

No. _____

**SUPREME COURT
OF THE STATE OF WASHINGTON**

**DAVID T. MCDONALD and RONALD TARO
SUYEMATSU; SANFORD SIDELL; BRENT
CAMPBELL; and HILLARY DENDY, Petitioner-
Electors, and WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,
Petitioners,**

v.

**SECRETARY OF STATE SAM REED; KING
COUNTY RECORDS, ELECTIONS AND
LICENSING SERVICES DIVISION and DEAN
LOGAN, ITS DIRECTOR; FRANKLIN COUNTY
AUDITOR; PEND OREILLE COUNTY AUDITOR;
and PIERCE COUNTY AUDITOR as representatives
of WASHINGTON STATE COUNTY AUDITORS
AND COUNTY CANVASSING BOARDS,
Respondents.**

**PETITION BY ELECTORS AND PETITION FOR
WRIT OF MANDAMUS AND OTHER RELIEF**

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Ryan J. McBrayer, WSBA # 28338
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INTRODUCTION

1. Every voter has a fundamental and equal right to have his or her ballot fairly and accurately counted. This action seeks to protect that fundamental right by requiring that the rules for the upcoming hand recount of the 2004 gubernatorial election apply consistent statewide standards and procedures. Prior errors and inconsistencies in the initial canvassing and machine recount of ballots must be reviewed and corrected. The requested relief will assure that all lawful votes are counted, that consistent standards are applied statewide, and that all voters are treated fairly, equally, and consistently under Washington election law and the constitutional right of Washington's citizens to participate fully in the election process.

2. Pursuant to RCW 29A.04.205, "[i]t is the policy of the state of Washington to encourage every eligible person to register to vote and to participate fully in all elections, and to protect the integrity of the electoral process by providing equal access to the process while guarding against discrimination and fraud." This policy is required by Article I, Sections 12 and 19, of the Washington Constitution, which require that elections be free and equal and that prohibit infringements on the right of suffrage and the creation of special privileges and immunities.

3. The Secretary of State is the chief election officer. RCW 29A.04.230. The Secretary of State is required to "make reasonable rules . . . not inconsistent with the federal and state election laws" to assure that those laws are executed "in an orderly, timely, and uniform manner."

RCW 29A.04.610. County auditors are responsible for the conduct of elections in their counties. RCW 29A.04.025 and .216. Petitioners allege that these election officers have not complied with the law or state constitution with respect to the 2004 gubernatorial election.

4. Petitioners bring this action pursuant to RCW 29A.68.011, through this petition and the accompanying declarations and affidavits, and also seek a writ of mandamus and other relief. Pursuant to RCW 29A.68.011, the action may be addressed by a single Justice, but in light of the importance of the matter and the need for expedited treatment, petitioners ask that it be reviewed by the entire Court or so many of the Justices as are available.

PARTIES

5. Petitioner-elect David T. McDonald is a qualified elector and registered voter in King County. He is the Recount Director for the Washington State Democratic Central Committee.

6. Petitioner-elect Ronald Taro Suyematsu is a qualified elector and registered voter residing in King County. After he did not receive the absentee ballot he requested prior to the election, he went to his assigned polling place on Election Day and voted using a provisional ballot. He later checked the King County elections website to determine the status of his vote and the website indicated that he was not a registered voter. Because this was incorrect, Mr. Suyematsu called King County many times prior to the end of the original count in an attempt to have his vote counted. His vote was never counted, and he was finally informed

that his ballot had not been counted due to human error in incorrectly coding his ballot as unregistered.

7. Petitioner-electors Sanford Sidell is a qualified elector and registered voter in King County. After he did not receive the absentee ballot he requested prior to the election, he went to his assigned polling place on Election Day and voted using a provisional ballot. On November 16, 2004, a volunteer from the Gregoire campaign contacted him and told him that his ballot was not being counted. He signed a document to verify his vote. However, since then he has followed up with King County and has learned that his vote was never counted.

8. Petitioner-electors Brent Campbell is a qualified elector and a registered voter in King County. He requested an absentee ballot but chose not to use it, and instead went to his assigned polling place on Election Day to vote. As instructed, he voted using a provisional ballot. After Election Day, he checked the King County website regularly to determine if his vote had been counted and followed up by phone twice. He finally learned that King County has no record of his provisional ballot.

9. Petitioner-electors Hillary Dendy is a qualified elector and a registered voter in King County. She is a 19-year-old college student and she was excited to vote in the 2004 elections, which were going to be the first time she had voted. She voted by absentee ballot in both the primary and general elections. After the general election, she received a notice from King County that she had failed to sign her ballot. She signed

documentation for her ballot on November 16, 2004. She has since learned that nonetheless, her vote was not counted.

10. Petitioner Washington State Democratic Central Committee ("WSDCC") is a major political party under RCW 29A.04.086. The WSDCC represents Democratic Party voters and candidates in Washington.

11. Respondent Sam Reed, Washington Secretary of State, is Washington's chief election officer and is responsible for administering elections in Washington. Respondent Reed is responsible for setting policies for and administering elections in Washington.

12. Respondents King County Records, Elections and Licensing Services Division and its Director Dean Logan are responsible for elections in King County. Respondents Franklin County Auditor, Pend Oreille County Auditor and Pierce County Auditor are responsible for elections in their respective counties. Respondent Logan is sued in his official capacity and as a representative of all other county election officials in Washington. Petitioners are not required to name as parties all such election officers under RCW 29A.68.011, and due to the exigent circumstances are not able to name and serve each responsible election officer as a party at this time.

JURISDICTION

13. Jurisdiction is proper under RCW 29A.68.011, RCW 7.16.160, and RAP 16.2(a).

ENTITLEMENT TO RELIEF

14. Because the initial results of the 2004 gubernatorial election reflected a differential between candidates Chris Gregoire and Dino Rossi of less than 2,000 votes, the Secretary of State ordered a mandatory recount by all Washington counties pursuant to RCW 29A.64.021(1)(a). The Secretary of State elected to conduct a machine recount.

15. The machine recount was completed on November 24. The reported margin was 42 votes out of nearly three million. Although there were numerous errors in the reported county canvass reports or that arose during the counting or recounting process that were identified by Petitioners, the Secretary of State refused to investigate and signed a "canvass" of the reported county recount results on November 30.

16. On December 3, WSDCC made a timely request for a hand recount of all ballots in all Washington counties. The Secretary of State plans to direct that the recount commence on December 8.

17. During the initial canvassing of ballots and throughout the course of the machine recount, significant problems have become evident. As described below, those problems indicate that ballots from properly registered voters were inappropriately rejected, voters were inappropriately challenged and then denied a meaningful opportunity to prove the validity of the ballots they cast, and that the election results recently announced by the Secretary of State are inaccurate. In some respects, the problems might not be more frequent than in a typical election, but the narrow margin between the candidates means that, unlike the typical election, they are not

harmless. That makes it necessary to correct the problems where possible. Some problems, such as those with provisional ballots, are not typical, however, perhaps due to the increased usage of such ballots and recent changes to governing law. The examples below are both worthy of correction in their own right and are indicative of the errors that would and should be corrected by a proper hand recount process.

18. Further, due to the limited time and delays in receiving records and other information from election officials, petitioners have not been able to completely document many problems that have been reported. For example, Petitioner WSDCC requested certain public records from Respondent Reed on November 18 and from Respondent Logan on December 1, and the records have not yet been made available. Proper rules would largely assure that any problems that would be discovered through review of those documents, and other unknown problems, are corrected during the hand recount.

1. The Secretary of State Failed to Canvass and Address Facial Errors in the County Abstracts Recording Vote Counts

19. Each county is required to provide an abstract detailing the form and resolution of votes cast to the Secretary of State. RCW 29A.60.230. A number of the abstracts from the machine recount are inaccurate on their face. The total number of ballots cast does not equal the total of the numbers of ballots indicated as having been voted for a gubernatorial candidate and those excluded on some basis. In other words, there are more votes ascribed to the race than there were ballots cast.

Petitioners have not had the opportunity to review all county returns, but there are inaccuracies in at least those for Franklin, Pend Oreille and Pierce Counties. The Secretary of State refused to delay his acceptance of the county results to allow investigation of these discrepancies, and accepted some results even when on notice from the involved county that they were not correct.

20. Additionally, a number of counties discovered after the initial canvass and in undertaking the machine recount that they had not initially counted groups of ballots that had been misplaced. No documentation of the chain of custody for these newly-found ballots has been provided.

21. Further, many counties had significant changes in the machine vote counts based on errors due to votes being counted twice or not at all.

22. Pursuant to RCW 29A.60.250, the Secretary of State was obligated by December 2 (thirty days from the election) to complete only "a canvass of such of the returns as are not required to be canvassed by the legislature." Pursuant to Article III, Section 4, of the Constitution, returns for the office of Governor are to be canvassed by the Legislature and not by the Secretary of State.

23. The Legislature has specified that in the event of a recount, "the secretary of state shall canvass the amended abstracts and shall file an amended abstract with the original results of that election." RCW 29A.64.061. No deadline is specified for the Secretary of State to

complete its recount canvass, and under the Constitution the Secretary of State need not "deliver the same to the speaker of the house of representatives" until "the first meeting of the house thereafter," in January 2005. In short, sufficient time was available for the Secretary of State to investigate problems and in fact verify the reports provided by the counties.

24. RCW 29A.04.013 defines "canvassing" as "the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns . . . and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election." The Secretary of State has issued a regulation that defines canvassing as "the process of examining *in detail* a ballot, groups of ballots, election subtotals, or grand totals, in order to determine the official results . . . and *to safeguard the integrity of the election process.*" WAC 434-262-010(1) (emphasis supplied). Prior to an official canvass, the abstracts must be inspected, and errors, discrepancies, or anomalies must be investigated and corrected. WAC 434-262-020, -040, & -050.

25. In addition, RCW 29A.04.570 requires the Secretary of State to "conduct a review of election-related policies, procedures, and practices" when "a mandatory recount is likely in a statewide election" and to do so "in as many selected counties as time and staffing permit" and before "the time the recount is to take place, if possible."

26. Despite these statutes and regulations, and despite the facial errors on the abstracts and wide array of problems set forth below, the Secretary of State declined to examine the accuracy of abstracts provided by the counties or the consistency of practices among the counties that might have resulted in failure to tabulate valid votes. On November 30, the Secretary of State nonetheless erroneously declared that he had caused the recount returns "to be canvassed and verified" and that "the full, true and correct total of votes cast for each candidate is" 1,372,442 for Gregoire, 1,372,484 for Rossi, and 63,415 for Bennett.

**2. County Errors and Subjective Determinations
Regarding Signature Matching for Absentee and
Provisional Ballot Voters Disenfranchised Many of
Those Lawful Voters**

27. Absentee ballots are requested by registered voters and provided to them by counties after verifying their status. The ballot is placed in a security/secretcy envelope, which in turn is placed in an external envelope signed by the voter.

28. Provisional ballots are issued to those who attempt to vote at a polling place but are turned away, most often because they are not included on the list of voters registered in the precinct or because they are shown as having requested an absentee ballot. WAC 434-253-043 (amended August 24, 2004). Such voters are required to be provided a ballot and a secretcy envelope and an external envelope similar to those for absentee ballots, and must sign an oath on the external envelope or the poll

book. WAC 434-253-045. The disposition of their vote is determined later.

29. Counties, and particularly King County, rejected numerous absentee and provisional ballots on the basis that the signature on the ballot did not sufficiently match the signature on the voter's registration card on file with the respective county auditor. These voters were lawfully registered, had either appeared at the polls or been verified by the county when the absentee ballot was issued, and had in fact signed the oaths as to their entitlement to vote. Denial of their right to vote violates the Washington Constitution and statutes.

30. A person's signature at different times is seldom exactly the same. Some people have more than one form of signature, depending on their mood, the formality of the moment, or other factors. Signatures, moreover, change over time, or as the result of aging or certain medical conditions. None of these factors are valid bases for disenfranchisement under the Washington Constitution or our state electoral system.

31. The determination as to signature mismatches is subjective, and there is no uniform statewide standard. WAC 434-240-240. Some counties do not even engage in signature verification as to provisional ballots, including Whitman, Walla Walla, and Whakiakum Counties. Some do not allow any election official other than the canvassing board to reject a signature match.

32. King County rejected provisional and absentee ballots on the basis of signature mismatch with significantly greater frequency than

was true in the state as a whole or in the counties in which candidate Rossi prevailed. Many of these decisions were made by staff with no review by the canvassing board. When King County had supervisors review the initially rejected provisional ballot signatures, it was determined that a number had been erroneously rejected. No such review has taken place with absentee ballots. Lawful absentee and provisional ballot voters in King County were much less likely to have their valid votes counted than voters in other counties.

33. In attempting to assist absentee and provisional ballot voters whose signatures were initially rejected, petitioner WSDCC observed that some of the signature rejections were clearly erroneous.

3. Many Lawful Voters Were Denied Meaningful Notice and an Opportunity to Contest Their Disenfranchisement

34. Due to the subjectivity and significant opportunity for erroneous rejection of signatures, the Secretary of State's regulations require absentee ballot voters to be notified and given an opportunity to validate their signature if it does not, in the county's view, match that on the voter's registration. WAC 434-240-235, -245. The regulation for situations in which the voter failed to sign at all requires that such correction or clarification occur by the day before the county is to certify the results. WAC 434-240-235. The regulation for signature mismatches, however, does not specify a deadline. WAC 434-240-245.

35. When provisional ballots were rejected on the basis of mismatched signatures, some counties treated them the same as absentee

ballot voters and contacted the provisional ballot voter, even though no regulation expressly requires that. All or most of the counties allowed them to validate their provisional ballot after Election Day by providing the required signature or updating their registration in the event of an apparent mismatch.

36. RCW 29A.60.190(1) requires that absentee ballots "received on or before the date on which the . . . election is certified . . . must be included in the canvas report." For this election, that date was November 17. Nothing in the statute allows the rejection of absentee ballot correction or clarification efforts on the date on which the election is certified. Nothing in the Secretary of State's regulations allows the rejection of absentee ballot correction or clarification of signature mismatches on the date on which the election is certified. Nothing in the statute or regulations allows the rejection of correction or clarification efforts as to provisional ballots on the date on which the election is certified. Absentee ballots are "received" by the day of certification if the voter validates her signature on that day.

37. King County rejected validation efforts as to absentee and provisional ballots on November 17 but before certification later that day. At least one county accepted such a validation effort on November 17.

38. Unfortunately, for many voters, they learned that their ballots had been rejected without sufficient time to provide verification of their signatures. King County did not provide the same notification by mail to provisional ballot voters that it did to absentee ballot voters. Even

those absentee ballot voters who received timely notice did not receive notice consistent with due process under the Washington Constitution. The King County notice, for example, does not identify the gravity of the situation. It did not specifically inform the voter that their vote would not be counted if they did not respond; it could reasonably be read to indicate that the new signature was being requested as a precaution for future elections.

39. Petitioner-electors Brent Campbell also was denied due process. Mr. Campbell is a registered voter in King County. He requested an absentee ballot but chose not to use it, and instead went to his assigned polling place on Election Day to vote. As instructed, he voted using a provisional ballot. After Election Day, he checked the King County website regularly to determine if his vote had been counted and followed up by phone twice. He finally learned that King County has no record of his provisional ballot.

40. Petitioner-electors Hillary Dendy also was denied her right to vote without due process. Ms. Dendy is a registered voter in King County. She is a 19-year-old college student and she was excited to vote in the 2004 elections, which were going to be the first time she had voted. She voted by absentee ballot in both the primary and general elections. After the general election, she received a notice from King County that she had failed to sign her ballot. She signed documentation for her ballot on November 16, 2004. She has since learned that nonetheless, her vote was not counted.

41. Gregory V. Roeben is another example of a voter who received no notice and no due process before being deprived of his right to vote. Dr. Roeben has first registered to vote in Washington in 1995. Although his signature has become shorter since he first registered, it has remained constant for at least the last three years. During that time he changed his registered address and voted by absentee ballot in several elections prior to the 2004 general election. He never was given any notice of any problem with his signature, and he is confident that his signature on those absentee ballots was the same as that on this year's general election ballot and his current driver's license. King County provided no notice of any problem with his signature in this year's general election. When he returned home from work on November 16, however, he found a note, probably from the Democratic Party, telling him that his ballot had been rejected and that he needed to address the issue with the County prior to the end of that day. The day had already ended, but he promptly undertook such efforts the next morning, November 17, but King County refused to allow him the opportunity to be heard and to avoid disenfranchisement even though the canvassing board did not meet until many hours later to certify the election.

42. The right to vote is a fundamental constitutional right. Denial by government of that right must be subject to reasonable due process safeguards. Respondents failed to provide meaningful notice and a real opportunity to be heard before disenfranchisement.

4. County Errors Forced Registered Voters to Vote Provisional Ballots and Eventually Deprived Them of Their Right to Vote

43. Some of those voters who were not shown as registered voters on the poll book at the polling place or as having already received an absentee ballot should have been allowed to vote in person but were denied the right to do so because of errors or delays by some counties in updating registration and absentee ballot records.

44. For example, Petitioner-electron Ronald Taro Suyematsu is a registered voter residing in King County. After he did not receive the absentee ballot he requested prior to the election, he went to his assigned polling place on Election Day and voted using a provisional ballot. He later checked the King County elections website to determine the status of his vote and the website indicated that he was not a registered voter. Because this was incorrect, Mr. Suyematsu called King County many times prior to the end of the original count in an attempt to have his vote counted. His vote was never counted, and he was finally informed that his ballot had not been counted due to human error in incorrectly coding his ballot as unregistered.

45. As another example, Petitioner-electron Sanford Sidell is a registered voter in King County. After he did not receive the absentee ballot he requested prior to the election, he went to his assigned polling place on Election Day and voted using a provisional ballot. On November 16, 2004, a volunteer from the Gregoire campaign contacted him and told him that his ballot was not being counted. He signed a document to verify

his vote. However, since then he has followed up with King County and has learned that his vote was never counted.

46. Donald Henning and his wife moved from Klickitat to Clallam County, but still own property in Klickitat County. They attempted to re-register in Clallam County. In September, the Clallam County Auditor's office informed them that they were not registered in Clallam County and could not vote there. Mr. Henning and his wife accordingly drove 360 miles on Election Day to Klickitat County. At the polling place, a poll worker told them their names were not in the poll book and instructed them to vote by provisional ballot. After the election, Mr. Henning and his wife received a notice telling them that their ballots had not been counted because the Klickitat County Auditor's Office had received a letter indicating that they had moved out of the county. Neither Mr. Henning nor his wife ever sent such a letter to the county.

47. Daniel John Chirillo is a lawfully registered voter in King County. He has been a registered voter since 1976. On Election Day, Mr. Chirillo went to his polling location to vote, and was informed that he was not on the voter roll so would be required to vote a provisional ballot. He did so. The following week, he visited the King County Elections web site where he learned that his provisional vote would not be counted because his absentee ballot had been received and counted.

48. Mr. Chirillo, however, had never asked for, received, or voted with an absentee ballot. He contacted King County and learned that his date of birth and address had been replaced with those of his nephew,

Daniel Kenichi Chirillo, who had recently moved to Sammamish. His nephew, not Mr. Chirillo, had received and voted by absentee ballot.

49. Through happenstance and persistence, Mr. Chirillo was able to succeed in having his vote counted, but there are undoubtedly many others like Mr. Chirillo who were not able to succeed in having their votes counted.

50. In addition, counties are allowed to deny a previously registered voter the right to vote only if the county confirms that the cancellation of the voter's registration, usually due to inactivity, was proper. A number of counties have not provided any documentation that they undertook such examination, and such voters were not given notice and an opportunity to be heard before deprivation in this manner of their right to vote. Mr. Suyematsu, Mr. Chirillo, and Mr. and Ms. Henning are examples of voters whose registrations were improperly cancelled.

5. Valid Ballots Were Rejected as a Result of Non-Utilization of "Secrecy" Envelopes

51. Certain counties rejected absentee ballots where the voter forgot to utilize the inner "secrecy" envelope. No statute requires or allows such rejection, and such rejection is contrary to RCW 29A.04.205.

6. The Secretary of State Has Refused to Promulgate Rules for the Hand Recount That Ensure that All Valid Votes Are Counted and That Washington Voters Are Treated Equally.

52. The Secretary of State has announced the intention to issue rules for the hand recount. Given the problems with processing of votes detailed above, it is essential that those rules (1) include all ballots, even

those previously rejected for some reason, and particularly where the reason was contrary to law or resulted from neglect of duty; (2) assure accurate counting of all ballots in a manner visible to the public and the political parties and in a fashion that reasonably permits a question raised as to possible erroneous disposition to be resolved by the canvassing board; (3) allow Washington voters meaningful notice and a reasonable opportunity to prove the validity of their improperly rejected ballots; and (4) require uniformity in processing of ballots across counties.

53. Such rules are required by the basic tenets of Washington election law: all valid votes must be counted, and Washington voters must be treated fairly and equally in the election process.

54. In particular, the requirement that all previously rejected votes be re-evaluated, and citizens be given a reasonable opportunity to validate improperly rejected votes, is essential. The denial of meaningful notice and the rejection of absentee or provisional ballot validation efforts on the date on which the election was certified are contrary to RCW 29A.04.205 and demonstrate the election officers' failure to follow the law.

55. The Secretary of State has indicated that his hand recount rules will not require review of ballots not counted earlier due to decisions on such issues on signatures, missing security envelopes, cancelled registration. But the whole point of a hand recount is to correct any errors in earlier efforts, whether those errors caused votes to be counted or not counted. Accordingly, Washington election law states that during a

recount, county canvassing boards conduct a recount of "*all votes cast.*" RCW 29A.64.021(1) (emphasis supplied); *see also* RCW 29A.64.050 (during partial recount that may change the result of election, Secretary of State shall order "a complete recount of *all ballots cast*") (emphasis supplied). The votes that were excluded in the initial canvass were in fact cast, and they should now be recounted.

56. In addition, the Secretary of State has failed to promulgate rules on how any "newly discovered" ballots should be handled to ensure that only ballots cast on or before Election Day and kept securely since then are included in the tabulation.

57. Moreover, because the acts alleged above not only are wrongful on their own but also varied by county, only a recount of all ballots cast, including those earlier rejected, can remedy the neglect by the Secretary of State and the auditors of their duty to assure uniformity in the electoral process. Failure, for example, to review the ballots excluded at excessive rates by King County due to signature decisions will infect the hand recount with the same denial of equal treatment of voters that occurred in the initial canvassing.

58. In addition, the Secretary of State has indicated that the rules will deny Petitioners the right to observe the hand recount if the counties employ as their recount staff representatives of the candidates and political parties. Because such staff will be fully occupied and will have certain obligations to the County, they will be incapable of acting as observers on behalf of a party or candidate.

59. The Secretary of State has also indicated that observers need not be allowed to make a record of their objection to the disposition of any ballot, and there will be no record kept by the County of which ballots were disputed. This process renders the right to "witness" each ballot virtually meaningless and denies Petitioners their rights under the Washington Constitution to petition the counties for the common good and to assure that elections are free and equal.

60. Unless rules are promulgated as suggested above, the Secretary of State will have failed in his duty to correct the inconsistencies and errors of law alleged above, and others, and validly cast votes will not be counted.

PRAYER FOR RELIEF

Petitioners respectfully request that a Justice or the Court:

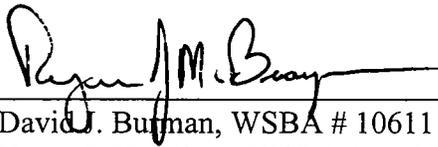
1. Immediately order that Respondents withhold any further action on the hand recount until further order and show cause why the Secretary of State should not be ordered to examine the machine recount returns and to correct any errors of math, law, or uniformity of treatment and to review the chain of custody of all newly-found ballots included in the machine recount;
2. Immediately order that Respondents make available within 24 hours all public records requested by Petitioners;
3. Order that Secretary Reed promulgate rules for any hand recount that assure that to the greatest extent possible wrongful acts and neglect of duty by county auditors be corrected, that standards be

articulated and uniformly applied in all counties, and that every vote of lawfully registered voters be counted;

4. Order that the ballots cast by absentee and provisional ballot voters but rejected for reasons of signature mismatch, cancelled registration, or missing security envelope be reviewed and that the involved voters be given notice and an opportunity to be heard before being finally deprived of their right to vote in the 2004 gubernatorial election;

5. Grant such further relief as is deemed just.

RESPECTFULLY SUBMITTED this 3rd day of December, 2004.

By 
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