

After Lawsuit Threatened, Ohio SOS Instructs Counties to Preserve Digital Ballot Images Before Case Filed.

By Emily Levy, Director of Communications AUDIT-USA May 18th, 2018



Brian Cleary, Manager of Ballot Preparation and Tabulation for Cuyahoga County, showing AUDIT USA's John Brakey the operation of the DS850 digital ballot scanner on March 29, 2018.

AUDIT USA's work for election transparency and integrity is gaining momentum around the country. Our efforts in Ohio have led to a formal, mandatory Directive from Secretary of State Jon Husted to Ohio counties to preserve the digital ballot images produced by some of the state's election systems.

Digital scanners used in a growing number of counties around the US take an image of every paper ballot. The scanners count the votes on the images, not on the ballots themselves. Both the paper ballots and the digital images are key public records that can be crucial in election audits, recounts, and investigations. (Learn more about the importance of digital ballot images to election transparency and integrity [here.](#))

Communities could use digital ballot images to count votes and verify the accuracy of the official vote totals. Clearly this can't happen if the images are destroyed.

When our Director John Brakey discovered that election officials in Ohio's two most populous counties — and with the largest population of people of color — planned to destroy the digital ballot images from the upcoming May 8 primary election, we knew we had to take action.

So, we supported a voter-initiated lawsuit that asked the Ohio Supreme Court to order election officials to follow the law. Both state and federal law clearly require preservation of election records, and since the primary election included federal races, both laws were about to be violated.

The defendants in the action were SOS Husted and the Boards of Elections of Cuyahoga and Franklin Counties. The writ of mandamus suit asked the Court to order the defendants to follow the law, to affirm that digital ballot images are public records, and to order the images from the primary election to be preserved.

We didn't know that Husted had [issued a Directive](#) instructing counties that use digital scanners to preserve all ballot images until that Directive was submitted to the court by the defense. The document was dated April 20, ten days after our letter to Husted. We received no direct response to that letter, which suggested he avoid litigation by ordering counties to preserve digital ballot images in the upcoming election.

The Directive said, in part: *"If your board utilizes a voting system and software that captures images of ballots as they are scanned by a high-speed scanner, those images may be subject to disclosure pursuant to a public records' request and need to be retained by your board."*

As our expert witness, Dr. Thomas W. Ryan — who holds a Ph.D. in Electrical Engineering and has over 30-years' experience in digital image creation, processing and interpretation — said in his affidavit: **"[D]eleting ballot images significantly undermines the integrity of the election system that derives all its tabulation data from those images."**

Brakey counted all 15 of Ohio's counties that use digital scanners to count votes. The remaining 73 counties use election systems that do not produce digital ballot images.

Franklin County (where Columbus is) told him that their system doesn't create ballot images. In fact, the system doesn't work without them! Cuyahoga County (where Cleveland is) told him they would be destroying these legally protected records.

Summit County refused to answer Brakey's questions. The remaining counties all stated that they would be preserving ballot images. Most found them to be

The goal of AUDIT USA is to bring public oversight to elections nationwide.

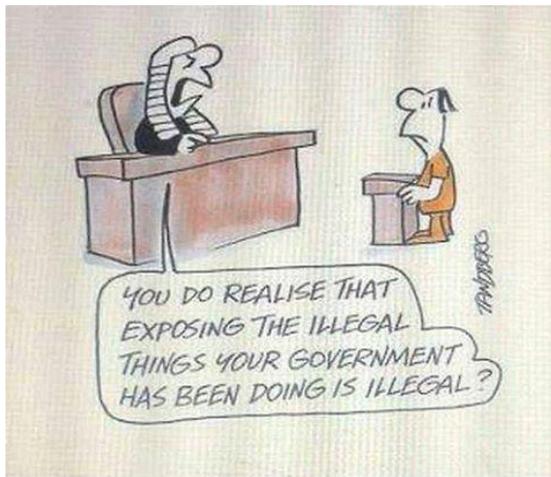
A little-known feature of the newest electronic voting systems makes public election audits possible on a large scale.

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useful for **“auditing and adjudication”** in the election process. Those counties are: Auglaize, Belmont, Carroll, Clermont, Fayette, Guernsey, Harrison, Huron, Knox, Mahoning, Monroe, and Portage.

Husted’s Directive is binding upon all of these counties, not just the two named in the court action.



Unfortunately, the Court [dismissed the case](#) on a questionable technicality on May 11, three days after the primary election. All the documents filed in relation to this case can be found [here](#).

Because the Court’s ruling focused on a narrow procedural issue, it has no impact on the legal duty Ohio of election officials to preserve ballot images. As a result, Ohio voters may bring another lawsuit in state or federal court against non-compliant counties and the Supreme Court ruling would not impact that case.

Meanwhile, candidates on the ballot and voters in any of the counties listed above can now file [public records requests](#) to view the ballot images from the June 8 election. AUDIT USA encourages you to become an election transparency activist! We’ll be happy to provide you with guidance. If you do file to get access to ballot images, please update us at each step of the process. You can contact us through our [website](#).

We’re now contemplating our next steps in Ohio. We expect previously non-compliant counties to follow the law, and we’ll be checking to make sure they do.

We also have our eyes on [the other states](#) that use digital scanners in their elections. It’s important to establish everywhere that digital ballot images are public records and must be retained according to federal and state laws.

It certainly shouldn’t require a court action to get election officials to obey the law. In some cases, election officials — most of whom have little technical expertise — simply don’t understand what the ballot images are, their importance, and that their protection is legally mandated.

We’re working to educate election officials where necessary and challenge any who are failing to protect these important public records. It shouldn’t be necessary to go to court to get election officials to follow the law. Ohio is the third state where we’ve supported legal action to protect ballot images.

We won in Arizona. Ballot images have been declared public records and are now routinely preserved statewide.

In [Alabama](#), where we filed a case in the Montgomery Circuit Court in advance of the Special Election for Senate (Roy Moore vs. Doug Jones), the court [ruled in our favor](#). But Secretary of State John Merrill asked for a stay from the Alabama Supreme Court to allow destruction of ballot images in that notorious election. The Alabama Supreme Court stayed the Montgomery Circuit Court’s ruling pending a full briefing on the merits. The case was fully briefed in January 2018. We are waiting for the Alabama Supreme Court to rule.

AUDIT USA is taking the lead on this election transparency issue, yet we’re not the only ones working on it. New York voter Bethany Kosmider recently [won an appeal](#) (she also won in the lower court) of her county’s refusal to give her access to view digital ballot images from a local election.

We’re working with voting rights advocates and activists to publicize how this relatively new election technology gives the public a new opportunity to oversee our elections.

Check out our Ballot Images Project and how you can get involved at <http://AUDITelectionsUSA.org>.

Emily Levy is the Director of Communications AUDIT-USA. Emily has been a leader in the election integrity movement since 2005, when she coordinated the first phase of the precinct-level statistical forensic investigation into the presidential election in Ohio. She has worked on election integrity projects in her home state of California as well as in Arizona, New York, Wisconsin, Nevada, and New Mexico. Her writings on election integrity have been published by The Hill, Op-Ed News, and The BRAD BLOG.