised by Relators concerns the proper operation of voting machines. (Relators’ Brief in Support, at 8-9.) Under Ohio law, voting systems are under the direct control and supervision of the boards of elections, not the Secretary. *See generally* R.C. Chapter 3506. While the Secretary may certify generally the voting systems which may be authorized for use in the various counties, R.C. 3506.05, the actual selection and control over the specific voting systems are within the exclusive province of the counties. R.C. 3506.02.

Specifically, Ohio law makes it the responsibility of each board of elections to “provide for the purchase, preservation and maintenance of ... equipment used in registration, nominations

and elections” and to ensure that polling places are “suitably provided with voting machines, marking devices, automatic tabulating equipment, stalls and other required supplies.” R.C. 3501.11(C) and (I). Accordingly, the duty that Relators seek to impose upon the Secretary is, in fact, the express responsibility of the local boards of election. Thus, to the extent Relators seek to challenge the “preservation and maintenance” of voting machines, the county boards of elections would be the proper respondent(s) in a mandamus action; the Secretary is not the proper respondent.³

c. The Security Ballots and Voting Systems Is a Specific Duty Imposed Upon the Local Boards of Elections

Finally, Relators raise an issue concerning the “security” of ballots and voting machines. (Relators’ Brief in Support, at 9-11.) But, once again, the General Assembly has designated the boards of elections as the specific entity or public body responsible for the preservation of and security relating to ballots. After dictating the specific procedure that local precinct officials must follow with respect to maintaining ballots, R.C. 3505.31 provides, in part, that “[t]he presiding judge shall then deliver to the board [of elections] the containers of ballots and the sealed pollbook, poll list, and tally sheet, together with all other election reports, materials, and supplies required to be delivered to the board. The board shall carefully preserve all ballots prepared and provided by it for use in an election, whether used or unused. The board shall carefully preserve the pollbook, poll list or signature pollbook, and tally sheet delivered to it from each polling place. . . .” No explicit duty or responsibility is imposed upon the Secretary with

³ In addition to Ohio’s rigid certification process, the Secretary has issued Directives and Advisories relating to the protection of votes on voting machines. These Directives and Advisories were designed both prevent machines from malfunctioning in the first place and to prevent the loss of data in the unfortunate event that a voting machine malfunctions. See, e.g., Directive 2006-45, Grady Affidavit, Exhibit 2 (reminding boards of their obligations under R.C. 3506.14 to publicly test and audit accuracy of

respect to the preservation of or security relating to the ballots. As before, to the extent Relators seek to challenge the specific concerning the security relating to ballots or voting machines, the boards of elections would be the proper respondent in a mandamus as the General Assembly has specified that it is the boards which have that responsibility; the Secretary is not the proper respondent for the relief Relators seek.⁴

C. Relators' Claims Are Barred By The Doctrine Of Laches.

The Ohio Supreme Court has consistently recognized that "Relators in elections cases must exercise the utmost diligence." *State ex rel. Fuller v. Medina Cty. Bd. of Elections*, 97 Ohio St 3d 221, 2002-Ohio-5922, ¶ 7. If a relator does not act with the required promptness, laches will bar extraordinary relief in elections cases. *State ex rel. Miller v. Cuyahoga Cty. Bd of Elections*, 103 Ohio St.3d 477, 2004-Ohio-5532, ¶ 21. A delay of only nine days has been sufficient to trigger laches. *See, e.g., State ex rel. Landis v. Morrow Cty Bd. of Elections* (2000), 88 Ohio St.3d 187, 189, 2000-Ohio-295 ("We have held that a delay as brief as nine days can preclude our consideration of the merits of an expedited election case."); *Carver v. Stankiewicz* (2004), 101 Ohio St.3d 256, 2004-Ohio-812 (denying an extraordinary writ because the relators waited 19 days before filing their claim).

In this case, Relators base their complaint upon events that occurred during the general election in 2004, studies issued in 2004 and 2005, and events that occurred during the May 2006

all computer programs and equipment to be used in tallying ballots prior to election, prior to tabulating ballots on election night, after completing the unofficial canvass, and before and after the official count).⁴ Since September 2005, the Secretary has issued numerous directives or advisories relating to numerous aspects the proper use, storage and control of ballots and voting machines. *See e.g.* Directive 2006-36, Grady Affidavit, Exhibit 3 (instructing the boards to maintain the highest level of security regarding voting machine key card management); Directive 2006-37, Grady Affidavit, Exhibit 4 (mandates boards to follow certain procedures to ensure secrecy and accuracy of absentee and provisional votes cast on DREs); Advisory No. 2006-03, Grady Affidavit, Exhibit 5 (reminding the boards of the importance of properly securing all electronic voting equipment, with associated guidelines); Advisory 2006-04 Grady Affidavit, Exhibit 1 (reminding boards that pollworkers must secure all memory cards and VVPATs).

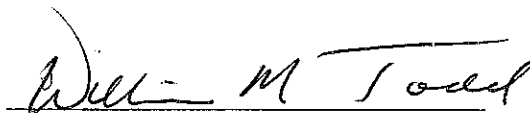
primary election. (Amended Petition, at ¶¶7-11.) Accordingly, Relators waited between four months to almost two years before they filed file this complaint on September 6, 2006, seeking an expedited writ of mandamus, two months before a general election. Under these circumstances, Relators' claims are barred by laches.

IV. CONCLUSION

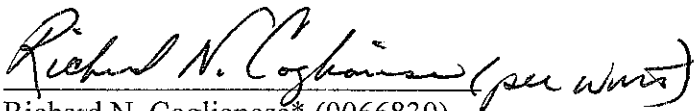
For the foregoing reasons, Respondent respectfully requests this Court to deny the Relators' Petition for a Writ of Mandamus in its entirety.

Respectfully submitted,

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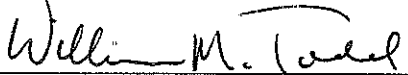
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CERTIFICATE OF SERVICE

This will certify that the foregoing Respondent's Brief in Opposition was served via facsimile and regular US mail this 20th day of October, 2006 to the following:

Richard M. Kerger
Kerger & Associates
33 South Michigan Street, Suite 100
Toledo, Ohio 43602



William M. Todd (0023061)

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SECRETARY, STATE OF OHIO, : :
 : :
 Respondent. : :

AFFIDAVIT OF JUDITH M. GRADY

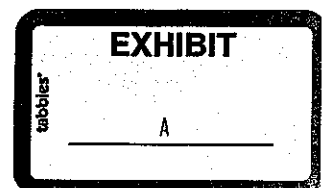
STATE OF OHIO)
) ss.
COUNTY OF FRANKLIN)

I, Judith M. Grady, being first duly sworn, depose and state as follows:

1. I am the Director of Elections for Ohio Secretary of State, J. Kenneth Blackwell.
2. From January 1, 2006 through October 19, 2006, the Office of the Secretary of

State has issued the following Directives to the boards of elections:

- 2006-75: Polling Place Access
- 2006-74: Removal of Issue 1 From The Ballot
- 2006-73: Registered Voters Report and Director's Estimate
- 2006-72: New Provisions for R.C. 3505.20
- 2006-71: State Advertising
- 2006-70: Supplemental Petition - Initiative Petition - SmokeFree Workplace Act
- 2006-69: Candidate Lists for General Election
- 2006-68: Supplemental Petition – Constitutional Amendment – Smoke Less
- 2006-67: Reporting Official Results – September 15, 2006 Special Congressional
Primary Election
- 2006-66: Reporting Official Results – September 14, 2006 Special Congressional
Primary Election



2006-65: Supplemental Petition -- Referendum -- Am. Sub. SB 7 Workers Compensation

2006-64: Unofficial Report- September 15 Special Congressional Primary (Democrat)

2006-63: Unofficial Report- September 14 Special Congressional Primary (Republican)

2006-62: Certified Forms of Official Ballots-2006 General Election (Ballot included in PDF file)

2006-61: State Board of Education and County Court Judge Candidates

2006-60: Supplemental Petition - Constitutional Amendment - Learn & Earn

2006-59: Record Retention Policies Governing Ballots and Pollbooks

2006-58: Initiative Petition - Constitutional Amendment - Smoke Less

2006-57: Initiative Petition - Constitutional Amendment - Minimum Wage

2006-56: SmokeFreeOhio Initiative Petition Proposing a Statute

2006-55: Initiative Petition - Constitutional Amendment - Learn & Earn

2006-54: Referendum Petition of Am. Sub. S.B. No. 7 (126th General Assembly) - Workers Compensation

2006-53: Independent Nominating Petition - William S Peirce and Mark M Noble - Governor and Lt. Governor

2006-52: Independent Nominating Petition - Robert Fitrakis and Anita Rios - Governor and Lt Governor

2006-51: Independent Nominating Petition - Timothy J. Kettler - Secretary of State

2006-50: Election Recount Requirements & Procedures

2006-49: Central and Executive Committee Reports

2006-48: Official Canvass for May 2, 2006 Election

2006-47: Election Night Reporting Requirements and Procedures

2006-46: Unofficial Report Forms

2006-45: Pre-Tests

2006-44: Withdrawal of Statewide Candidacy - Hugh Quill (Democratic Ballot)

2006-43: Registered Voters Report and Directors' Estimate

2006-42: Petition Against Am. Sub. H.B. 7

2006-41: Primary Candidates' Lists

2006-40: Removal of Name of Jim Trakas from the Primary Ballot

2006-39: 17-Year-Old Voters in the May 2 Primary Election

2006-38: 2006 Prescribed Primary Ballot

2006-37: Voting on Absentee or Provisional Ballot on DRE with VVPAT - Secrecy of Ballot

2006-36: Direct Recording Electronic (DRE) Voting Machine Key Card Management

2006-35: Candidate Reporting Forms

2006-34: Declaration of Candidacy for Secretary of State - Robert G Montgomery

2006-33: Declaration of Candidacy for Justice of Supreme Court 1-1-07 term - A.J Wagner

2006-32: Declaration of Candidacy for Auditor of State - Christopher McNulty

2006-31: Declaration of Candidacy for Treasurer of State - Richard Cordray
 2006-30: Declaration of Candidacy for Secretary of State - Greg Hartmann
 2006-29: Declaration of Candidacy for U.S. Senator - Sherrod Brown
 2006-28: Declaration of Candidacy for Attorney General - Marc Dann
 2006-27: Declaration of Candidacy for Attorney General - Betty Montgomery
 2006-26: Declaration of Candidacy for Justice of Supreme Court 1-2-07 term -
 Ben Espy
 2006-25: Declaration of Candidacy for Secretary of State - Jim Trakas
 2006-24: Declaration of Candidacy for Justice of Supreme Court 1-1-07 term -
 Terrence O'Donnell
 2006-23: Declaration of Candidacy for Justice of Supreme Court 1-2-07 term -
 Robert R. Cupp
 2006-22: Declaration of Candidacy for Governor and Lieutenant Governor -
 Bryan E. Flannery and Frank M. Stams
 2006-21: Declaration of Candidacy for Auditor of State - Barbara Sykes
 2006-20: Declaration of Candidacy for U.S. Senator - Mike DeWine
 2006-19: Declaration of Candidacy for Attorney General - Tim Grendell
 2006-18: Declaration of Candidacy for Treasurer of State - Hugh Quill
 2006-17: Declaration of Candidacy for Secretary of State - Jennifer L. Brunner
 2006-16: Declaration of Candidacy for U S Senator - William G. Pierce
 2006-15: Declaration of Candidacy for Attorney General - Subodh Chandra
 2006-14: Declaration of Candidacy for Governor and Lieutenant Governor - J.
 Kenneth Blackwell and Thomas Raga
 2006-13: Declaration of Candidacy for Auditor of State - John B. Reardon
 2006-12: Declaration of Candidacy for Governor and Lieutenant Governor - Jim
 Petro and Joy Padgett
 2006-11: Declaration of Candidacy for U S Senator - David R. Smith
 2006-08: Declaration of Candidacy for U S Senate - John Mitchel
 2006-07: Declaration of Candidacy for Treasurer of State - Sandra O'Brien
 2006-06: Declaration of Candidacy for Governor and Lieutenant Governor - Ted
 Strickland and Lee Fisher
 2006-05: Declaration of Candidacy for Treasurer of State - Jennette B Bradley
 2006-04: Declaration of Candidacy for Auditor of State - Mary Taylor
 2006-03: Declaration of Candidacy for U.S. Senate - Merrill Samuel Keiser, Jr
 2006-02: County Board Reorganization
 2006-01: Independent Nominating Petition

3. Pursuant to R.C. 3501.05 the foregoing 2006 Directives are accessible on the Secretary of State's website, at

<http://www.sos.state.oh.us/sos/ElectionsVoter/OhioElections.aspx?Section=1235>

4. A true and accurate copy of the following directives and advisories are attached as Exhibits 1 through 5 and made a part hereof:

Advisory 2006-04 (Exhibit 1)

Directive 2006-45 (Exhibit 2)

Directive 2006-36 (Exhibit 3)

Directive 2006-37 (Exhibit 4)

Advisory 2006-03 (Exhibit 5)

5. From January 1, 2006 through October 19, 2006, the Secretary of State has issued the following advisories to the boards of elections:

2006-07: UOCAVA Overview

2006-06: Preliminary Injunction Relevant to Voter Registration Form and Procedures

2006-05: Amended Substitute House Bill 3

2006-04: Election Day Procedures

2006-03: Boards of Elections Using DRE Voting Units

2006-02: Recent Ohio Supreme Court Decision Potentially Relevant to R.C. 3513.041

2006-01: Law & Procedures Governing the May 2, 2006 Election - Substitute House Bill No. 234 and Amended Substitute House Bill No. 3

6 Pursuant to R.C. 3501.05, the foregoing 2006 Advisories are accessible on the Secretary of State's website, at

<http://www.sos.state.oh.us/sos/ElectionsVoter/OhioElections.aspx?Section=1614>

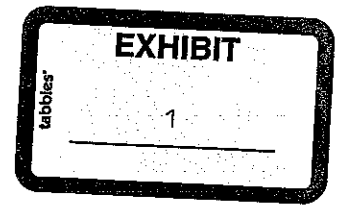
Further affiant sayeth naught.


Judith M. Grady

Sworn to and subscribed before me on this 20th day of October, 2006.


Notary Public

KEITH A. SCOTT, ATTORNEY AT LAW
NOTARY PUBLIC STATE OF OHIO
My commission has no expiration date.
Section 147 03 R.C.



J. KENNETH BLACKWELL
Ohio Secretary of State

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ADVISORY 2006-04

April 21, 2006

To: ALL COUNTY BOARDS OF ELECTIONS
Members, Directors and Deputy Directors

**Election Day Procedures
May 2, 2006 ~ 6:30 a.m. – 7:30 p.m.**

This advisory briefly reviews some of the essential election day procedures which all election officials must follow and enforce.

Pre-Tests

All equipment pre-tests mandated by R.C. 3506.14 must be successfully completed before the polls open. Please refer to Directive 2006-45 for more information about pre-test requirements.

Board of Elections in Session Throughout Election Day

R.C. 3505.30 states: "The board shall remain in session from the time of the opening of the polls, continuously, until the results of the election are received from every precinct in the county and such results are communicated to the secretary of state." A quorum consisting of three board members is required for a board to be in session and vote on official business.

Pollworkers and Poll Hours -- R.C. 3501.31, 3501.32

All polling locations must be open and available for voting beginning at 6:30 a.m. Pollworkers must report to their assigned precinct polling locations no later than 6:00 a.m., take the oath of office prescribed in R.C. 3501.31, and immediately notify the board of elections if any pollworker assigned to that precinct is absent. Pollworkers must ensure that their precincts are ready to receive voters at 6:30 a.m.

In accordance with R.C. 3501.32, the polls shall be opened by proclamation by the presiding judge or, in the presiding judge's absence, by a presiding judge chosen by the other precinct judges, at 6:30 a.m. The polls shall be closed by proclamation at 7:30 p.m., unless there are voters waiting in line to cast their ballots, in which case the polls shall be kept open until such waiting voters have voted.

Voting Procedures

▪ **Generally**

While the polls are open, all pollworkers must perform the duties set forth in:

- R.C. 3501.30 and 3501.35 (enforcing the prohibition against loitering, congregating, delaying voters, campaigning, etc. in the "neutral zone" between the polling place and the U.S. flags or, if the line of voters extends beyond the U.S. flags, a distance of 10 feet from the end of the line),

- R.C. 3501.33 (enforcing peace and good order in and around the polling place),
- R.C. 3505.18 (signing in voters, verifying signatures, issuing the appropriate ballot), and
- R.C. 3505.23 (replacing torn, soiled, defaced or erroneously marked ballots, verifying the ballot stub numbers before the voters casts the ballots).

▪ **Be Flexible about the “5-Minute Rule”**

Pollworkers need to be flexible about enforcing the provision of R.C. 3505.23 that limits voters to five minutes in the voting compartment when there is a line of people waiting to vote. Many voters will be using the optical scan or DRE voting systems for the first time on May 2. Pollworkers must allow voters a reasonable amount of time to mark and check their ballots. If a voter seems to be taking an unusually long amount of time to vacate the voting compartment, two pollworkers of different parties may want to inquire, very politely and professionally, if the voter requires assistance.

▪ **Provisional Voters**

Provisional voting will be conducted in the May 2, 2006 elections using the same procedures used in the 2004 general election. Please review the following:

- Memorandum of March 3, 2006 (Primary posters, instructions, statements and notices)
- Directive 2004-05 (HAVA 302/(b) Voting Information Requirements - Polling Places)
- Directive 2004-42 (Provisional Voting: Home Precinct Balloting Only)
- Memorandum of October 26, 2004 (Provisional Voting) and
- Directive 2004-52 (Judge Katz' order re: voting provisionally certain voters to whom absentee ballots had been issued)

▪ **Providing Assistance to Disabled Voters (R.C. 3505.24)**

Any disabled voter may be aided at the polling place by any person of the elector's choice *except* a candidate whose name appears on the ballot; the voter's employer or an agent of the employer; or an officer or agent of the elector's union, if any. A disabled voter who requests pollworkers for assistance in marking and/or casting the voter's ballot shall be aided by two pollworkers of different parties.

Enforce prohibitions against certain conduct

State law safeguards the integrity of the ballot by imposing criminal sanctions for certain misconduct on the part of anyone assisting a disabled voter. R.C. 3599.20 states that no one assisting a voter in the voting booth may attempt to interfere with the voter when marking the voter's ballot. R.C. 3599.20 prohibits anyone who provides assistance in marking another voter's ballot from disclosing how the voter chose to mark the ballot. R.C. 3599.21 makes it a crime to possess the absentee ballot of another person except as the law expressly permits. R.C. 3599.26 prohibits any form of ballot tampering:

“No one shall ... fraudulently or deceitfully change a ballot of an elector, by which such elector is prevented from voting for such candidates or on an issue as the voter intends to do; or mark a ballot of an elector except as authorized by [R.C. 3505.24]; or hand a marked ballot to an elector to vote, with intent to ascertain how the elector voted; or furnish a ballot to an elector who cannot read, knowingly informing the elector that it contains a name different from the one that is printed or written thereon, to induce the elector to vote contrary to the elector's intentions; to induce the elector to vote contrary to the elector's intentions; ***.”

Pollworkers must intervene if they observe anyone violating any of these provisions and must submit a thorough report of such violations to the board for review and possible further action.

- **Information about Write-in Candidates**

The presiding judge of each precinct must have a list of all eligible write-in candidates for that precinct. The list of write-in candidates shall not be posted in plain view anywhere in the polling place nor shared automatically with every voter in the precinct. However, if any voter asks if there are any write-in candidates in the precinct or asks to see the list of such candidates, the pollworkers shall promptly make the list available for the voter to review.

Pollworkers shall not volunteer to any voter that there are write-in candidates, as that could be construed as campaigning for the write-in candidates inside the polling place or attempting to influence the voter, both of which are violations of the election laws.

- **Challenges**

Any person who appears to vote may, for good cause, be challenged as to the right to vote the requested ballot on May 2. The challenge may be based on the voter's:

- Citizenship (not a U.S. citizen, even if a resident of the county for many years),
- Age (a 17-year old cannot vote on central committee candidates or any questions or issues),
- Residency (does not have a qualifying voting residence in the precinct or precinct split)
- Registration (is not registered to vote in Ohio, or not registered in time for this election),
- Political party affiliation. Have any voter who wishes to change party affiliation by voting the primary ballot of a different political party complete and sign the statement on whichever challenge form – Form 10-W (for individual challenges) or 10-X (for challenges of more than one person) – that is provided in the precinct kit, affirming that change.

Any challenge must be conducted in a professional and informational manner, never in an intimidating or accusatory fashion.

- **Casting Ballots**

The voter is responsible for casting his or her ballot. No pollworker shall cast the ballot, paper or electronic, of any voter who has failed to cast that ballot before leaving the polling place.

- **Stubs**

Before a voter casts his or her marked optical scan ballot, pollworkers must confirm the number on the stub and, if the stub number is correct, remove the stub from the ballot before the voter casts it.

- **Posting the 11 and 4 Lists**

In accordance with R.C. 3503.23, precinct election officials shall do both of the following:

- (1) By the time the polls open, conspicuously post and display at the polling place one copy of the registration list of voters in that precinct;
- (2) At 11 a.m. and 4 p.m. place a mark, on the official registration list posted at the polling place, before the name of those registered voters who have voted.

Procedures when the Polls Close (R.C. 3501.26, 3505.26)

- **Reconciliation**

Regardless of the voting system used, the pollworkers must reconcile their records before returning the ballots and materials to the board.

- **Memory Cards & VVPATs**

Pollworkers must secure all memory cards and, if appropriate, VVPATs as directed by the board.

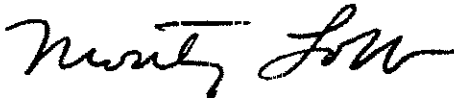
Required Reports For The May 2 Primary Election

In accordance with R.C. 3505 30, every board must send its unofficial canvass reports to this office via certified mail by **noon** on the day after the election, i.e., May 3, 2006.

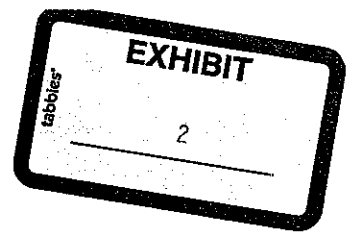
QUESTIONS?

If you have any question regarding these instructions, please contact the Elections Division at (614) 466-2585.

Sincerely,

A handwritten signature in black ink, appearing to read "Monty Lobb". The signature is fluid and cursive, with the first name "Monty" and the last name "Lobb" clearly distinguishable.

Monty Lobb
Assistant Secretary of State



J. KENNETH BLACKWELL
Ohio Secretary of State

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DIRECTIVE 2006-45

April 18, 2006

To: ALL COUNTY BOARDS OF ELECTIONS
Members, Directors and Deputy Directors

To ensure that all votes cast in the May 2 primary election are counted accurately and uniformly, I am issuing this directive, which provides instructions for:

- Pre-testing codes and tabulating equipment used in the unofficial canvasses
- Canvassing unofficial election results on election night.

PRE-TESTS

R.C. 3506.14 requires the board of elections, before any election, to publicly test and audit the variable codes applicable to that election so as to verify the accuracy of any computer program that will be used for tallying ballots cast at the election. In order to satisfy this statutory mandate, which includes the taking of any necessary corrective action, this office strongly advises all boards to conduct the public test before election day.

The public pretest should be conducted after the logic and accuracy (L&A) testing has been completed. Because the pretest is to demonstrate the accuracy of the tabulating program, the precincts chosen for the pretest should contain races with multiple candidates, candidate rotations, splits within a precinct and, if applicable, write-ins candidates.

Each board must give public notice of the date, time and place of the test, by either proclamation or posting of the notice, as in the case of notice of elections.

The board must conduct the test using a pre-audited group of ballots with a predetermined number of votes cast for each candidate, issue and question. The automatic tabulating equipment must be tested for the ability to detect undervotes and overvotes.

If any error is detected, the board must determine the cause for the error, correct it, and conduct another test. An errorless test must be conducted and certified by the board.

The board must conduct successful tests on four more occasions:

- Before tabulating ballots on election night,
- After completing the unofficial canvass, and
- Before and after the official count, before the board certifies the results as official.

UNOFFICIAL CANVASS

Reminder: You must send the results of your unofficial canvass to the Secretary of State's Elections Division by **noon on Wednesday, May 3, 2006.**

The election night "unofficial canvass" shall be conducted in accordance with Revised Code sections 3505.27 (*counting regular ballots cast at polling locations*), 3505.28 (*ballots not counted*), 3509.06 (*counting absentee ballots*), 3509.07 (*absentee ballots not counted*) and 3511.11 through .13 (*armed service absentee ballot*), as well as instructions provided by the Secretary of State office. The unofficial canvass shall include all ballots that the board determines are eligible to be counted on election night. An example of a ballot that cannot be counted on election night is a provisional ballot. Pursuant to R.C. 3505.27, the unofficial canvass must be conducted in full view of the board members and any witness appointed under R.C. 3505.21.

The board of elections must designate teams having an equal number of people from each major political party to inspect and/or count the ballots. Depending on the type of voting system used in the county, the teams either inspect or count the ballots as follows:

- Paper ballots *Count* and record votes cast on each ballot; *or sort* into stacks, count the ballots and record the votes cast.
- Optical Scan *Verify* that memory cards and corresponding report from all the polling places containing results from all precincts are received.

 Inspect any ballot rejected by the tabulator as a blank ballot or a ballot in which the voter intent is in question. As stated in R.C. 3506.21(B), voter intent is determined by examining the ballot for a consistently made mark that is contrary to voting instructions. *Examples:* Rather than filling in the oval or box, the voter underlined or circled choice; circled oval or box by choice; made an "X", checkmark or other recognizable mark beside the choice; or marked the ballot with a writing instrument not recognized by tabulator.

 Remake any ballot where the intent of the voter has been determined.
- DRE *Verify* that cartridges, PCMCIA cards or other removable memory devices and a corresponding report is received from each precinct.

- *Write-in Candidates: All Voting Systems*

A voter may write in only the last name of the candidate, if there is only one candidate with that last name as a candidate. But if there are two or more write-in candidates with the same last name, the voter must provide sufficient information for election officials to determine the voter's intent. For example, the voter must write on the ballot the write-in candidate's first and last names, or the last name and the office sought.

Optical Scan Ballots:

- The oval or box next to the write-in candidate's name must be filled in for a write-in vote to be valid.
- If, for the same office, there is any candidate whose name is on the ballot and any candidate who is a write-in, the ballots must be examined for the possibility of an overvote and whether any name the voter has written on the ballot is a qualified write-in candidate.

**REMINDER AS TO NUMBER OF VOTES REQUIRED FOR CERTAIN
WRITE-IN CANDIDATES TO BE NOMINATED**

R.C. 3513.23 (B) states:

In no event shall a person whose name is written on a primary election ballot be nominated as a candidate for election to an office if the name of no person living on the day of that primary election is printed on the ballot as a candidate for that nomination, unless the total number of votes cast for the person whose name is written on the ballot is not less than that number of petition signatures that would have been required for the printing of the person's name on the primary ballot pursuant to section 3513.05 of the Revised Code.

REQUIRED REPORTS FOR THE MAY 2 PRIMARY ELECTION

This office will send to each board of elections under separate cover:

- the election night reporting forms,
- unofficial report forms and
- official report forms

As noted above, R.C. 3505.30 requires every board to send its unofficial canvass reports to this office via certified mail by **noon** on the day after the election, i.e., May 3, 2006.

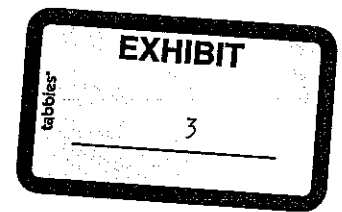
QUESTIONS?

If you have any question regarding these instructions, please contact the Elections Division at (614) 466-2585

Sincerely,



Monty Lobb
Assistant Secretary of State



J. KENNETH BLACKWELL
Ohio Secretary of State

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Directive 2006-36
February 22, 2006

ALL COUNTY BOARDS OF ELECTIONS IMPLEMENTING DIEBOLD DRE'S
TO: Members, Directors & Deputy Directors

Direct Recording Electronic (DRE) Voting Machine Key Card Management

Diebold's DRE's use special security encryption, or keys, on voting system access cards to perform management and voter functions. These cards include supervisor, administration and voter access cards. To ensure that the highest level of security for the election process is achieved, keys will be changed prior to the primary election. The Office of the Secretary of State (SOS) of Ohio will be responsible for managing and completing the change process.

Management of security keys requires the use of special equipment that allows a user who has appropriate security access to change the key(s) on security, supervisor and administration cards. By changing the keys on these cards, passwords used to prevent unauthorized access into a DRE are changed.

Keys on voter access cards are changed by Boards of Elections through use of the encoders.

PROCESS

To accomplish this task:

- o All security, supervisor and administration cards (except those used for training purposes) must be sent to SOS by February 28, 2006. It is imperative that keys for all cards within a county be kept in sync (contain the same keys and thereby passwords for DRE's). Failure to do so will result in confusion and unusable cards at polling locations.
- o Cards should be bundled in groups of 20 for ease of counting.
- o Each county must complete and submit an inventory control sheet (Exhibit A) with the cards.
- o SOS staff will complete updates/changes to keys and cards will be returned to the county of origin on or before the write-in candidate filing deadline in order to allow counties time to use cards for logic and accuracy testing as well as meet training needs.
- o New passwords will be communicated separately via email to the SOS email account provided to your county on your SOS provided workstation.

DRE's will be updated with the new keys/passwords when the newly updated administration cards are used during logic and accuracy testing.

IMPORTANT POINTS TO REMEMBER

Training and Demonstration Voting Systems

Some DRE's may be used for training and demonstration purposes. This equipment should be clearly labeled and kept separate from DRE's used for elections. Before training and demonstration units can be utilized for an actual election, they must undergo logic and accuracy testing.

Cards for Training and Demonstration Equipment

Supervisor and administration cards that are used for training staff, poll workers and the general public should be clearly labeled and kept separate from those used for elections. Keys on these cards should **not** be changed from the default setting of 11111 for ease of training.

Sincerely,



J. Kenneth Blackwell

Exhibit A

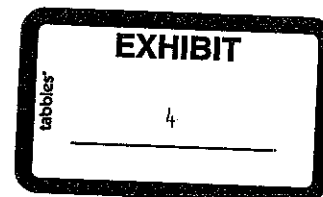
Key Card Inventory Control Sheet

County Name: _____

Card Type	# Of Cards Sent For Updates	Date Sent	Sent By	Confirmed By
Supervisor				
Administration				

For SOS Use:

Card Type	# Of Cards Updated	Date Returned to County	Sent By	Confirmed By
Supervisor				
Administration				



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Directive No. 2006-37

March 2, 2006

To: ALL COUNTY BOARDS OF ELECTIONS

Voting an Absentee or Provisional Ballot on DRE with VVPAT – Secrecy of Ballot

The board of elections in every county must assign a five-digit number to each provisional or absentee cast on a DRE, following the procedures set forth in Directive 2005-25. This number serves as the stub number for electronically cast ballots.

The law requires election officials to remove from paper ballots the stubs bearing the numbers that link a ballot to a specific voter. This is done to protect and preserve the secrecy of the ballot. Because the five-digit stub number cannot be removed from ballots on DREs, election officials must take reasonable alternative steps to protect and preserve the secrecy of any absentee or provisional ballot stored on a DRE. Therefore, election officials must redact the stub number printed on the Voter Verified Paper Audit Trail (VVPAT) to avoid the linking of a ballot to a specific voter.

Provided below is an example of how a board of elections will conduct a recount while protecting and preserving the secrecy of each ballot. Following are the facts of this example:

- This recount involves only one precinct.
- Four provisional ballots were cast on the DRE in that precinct.
- The board of elections determined during its certification meeting that three of the provisional ballots were valid, and one was not.

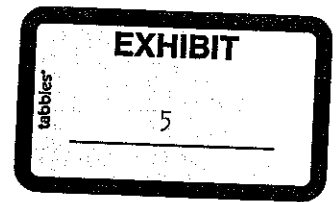
In addition to the instructions provided with Directive 2005-32 for conducting the hand count of the VVPAT, the board of elections must follow this process:

1. A list indicating valid and invalid provisional ballots must be prepared with the electronic stub numbers included, but with no name linked to the numbers.
2. When a provisional ballot is listed on the VVPAT, the VVPAT team must immediately cover the portion of the ballot indicating the voter's choice(s) by a method determined by the board.
3. Then the two election officials comprising the VVPAT team shall ascertain from the list provided whether the ballot is valid or invalid.
4. Once a ballot's validity or invalidity has been ascertained, the VVPAT team shall mark out or label over that ballot's electronic stub number so the stub number is unreadable.
5. The ballot is then counted or not counted, depending upon its validity as indicated on the certification list. If the ballot is not counted, in addition to having the electronic "stub number" marked out, the ballot shall be marked "Not Valid."

If you have any questions concerning the directive, call my Elections Division at 614-466-2585.

Sincerely,

J. Kenneth Blackwell



J KENNETH BLACKWELL
Ohio Secretary of State

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ADVISORY NO. 2006-03

March 31, 2006

To: Boards of Elections Using Direct Recording Electronic (DRE) Voting Units

Several inquiries have been made concerning the proper application of Physical Security Requirements for electronic voting units in the upcoming election. The purpose of this advisory is to reaffirm and clarify the policy underlying secure management of PEB/PCMCIA Cards, hereafter referred to collectively as "Cards," and to outline preferred Card-handling practices. For purposes of this advisory, voting units is defined but not limited to the device that houses the Card during the election process as well as the DRE unit.

Boards of Elections need no reminders of the importance of ballot security. With the introduction of DRE voting units with removable memory devices, however, the Secretary feels it is prudent to clearly articulate the differences between secure management of paper-based ballots and electronic ballots. Generally speaking, Cards should be treated as ballots and handled with the same standard of care. Unlike paper ballots, Cards do not have numbered stubs, matching tracking numbers nor are they pre-packaged by the ballot printer.

Cards should be maintained in the most secure fashion possible. As we recognize that Boards have many considerations when assigning and delivering equipment, the following guidelines should be helpful for you in determining the best process for insuring security (Note: only #1 is an absolute rule):

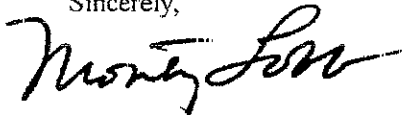
1. If voting units are pre-delivered to polling locations prior to Election Day, the Card may not be left with or within the voting units under any circumstances.
2. When voting units are pre-delivered (picked up, etc.) to a precinct judge or other election official responsible for setting up voting units prior to Election Day, it is preferable that Cards not be pre-loaded in the unit. Alternatively, the Board could adopt one of the following policies:
 - a. Deliver Cards along with precinct supplies to the polling location on the morning of the election;
 - b. Deliver Cards to a precinct election official other than the official in possession of the voting unit; or
 - c. Pre-loaded Cards be "sealed" with tamper-evident tape, held for a limited period of time by a sworn election official and written policies for insuring a complete review of voting equipment at the opening of polls are adopted by the Board

3. When voting units are pre-deployed at polling locations, the Board may use any secure method for delivering Cards. They may be held securely by the Presiding Judge for a limited period of time before the election or delivered to polling locations the morning of the election as the Board sees fit. Provided Cards are not left with unattended voting units, either method of secure delivery is presumed valid.
4. Voting units may be pre-set – including the DRE with VVPAT, prior to Election Day. Remember, though, that this may make it impossible to “seal” the screen cover of the DRE depending on the type of DRE being used. Special care should be taken to use tamper-evident seals on the cover of the Card Slot Door on the voting unit as added protection against unauthorized access. Furthermore, the DRE units should be chained or cabled together through the carrying handle to physically secure the voting at that location and use a no-slack chain to go around the DREs in a cross pattern that is padlocked to secure the tablets.

We recognize that changing past practices of ballot handling and tracking can be logistically difficult for Boards. To the greatest extent possible, when defining your Card-handling procedures please give consideration to voter confidence, audit-ability and security.

If you have any questions, please contact Conni Siegmund or Joy West at (614) 466-2585.

Sincerely,

A handwritten signature in black ink, appearing to read "Monty Lobb". The signature is fluid and cursive, with the first name "Monty" being larger and more prominent than the last name "Lobb".

Monty Lobb
Assistant Secretary of State