

**INDIANA RECOUNT COMMISSION  
MINUTES OF THE NOVEMBER 16, 2004 MEETING**

**MEMBERS PRESENT:** Todd Rokita, Chair of the Indiana State Recount Commission ("the Commission"); Gordon Durnil, Member; John Griffin, Member

**MEMBERS ABSENT:** None

**STAFF ATTENDING:** Heather Willis, Recount Director; J. Bradley King, Majority Counsel; Kristi Robertson, Minority Counsel; Phil McGovern, State Board of Accounts; and Lt. Colonel Michael Medler, Indiana State Police

**ALSO ATTENDING:** James Bopp Jr., representing Mike Sodrel; Kevin Boehnlein, Friends of Mike Sodrel; Sarah M. Benter, Jackson County Circuit Court Clerk; David Buskill, Friends of Mike Sodrel; Larry D. Shickles, Ninth District Republicans; Geoffrey Lohman, Indiana Democratic Party Attorney; Luke Clippinger, on behalf of Congressman Baron Hill; Marybeth Schneider, Indianapolis Star; Noah Sodrel, Friends of Mike Sodrel; San Wamsley, Friends of Mike Sodrel; Tammy Koerner, Jackson County Republican Chair; Brad Klopfenstein, Indiana Libertarian Party; Jerry Snook, Metro Source-News; Lesley Stedman Weidenbener, The Louisville Courier-Journal; William Groth, Indiana Democratic Party; Kevin Rader, WTHR TV; Melissa Acton, Jackson Country Republicans

**1. CALL TO ORDER:**

The chair called the November 16, 2004 meeting of the Indiana State Recount Commission to order at 4:32 p.m. in State House Room 201, 200 West Washington Street, Indianapolis, Indiana.

**2. DOCUMENTATION OF MEETING NOTICE**

The chair recognized Mr. King, who stated that the notice for this meeting was given prior to adjournment of the November 12, 2004 meeting and notice had been posted. The chair asked Mr. King if this notice complied with state law. Mr. King affirmed that it did.

**3. INTRODUCTORY REMARKS**

Before continuing with the next item on the agenda, the chair recognized Mr. Griffin. Mr. Griffin disclosed that one of Mr. Groth's partners represents the organization for which Mr. Griffin works. Mr. Griffin stated that he understood the partner has nothing to do with the recount petition. The chair stated that state statute is clear stating that Mr. Griffin is appointed by the Indiana Democratic Party to serve at the pleasure of the party and the commission could proceed. Ms. Robertson affirmed the statute's requirements. The chair stated that he is one of several honorary chairmen for Mike Sodrel, and that state statute says that he shall serve as chair of the recount commission, and he will do so.

**4. APPROVAL OF MINUTES OF NOVEMBER 12, 2004 MEETING**

The chair referred members to the draft of the minutes of the November 12, 2004 meeting. He indicated that members were not given the document prior to the meeting because of

the quick pace in which the commission was working. The chair asked the commission to take a few minutes to review the minutes. After members reviewed the minutes, the chair moved, seconded by Mr. Durnil, to approve the minutes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

##### **5. PETITION FOR A RECOUNT INDIANA HOUSE DISTRICT 9 (*Kelver v. Pelath*)**

The chair stated that there was a pending motion to dismiss this petition. The chair asked if the petitioner, respondent or their representatives were present. The chair explained that the motion was pending discussion by the parties and that discussion was limited to two minutes per side. The chair asked that Mr. King swear in the individuals presenting testimony to the commission. Mr. King administered the oath to Mr. Klopfenstein.

Mr. Klopfenstein explained that Mr. Kelter asked for a recount in six precincts where there were numerous alleged errors in LaPorte County. First, Mr. Kelter was initially listed as a Republican candidate on the absentee ballots. Second, both on the pre-election test and on election night the computer system was not able to provide the total number of registered voters in any given precinct; rather, it provided the number of 300 as the total for every precinct. Third, LaPorte County is on a punch card system which presents numerous problems. Mr. Kelter does not think the recount will overturn the election results but would like to verify the accuracy of the election. Mr. Klopfenstein suggested that verifying the results serves public interest to make sure that the votes were accurately counted and that the right votes went to the right candidates.

The chair asked for questions from commission members. Mr. King stated that LaPorte County had submitted certified results today. Mr. Klopfenstein had not seen the certified results having been in Indianapolis all day.

Mr. Klopfenstein added that he understood that there was a technical flaw in the petition but asked the commission to reconsider it to make the elections better for everyone.

The chair asked Mr. Klopfenstein what legal vehicle he would give the commission to go forward with the petition as the commission is carved out of state statute and there is very specific Indiana case law holding that the commission must follow state statutes strictly. The chair noted that commission has previously ruled that if a petition failed to meet the requirements, that petition should not be granted. Mr. Klopfenstein said he did not have any specific instance to which the chair should refer other than the commission's good will and good intent.

The chair asked if any one was present for Respondent. It being apparent that Respondent was not present to provide testimony, the chair moved, seconded by Mr. Durnil, to grant the motion to dismiss. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil;

and Mr. Griffin), and no member voting “nay,” the motion was adopted. The chair noted the commission’s appreciation for the work of the Libertarian party.

## **6. STATE POLICE REPORT**

The chair recognized Lt. Colonel Michael Medler of the Indiana State Police. Lt. Colonel Medler stated that the commission members had in their packets a three-page report from the State Police. Service of process was completed on November 13, 2004, and the impoundment throughout the district was completed by November 14, 2004.

The chair asked for questions. The chair asked that counsel confirm that the report reflected the requirements of the impoundment order. Not having the impoundment order in front of him that listed everything to be impounded, Mr. Griffin asked Lt. Colonel Medler whether the State Police impounded everything covered by it, and Lt. Colonel Medler affirmed. The chair thanked the State Police for their very quick help.

Mr. King said that proof of service of notice is referenced in Lt. Colonel Medler’s report. The originals had also been received and will be incorporated into the minutes.

## **7. AMENDMENT OF VERIFIED PETITION FOR RECOUNT AND CONTEST IN UNITED STATES CONGRESSIONAL DISTRICT 9 (*Tew v. Sodrel et al.*)**

The chair asked if there were any motions at the time by any parties.

Hearing none, the chair moved, seconded by Mr. Durnil, to amend the petition to exclude Franklin County because it is not part of the Ninth Congressional District. The chair gave the parties one minute to discuss whether they were amenable to the exclusion of Franklin County. Mr. Groth said that the Indiana Democratic Party had no objection. Mr. Bopp said that Mr. Sodrel had no objection. There being no more discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

## **8. VERIFIED PETITION FOR RECOUNT AND CONTEST IN UNITED STATES CONGRESSIONAL DISTRICT 9 AND CROSS PETITION FOR CONTEST IN UNITED STATES CONGRESSIONAL DISTRICT 9 (*Tew v. Sodrel et al.*)**

The chair noted that a cross-petition was filed in this matter by Respondent Mr. Sodrel. Mr. King stated that the Election Division received the cross-petition at 10:11 a.m. November 16, 2004. The chair stated that the cross petition was filed before the statutory deadline. The commission members agreed to consider both the verified petition for a recount and contest and the cross petition for a contest together. Each party was given two minutes to comment.

Mr. Groth said that they just received the cross petition a few minutes prior to the meeting. He had no objection except that the cross-petition is derivative of the petition so unless the petition is granted, ruling on the cross-petition would be premature.

Mr. Bopp agreed with Mr. Groth that the cross-petition is derivative of the petition and if the petition is not granted the Respondent will not proceed with the cross-petition. Mr. Bopp stated that in order to have assurance they needed to have a Petitioner present for whom to grant a petition. He noted that Kip Tew had resigned as State Democratic Chairman, and if that resignation was effective immediately, there is no petitioner in order to grant a petition before the commission.

Mr. Groth said that the petition filed Friday was both signed and authorized by Kip Tew in his capacity as chairperson of the Indiana Democratic Party at the time. By trial rules, if there is a change in an officer or official, by operation of the trial rules, the successor then stands in the shoes of the original party. The petition was valid when it was signed by Kip Tew who at the time occupied the position of Indiana State Democratic Chair and therefore is a valid petition before the commission.

Mr. Bopp said that he inferred from Mr. Groth's discussion that Kip Tew's resignation was immediate, and if that is so, then there was no petitioner before the commission and no one to represent the petitioner before this commission. Therefore the petition cannot be granted without a petitioner. He agreed that if the resignation was effective upon a successor being elected someone else could be substituted and he would have no objection. But if his resignation was effective today, there is no petitioner before the commission.

The chair asked for comments from the commission. Mr. Griffin said that the party filed pursuant to statute within the statutory deadline and added that what happens subsequently to that is irrelevant. He added that anything that was filed today would not have been timely regardless of who was the chair. Mr. Durnil asked if counsel knew whether Mr. Tew resigned, subject to the selection of a successor. Mr. Groth said that he did not know, but he would suspect that his resignation would not be effective until his replacement was made. Ms. Robertson said she understood that the replacement will occur at a central committee meeting scheduled for November 23, 2004 so there has not yet been a switch, but rather a plan to make the switch on the November 23, 2004.

The chair stated he agreed with Mr. Griffin and did not see a problem with proceeding notwithstanding the reported resignation of the Indiana Democratic Party chair. The chair said that the commission has a properly filed, verified petition for recount and contest and a properly filed cross-petition for contest for United States Representative District 9. The chair moved, seconded by Mr. Griffin, to grant the petition and proceed with a recount under the recount commission guidelines as requested by the petition and cross-petition as amended. There being no more discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

The chair recognized Ms. Willis. Ms. Willis provided a brief recount director's report. She indicated that since the November 12 commission meeting she has worked with Lt. Colonel Medler and Phil McGovern. She thanked the state police for their work in quickly getting the materials in all twenty counties impounded. She, along State Board of

Accounts and Indiana State Police, drafted an order with which to proceed. She explained that the order of the counties for the recount should be prudent because it first addresses the counties that are specifically outlined in the petition and cross petition and it also groups the counties by type of voting equipment so that the examiners will have continuity in their examinations and will be used to the type of votes that they are counting. She further indicated that the order considers geography and saves approximately 800 miles per person that would be spent if they proceeded alphabetically. Ms. Willis then listed the order that they would like to follow: Ripley, Switzerland, Scott (which are optical scan counties); Dubois and Monroe (which are DRE (direct report electronic) counties); Bartholomew and Jefferson (which are DRE counties); Ohio, Dearborn, Jennings, Brown, Jackson, Washington, Clark, Lloyd, Harrison, Crawford, and Spencer (which are optical scan counties); then Perry and Orange (which are punch card counties). A pre-recount inspection has not yet been discussed. Ms. Willis suggested that if any of the parties do request a pre-recount inspection, that inspection would begin Thursday, November 18<sup>th</sup> at 8:00 a.m. She then suggested that the actual examination of the ballots, whether there is a recount inspection or not, begin Monday November 29<sup>th</sup> at 8:00 a.m. The reason for the gap between now and the start date for the examination is to allow the State Board of Accounts to assemble and train their team before the team goes out into the field. The gap also gives time for the State Police as well as the county Circuit Court Clerks to be ready. Ms. Willis said that she and the State Board of Accounts had discussed State Board of Accounts having as many as ten teams of examiners in each county. She plans to let the parties and counties know the number of teams in advance of the days when they begin examining the ballots because they are entitled to watchers and need to know how many they need to have.

Ms. Willis requested that any subpoenas that would come to the commission or to her on behalf of the commission be served on opposing counsel with 72 hours notice before the requested action, meaning that they would need to come to her or the recount commission before that. She proposed that the briefing schedule be as follows: upon completion of the examination of all of the ballots, briefs which would be optional but not required would be due to be filed with the Election Division, either by fax or in person, and with simultaneous filing with opposing counsel, three days after the examination concludes, by noon on that day. She said that she would send something to remind parties of the deadline at the end of examination. Response briefs would be optional but due two days following, at noon on that day. The Recount Commission hearing would follow at least 48 hours after that.

The chair asked for questions. Mr. Griffin asked if Ms. Willis had consulted both parties in developing the sequence. Ms. Willis said that although she did not speak with the parties, she did talk to the commission's counsels, Mr. King and Ms. Robertson, as well as State Board of Accounts and State Police.

The chair said that the commission would like to hear from the parties about what the recount director had proposed as a plan. Discussion was limited to two minutes.

Mr. Groth said that the change that they suggest is to amend the plan to provide for conducting the recount in Monroe and Dubois counties to the beginning, because both the petition and cross-petition raise issues in those counties and because of the number of votes there.

Ms. Willis, after question by Mr. Groth, clarified that she had said ten teams would likely be used and that each team included two examiners. Ms. Willis then explained that the number of observers was laid out in the guidelines; each party would be allowed one watcher at the table with each team, and that there was a provision for two people to lead the watchers. Mr. King and Ms. Robertson affirmed.

Mr. Bopp said that Respondent had no objection to changing the order as requested by Mr. Groth. Mr. Bopp stated that Respondent requested a pre-recount inspection. The chair asked if Respondent had consent of Petitioner. Mr. Bopp said that they had not yet discussed it. The chair said that they could take time to discuss it with the other party.

Ms. Willis said that taking Monroe and Dubois counties first meant that they would do two DRE and then 3 optical scan then back to DRE. She said that she would defer to Mr. McGovern on whether that would slow the process. Ms. Willis said that they will need to know about pre-recount inspection today, and suggested that since parties were present, it would be convenient to know during the meeting.

The chair stated that this was the biggest recount they had been asked to conduct since the recount commission formed, so they were trying to be very thorough and plan ahead of time. Mr. McGovern said it did not really matter if they moved Dubois and Monroe counties to the beginning of the schedule. He also confirmed that they would have ten teams.

Mr. Griffin moved, seconded by Mr. Durnil, to adopt the recount director's plan to conduct the recount with the suggested recount, with the amended order suggested by Mr. Groth.. There being no more discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

## **9. ORDER 2004-14 DESIGNATION OF AUTHORITY TO APPOINT RECOUNT DIRECTOR**

The chair told commission members that proposed Order 2004-14 was in their packets. Mr. King said that Order 2004-14 is identical to an order that was approved for the Senate District 36 primary in the spring, Order 2004-5. It notes that state law permits the recount commission to designate a person to exercise certain of the commission's powers other than those listed in the first paragraph. Mr. King indicated that the schedule for conducting the recount had been presented in this proceeding by the recount director but that it may be necessary to modify the schedule in the plan or address matters that are not in the plan. It is convenient to have the recount director make these changes without convening the recount commission. As with Order 2004-5, Order 2004-14 designates Ms.

Willis the recount director and gives her the authority to perform those duties on behalf of the commission.

The chair asked for questions from commission members. Hearing none, he moved, seconded by Mr. Durnil, to adopt Order 2004-14. There being no more discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

## **10. REVIEW OF GUIDELINES FOR RECOUNTS AND CONTESTS**

Mr. King said that commission's packets included a copy of the recount commission guidelines, as amended July 6, 2004. He proceeded to briefly review the guidelines. He noted that Chapter 1 of the guidelines contain definitions for terms. Mr King said that Chapter 2 contains general provisions about conducting recounts and contests. He noted that this chapter incorporates the procedures set forth in the State Board of Accounts Manual. He stated that this Chapter included provisions concerning ex parte communications concerning these proceedings (Section 21); a requirement for sworn testimony (Section 22); Section 23, the evidentiary standard; and Section 24, the requirement of 48 hour notice in certain cases.

Mr. King stated that the remaining chapters address the different types of voting systems used and how to conduct recounts in counties using those types of systems. He noted that the commission will not be conducting a recount in any county with lever machines.

The chair asked for comment from commission members and/or parties regarding the commission guidelines.

The chair recognized Mr. McGovern regarding the State Board of Accounts' plan. Mr. McGovern stated that their Manual was also in the packet and had been readopted by the State Board of Accounts in May of 2004 in connection with the Senate 36 primary recount. The Manual provides detail including the forms that they will use and are the same as they were in the Senate 36 primary recount. He indicated that they are not perfect but are as good as they can make them.

The chair asked how many veterans State Board of Accounts would have for this recount. Mr. McGovern said that he hoped for a handful and noted that other recounts had occurred in other areas of the state so they might be a little short on experience. The chair asked how they would account for that. Mr. McGovern explained that they would have a central training session in Indianapolis that would last about four hours on Tuesday, November 23, 2004.

The chair asked Mr. McGovern and State Police if they had an estimate of what their expenses would be, considering that the last recount included 100+ precincts and 13,000 voters and this includes 613 precincts and 280,000 voters. Mr. McGovern had no particular figure, but expected it to be a substantial increase particularly because of travel expenses. Lt. Colonel Medler also said that he did not have an estimate. He noted that

his people had worked 150 man hours over the weekend, November 13 and 14, to secure the materials.

Mr. Bopp said that the parties had reached an agreement for a pre-recount inspection to begin at 8:00 a.m. Thursday, November 18, 2004 starting with Dubois and Monroe Counties. Subject to agreement, they may or may not want to do any other counties, but they certainly want to do those two. Mr. Groth agreed. The chair noted the agreement.

Mr. Bopp moved that the commission extend its impoundment order in Monroe County to include all voter registration forms and absentee ballot applications in the county. He indicated that Respondent's cross-petition involves concern that there was substantial voter fraud and fraudulent registrations and ineligible voters voting in Monroe County. There were 12,000 new voters registered, and there were three mailings done by the Monroe County Republican Party resulting in 4,000 returns to the post office for reasons such as undeliverable, no such address, etc. The voting pattern in Monroe County was very unusual including 24 precincts where the votes doubled, or in some cases went up to 12 times more votes cast in that particular precinct than two years before. Respondent believes that it is necessary for them to perform a proper investigation and secure the relevant official documents that the impoundment order encompass those documents.

The chair asked if Petitioner had any comment. Mr. Groth said that he had just heard the motion for the first time, so they have not had time to review Indiana Code to see if there is a relevant code provision that would allow the commission to extend the impoundment order to include those items. He would ask the commission if there is any statutory authority to extend an impoundment order.

Mr. Durnil moved to extend the impoundment order in Monroe County. Mr. King said that the state recount commission powers are addressed in Ind. Code 3-12-10-5(a), which says that the state recount commission may, to comply with section 4 which concerns both recount and contest proceedings, impound, take possession of, transport, or otherwise protect any election records or equipment related to a recount or contest. Mr. King said that the section appeared to be a very broad grant of authority in regard to election records related to a recount or contest.

The chair asked for any questions from commission members. Hearing none, he seconded the motion by Mr. Durnil to impound the additional materials in Monroe County. Mr. Griffin asked that Petitioner be allowed to respond to the statute. Mr. Groth said that the specific statute that governs impoundment orders, Ind. Code 3-12-11-16 (a), enumerates the items that the recount commissioner may by order impound. Among those items is not any reference to voter registration forms or absentee ballot applications. To the extent that this section should be read in tandem with the other section, it is the more specific and controls. Petitioner said that it limits the commission's ability to extend the impoundment order beyond those specific items. The chair asked for comment from commission and counsel. Mr. King added that Ind. Code 3-12-10-5 also connects to other provisions that may be relevant to the question of authority. Ind. Code 3-12-10-5(a)(6) provides a general grant that the commission can exercise any necessary

power to perform its functions under this article. The chair said that he took Ind. Code 3-12-10-5 to allow the commission to extend the impoundment. He further indicated that the cross-petition alleges some pretty serious violations and criminal activity, and he thinks that in terms of public service and public good, those should be looked at to see whether the violations exist or not. The chair stated his intent to vote to extend the impoundment order. Mr. Groth said that the commission is a civil body, with no authority to look into any criminal violations and he respectfully requested that the chair reconsider. The chair said that for any criminal evidence found, he would motion the commission to refer the evidence to a prosecutor who does have criminal authority. There being no more discussion, the chair called the question, and declared that with two members voting "aye" (Mr. Rokita and Mr. Durnil), and one member voting "nay," (Mr. Griffin) the motion was adopted.

Mr. Bopp said that Respondent intends to ask the Monroe County Circuit Court Clerk to provide copies for all voter registration forms for 2004, all absentee ballot applications for the general election, all absentee ballot security envelopes that would indicate the signature of the absentee ballot voter, and the poll book for the precincts in the district. Mr. Bopp indicated he is making his request now because he believes that if he waited until Thursday then there would be considerable delay. He asked permission to ask the clerk of Monroe County Clerk with cooperation of state police to begin the copying of the material that they request

Mr. Groth indicated that he had already made the Petitioner's position clear that they do not believe that the extension of the impoundment is within the commission's jurisdiction. The information is a matter of public record and could be obtained with a public record request.

The chair asked for comments from commission members. Ms. Robertson said that she recalled a similar situation in House District 86 in 2002, and during that recount State Board of Accounts personnel made the copies of the material. Mr. King agreed. Mr. King asked whether this would be a copying as part of the a pre-recount inspection or prior to any inspection because under the guidelines a pre-recount inspection must be conducted under the supervision of State Police and State Board of Accounts at all times, so both entities would have to be involved. Mr. King noted that there had been a statutory change since the House District 86 recount in 2002 that specifically states that copying will not be charged to the state but will be charged to the party making the request.

Mr. McGovern stated that they do not intend to have people present to perform copying. Ms. Willis said that as a matter of course, as performed in the Senate District 36 recount, while they had the teams of examiners, there were also two or three people from the State Board of Accounts that were dedicated to making copies of recount materials. She added that as a result, they would have the people there at the time and the machines there to make the copies of anything that is impounded and is part of the recount.

The chair said that he thought they should follow that course. Mr. King and Ms. Robertson agreed that the materials should be physically under the control of state board of accounts and the state police, and not either of the parties or other entities involved.

## **11. ADJOURNMENT**

The chair inquired whether there was any additional business to come before the Commission at this time. There being no further business, Mr. Durnil moved, seconded by Mr. Griffin, that the Commission do now adjourn. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted. The commission adjourned at 5:37 p.m.

APPROVED,

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Todd Rokita, Chair