

LINDA SCHADE, et al

Plaintiffs

v.

MARYLAND STATE BOARD OF ELECTIONS
LINDA H. LAMONE (as Administrator of
Maryland's State Board of Elections)

Defendants

* IN THE
* CIRCUIT COURT
* FOR
* ANNE ARUNDEL COUNTY
* CASE NO. C-04-97297

*

* * *

MEMORANDUM OPINION

One of the most precious freedoms Americans enjoy is the right to vote. Equally of import is to have that vote counted. Plaintiffs suggest to the Court the use of the Diebold AccuVote TS Electronic Voting System cannot preserve this freedom. They question the security and reliability of this system in the upcoming November 2004 election. They advance theories that the State Board of Elections and its administrator were arbitrary and capricious in purchasing and certifying this electronic voting system. They postulate the system was purchased over objections of its own Procurement Review Committee and further, the State Board of Elections failed to decertify the machines as required by State and Federal law once independent experts commissioned by the State of Maryland confirmed serious security and vulnerability flaws in this system.

The State of Maryland, acknowledging there is, or could be, possible security risks with the machines, employed independent experts to help implement the reasonable and feasible suggestions made by all experts and have, in fact, considered and corrected many risk factors to ensure each vote is counted and the security and secrecy of the ballots remain intact.

Preliminarily, in 1996, Baltimore City implemented electronic voting, and in 2002, four counties in Maryland used the Diebold machines. The Primary of 2004 saw the use of the Diebold machines in every precinct in the State of Maryland, excepting Baltimore City.

It was not until April of 2004 that the Plaintiffs brought their original suit, subsequently amended, and some time thereafter requested this preliminary injunction.

The Court heard three full days of testimony from experts and lay witnesses. While not demeaning

witnesses who were called and qualified purportedly as experts, the Court was most impressed with the credentials of three who testified, one for the defense, two for the Plaintiffs. Those witnesses were Dr. Aviel Rubin, author of the Hopkins Report, Dr. Michael Wertheimer, who authored the RABA Report, and finally, Dr. Shamos.

These experts, highly credentialed and respected in their field, discussed their respective reports, recommendations and opinions, as well as the Science Application International Corporation ("SAIC") Report ordered by Governor Ehrlich in August 2003.

Needless to say, the Hopkins and RABA Reports found numerous security risks and vulnerability in these voting machines. Reports were forwarded to the State Board of Elections and, not surprisingly, the reasonable recommendations made by the reports have been, or will be, implemented prior to the November 2004 Election. For example, the reports mandated parallel monitoring, as well as secure lines when the machines interface to send the vote count over telephone lines to the central depository, protection of the machines prior to voting, during voting, and after voting, encryption of the voting information when sent over the land lines, changing of passwords and the use of Microsoft patch updates to ensure security.

Maryland Code, Election Law, §9-102, indicates the State Board of Elections

"may not certify a voting system unless the State Board determines that: (1) the voting system will:

- (i) protect the secrecy of the ballot;
- (ii) protect the security of the voting process;
- (iii) count and record all votes accurately ..."

The law goes on to discuss the considerations for certification. §9-103 discusses the reasons for decertification of voting systems, the most important of which is "if the voting system no longer meets one or more of the standards in §9-102(c)(1)(i-iii) of this subtitle."

The Plaintiffs recognize decertification is not an option, but requests the Court order parallel monitoring and, most importantly, to allow voters with little or no faith in the Diebold system to have an alternative paper ballot option.

While all three experts were of the highest quality and quite informative in their testimony, the Court finds Dr. Shamos, Defendants' expert, to be the true voice of reason and the most credible expert in this matter. Dr. Shamos's criticisms of Dr. Wertheimer's and Dr. Rubin's reports were simply the standards they employed in formulating their conclusions. He opined the Hopkins Report, co-authored by Dr. Rubin, used a "perfection" standard in order to arrive at the factors mandated in the Election Law, §9-102, and Dr. Wertheimer used a "military standard" to arrive at his conclusions.

Dr. Shamos, being familiar with Maryland law and its standards, indicated the State Board of Elections was more than reasonable and in compliance with Maryland standards in selecting the Diebold system and in their conclusions they could protect the secrecy of the ballot, the security of the voting process and the accurate counting of the ballots.

All experts agreed the use of paper ballots is the least accurate of all systems and lends itself to the most chicanery. On the other hand, the experts seem to agree, if untampered, the Diebold-type voting machines are the most accurate in recording and counting votes.

In addition, there is no question the secrecy of the ballot is clearly protected by machines such as these. This is especially true for the visually impaired. The blind voter, for the first time, can vote without the need of another looking over their shoulder and guiding them through the process. Through the use of specialized equipment, a blind voter can vote and maintain the secrecy of the vote as mandated by federal and state law.

The major contention of the Plaintiffs is the security of the voting process can be breached by hackers or others who wish to interfere with the voting process. All experts agree no system is perfect. All experts agree the paper ballot, as far back as the early 1800's, was insecure and could be manipulated very easily. The fear that unknown individuals can tamper with the machines before, or during, the election process, or after the votes have been tabulated and sent to the central depository, is, candidly, a very real fear. It is, however, one that can reasonably be protected against by implementing some of the more reasonable suggestions of the SAIC, Hopkins and RABA reports.

It should be noted after these reports were published, the State of Maryland commissioned their own independent testing of the system, reviewed all the reports and their own independent testing, and implemented those safeguards that would reasonably protect against the alleged vulnerability and security flaws.

The right to an injunction is not absolute. *Western Maryland Dairy v. Chenowith*, 180 Md. 236 (1942). Granting or refusing of such relief rests in the sound discretion of the trial court, acting on all of the circumstances of the case. *Fox v. Ewers*, 195 Md. 650 (1950); *Kennedy v. Bar Association of Montgomery County*, 316 Md. 646 (1989).

Normally, a preliminary injunction is one granted after an opportunity for a full, adversarial hearing on the propriety of its issuance and normally will only be issued when it is necessary to preserve the "status quo" until a final decision on the merits can be had. *Tyler v. State of Maryland*, 230 Md. 18 (1962).

In order to obtain a preliminary injunction, the moving party has the burden to satisfy all four of the following criteria:

- 1). There is a real probability the party seeking the injunction will succeed on the merits.
- 2). The injury that would be suffered if the injunction is granted is less than the harm that would result from its refusal, otherwise known as the balance of hardship test, or the balance of convenience.
- 3). The party seeking the injunction will suffer irreparable injury if it is not granted, and
- 4). Granting the injunction would be in the public interests.

Maloof v. State Department of Environment, 136 Md. 682 (2001); *Teferi v. Dupont Plaza Associates*, 77 Md. App. 566 (1989).

Ordinarily, the failure to prove the existence of even one of the four factors precludes a grant of preliminary relief. *Fogle v. H & W Restaurant, Inc.*, 337 Md. 441 (1995). However, in litigation between governmental and private parties, or in cases in which injunctive relief directly impacts governmental interests, the Court is not bound by the strict requirements of traditional equity as developed in private litigation. *Fogle*, 337 Md. at 456. Rather, the courts may, and frequently do, go much further, both to give

and withhold relief in furtherance of the public interests, than they are accustomed to do when only private interests are involved. *Id.* at 456.

Taking each factor in turn, the Court is not convinced, from the credible evidence it heard, that Plaintiffs have a real probability of prevailing on the merits. While the Court is extremely concerned with the allegations of vulnerabilities and security flaws in this system, as well as any other system, the credible expert testimony by Dr. Shamos indicated the State of Maryland is now employing all reasonable solutions and fixes suggested by all experts and has developed a system that could and should withstand external attack.

As indicated, his opinion is predicated on a more appropriate standard of care, if you will, than one of 100% perfection and/or military concepts. That is not to say that after a full-blown adversarial hearing the Plaintiffs may yet prove to the Court that more needs to be done, but from the testimony the Court heard, it is satisfied the Plaintiffs have not established the probability of prevailing on the merits, thereby decertifying or in some other fashion negating the use of the Diebold machines.

In any election, the mere suggestion a vote would be lost, or not counted, is a harm the government cannot ignore. A small number of plaintiffs wish to have the option to not vote on the touch screen, but to do so on paper. Defendants' witness, Torre, testified to the exorbitant cost of printing, advertising, educating the public, training judges, and preparing paper ballots for those who do not wish to use the touch screen. See, Defendant's Exhibit L. In light of the fact the Plaintiffs waited, perhaps years to bring this suit after notice of the use of this system, and the exorbitant cost of their so-called "fix", the Court finds the harm suffered by the State of Maryland far outweighs the possibility of a vote not being counted.

This member of the bench will not find the Plaintiffs' claims are barred by laches, see, *Barthelmes v. Morris*, 342 F.Supp. 153 (D. Md., 1972). However, the Court does find the Plaintiffs had ample notice, as early as 2002, of the use of the Diebold machines and clearly could have taken steps earlier than late April of 2004 concerning the November 2004 presidential election. In any event, the Court does not find, on balance, that the hypothetical harm to the Plaintiffs outweighs the real harm to the Defendants. As pointed

out, it is not just a question of printing ballots, but rather, of advertising the use of the ballots, educating the public, training the election judges and developing a security system for the paper ballots, all of which takes time, of which there is precious little.

The next criteria to be discussed is whether the Plaintiffs will suffer irreparable injury unless the injunction is granted. Clearly, from the overwhelming weight of credible evidence, the Plaintiffs will not suffer irreparable injury. While the Hopkins and RABA reports indicate catastrophic, doomsday-type scenarios, nevertheless, the Court is impressed with Dr. Shamos's testimony this will not occur. The Court is confident the votes of Plaintiffs will be counted. The State of Maryland has implemented the more reasonable requests and recommendations made by all the studies. They are, for example, implementing parallel monitoring, which, in a nutshell, is the random testing of machines during the hours the polls are open to ensure a virus has not been placed in the machines in order to count votes which were not cast, or disrupt the election. This is done during the poll hours of operation to ensure that if a virus was loaded into the machine, and which will only activate during the time of operation, that theoretically, it would be detected. They have secured and encrypted the information sent by machine to machine; they have secured the machines; they have changed the passwords; they have taken the necessary steps to ensure external security of the machines and they protect the machines prior to the election and subsequent thereto. They have taken all reasonable steps to protect the integrity of the voting process in the State of Maryland.

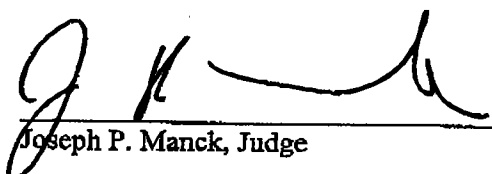
The last criteria, the public interest, the Court finds is served and protected by the actions taken by the State of Maryland. Granting this injunction, at this late date, to allow for paper ballots for those who, for whatever reason, have no faith in the Diebold touch-screen voting system would cause much confusion and is clearly against the public interest. Maryland has indicated by law there shall be one system in use throughout all counties in the state. Election Law, §9-101. This system has been, as all experts indicated, thoroughly dissected and studied, more so in Maryland than in any other state. External systems such as locked warehouses, lock tape, etc., have been employed to provide integrity to the external portion of the machines. The Microsoft patches, when feasible, have been installed. Encryption, password change, etc.

and parallel monitoring have been implemented. Maryland has done what Maryland should do for the benefit of its voters to ensure the safety, confidence, reliability and minimizing of risk of this voting system. No system is infallible. No machine is infallible. All experts agree systems such as these are much more secure and less vulnerable than the paper ballot, and even the optoscan ballots. The public interest is being served by the careful and complete review by the State Board of Elections of all reports, independent testing, and the eventual implementation of those factors deemed appropriate to be instituted for the protection of the public and the voting system.

While the Court was certainly impressed with the testimony of all experts, and those the Court qualified as experts in fields where, perhaps, expert testimony was truly not necessary, nevertheless, the Plaintiffs' experts either demand a paper ballot in conjunction with the voting machines or a militarily impregnable voting system. Not only is this not feasible, it is cost-prohibitive. In a perfect world, perhaps, this should be done, and perhaps the Legislature should review same, however the overwhelming factual evidence clearly shows there have been no verified incidences of tampering with these machines anywhere in the United States. The votes have been counted accurately. Recounts have occurred with complete accuracy, and there is no reason to believe this will not continue.

The Court finds the State of Maryland has acted reasonably in setting up the system and protecting it against any reasonable risks.

On balance, it is clear this injunction should not be granted. For the above-stated reasons, the Court will deny the injunction requested by the Plaintiffs.



Joseph P. Manck, Judge

Dated: 1 day of September, 2004.

Copies to:

Ryan D. Phair, Esquire
Daniel F. Goldstein, Esquire
Richard D. Rosenthal, Esquire
Michael D. Berman, Esquire

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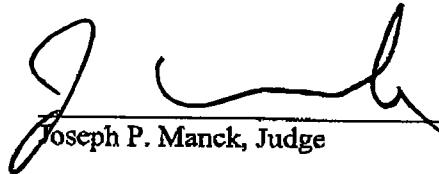
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* * *

ORDER

In accordance with the Memorandum Opinion of even date herewith and attached hereto, it is, this
1 day of September, 2004, by the Circuit Court for Anne Arundel County,

ORDERED, that Plaintiffs' Motion for Preliminary Injunction be and the same is hereby denied.



Joseph P. Manck, Judge

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