

TAKING ONE FOR HIS COUNTRY

"THIS IS A VERY RARE INSTANCE,"

said Michael Kohn, general counsel to the National Whistleblower Center. "In fact, the only one of which I'm aware, in which a whistleblower has been charged with a felony. I find it outrageous."

Welcome to George W. Bush's United States of America, Mr. Kohn.

Kohn was speaking to the *Cleveland Plain Dealer* about a citizen doing what he felt was his civic duty. In 2004 Stephen Heller alerted officials in California that Diebold, Inc.—the infamously partisan, right-wing manufacturer of hackable electronic-voting machines—had been using illegal software in the state's voting machines. Furthermore, he aired allegations that Diebold had planned to lie about using the software just prior to one of our nation's most contentious Presidential elections.

Heller's reward for alerting authorities to Diebold's crime-in-progress? Three felony counts and the prospect of almost four years in the slammer.

Yes, being a whistleblower is usually a risky and costly proposition.

Contrary to what many of Bush's sycophant apologists in Congress and at the CIA have to say, the bulk of whistleblowers don't gain celebrity status with big-ticket book advances and screenplay deals. Most lose their jobs and often have trouble finding another.

Such is the case with Heller, who received no

financial windfall for helping to bring Diebold's nefarious plot to an end (at least for the time being) in California. His allegations led to the decertification of the company's touch-screen voting machines in 2004 and to an eventual \$2.6-million settlement paid by Diebold to the state. Having filed a false-claims lawsuit against the manufacturer, electronic-voting watchdogs Bev Harris and Jim March of BlackBoxVoting.org were delegated \$152,000.

BlackBoxVoting.org, a Progressive election integrity group, has since donated \$10,000 to Heller for his legal fees, but he is still trying to scrape together the staggering sums required in fighting for his freedom. Heller also needs to find full-time work, which has proven to be difficult. After all, having "whistleblower" on your résumé is not a big draw for prospective employers.

Michael Kohn compares Heller to the Nixon-era's Daniel Ellsberg, who blew the whistle on the so-called Pentagon Papers, which exposed the U.S. military's flawed strategy in Vietnam. Heller detractors—the Los Angeles County District Attorney, Diebold's law firm and, of course, Diebold itself—disagree. They argue that Heller is actually a thief.

In 2004 Heller, a struggling actor, took a temporary graveyard-shift job as a word processor, transcribing audiotapes in the L.A. office of Jones

Day, a high-powered, international law firm representing Diebold in California. After reading case documents from Daniel McMillan, the lead attorney tending to Diebold matters, Heller realized that Jones Day had informed its client in 2003 that Diebold was breaking California law by using uncertified software on many of the company's touch-screen voting machines in the state. Jones Day then went on to advise Diebold on how the law firm might offer "legal" explanations about the transgressions to the state if caught.

Familiar with Diebold's dubious past and questionable practices in the field of electronic voting, Heller copied some 500 pages of what he perceived to be damning documents from Jones Day. According to the prosecution, making the privileged attorney-client documents public is considered to be criminal theft.

It has been accepted that Heller exposed Diebold's violations of state law. These violations were described by then California Secretary of State Kevin Shelley as "deceitful" and "fraudulent" when he decertified all of California's Diebold touch-screen voting machines in May 2004 due to security risks, lack of voter confidence and most notably, Diebold's deceptive practices in the state.

The company's machines had already caused misery earlier that year. In Alameda County, California, Diebold machines failed in the March 2004 Presidential primary elections, forcing voters to use backup paper ballots. The

Whistleblower Stephen Heller faces years in prison for exposing voting machine manufacturer Diebold's possible criminal activities.

Los Angeles Daily Journal reports that Alameda County spent nearly \$12 million in taxpayer dollars on Diebold machines that were ultimately unable to serve their intended purpose. (Alameda County was awarded \$100,000 as part of the settlement mentioned earlier.) In San Diego, where Diebold's machines also malfunctioned, some 40,000 people were reportedly unable to cast their vote, disenfranchised by Diebold because there was no Plan B in place when machines failed on Election Day.

The thanks Heller got for speaking up and trying to protect Americans' votes was a full-

out smear campaign designed to ruin his life and send a clear signal to any other prospective whistleblowers.

The *Oakland Tribune* published several of Heller's smoking-gun Jones Day memos after receiving them from activists working with BlackBoxVoting.org. The *Tribune* reported that Jones Day counselor McMillan told prosecutors he was distraught over the incident.

"He now has a hard time trusting others," the D.A.'s investigators wrote in a report. "McMillan's 20-year legal career is in jeopardy due to the act of the criminal [Heller] who was working at Jones Day." McMillan claims Heller endangered his posh legal job by making him look bad to his clients, who were understandably upset that their attorneys were unable to keep confidential information secure.

Many see this so-called criminal as a hero. Heller detractors point to the attorney-client privilege, a sacrosanct bond.

But how holy is the attorney-client privilege? The California Labor Code §1102.5 states: "An employer may not make, adopt or enforce any rule, regulation or policy preventing an employee from disclosing information to a government or law-enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

The California Whistleblower Protection Act §8547.1 further stipulates: "The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law or threat to public health without fear of retribution."

Yet the 44-year-old Heller now faces criminal prosecution because "whistleblower status" only protects one from retribution by employers. Criminal prosecution is another matter entirely. Little did Heller know that powerful forces were working against him.

Heller first learned he was under investigation early one morning in August 2004, when a contingent of police officers and investigators showed up at his home with a search warrant. Eighteen months elapsed before official charges were finally brought against him in February 2006. The L.A. County District Attorney's office charged Heller with felony access to computer data, receiving stolen



Whistleblower Stephen Heller tried to hold Diebold Inc. responsible for breaking California law. He's now looking at 3 possible felony counts.

property and commercial burglary. Heller has pleaded not guilty.

According to a blog written by Heller's wife, Michele Gregory, during the search, officials confiscated the couple's belongings, such as cell phones, computers and address books—even Gregory's favorite shoes. (She and her husband were unable to speak to us on the record while the case was ongoing.)

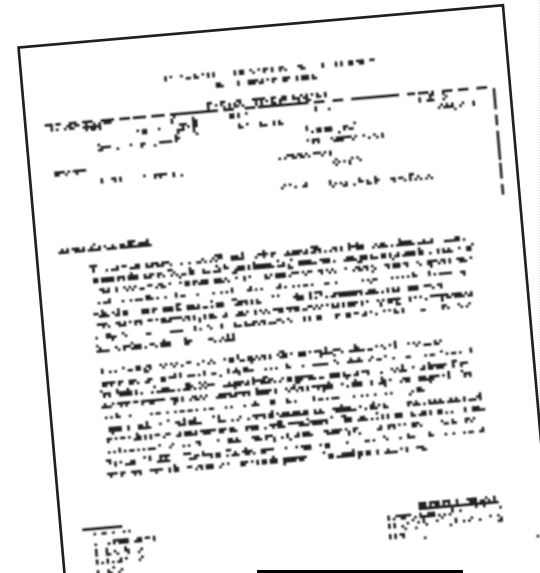
"You have to have a sense of humor when your world is crumbling all around you, and you can't seem to stop it," she wrote.

"I couldn't believe it," Stephen Heller told *The Oakland Tribune* about the raid. "I thought it must be a mistake....I kept thinking they had the wrong house, that they were after someone else....It was just very frightening; it was so surreal."

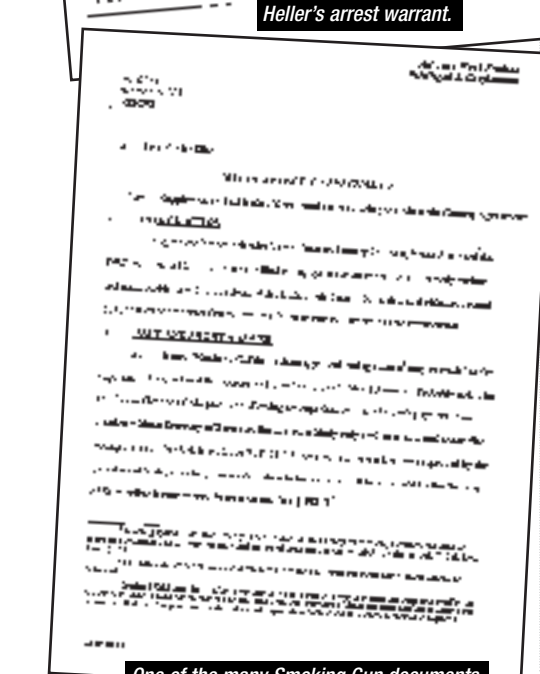
Federal and state authorities declined to prosecute Heller, but the L.A. County District Attorney's Office was all too happy to catch this "thief," who, by all accounts, had never even been a political activist.

Now, as Heller fights to regain control of his life, Diebold machines continue to fail elsewhere in the country. In December 2005 its optical-scan systems were hacked in a mock-election test in Leon County, Florida. The results were flipped without a trace. Diebold would eventually admit that its software contained code banned by federal Voting System Standards. It was this code the hackers had exploited. As of this writing, the banned code has still not been purged.

Shortly after the Leon County simulated hack, an independent study commissioned by California's new Secretary of State, Bruce McPherson, a Diebold supporter at the time, found another 16 bugs in just one portion of Diebold's voting system. The analysis described the bugs as a "more dangerous family of (continued on page 85)



Heller's arrest warrant.



One of the many Smoking Gun documents Heller brought to public attention.

(continued from page 79) vulnerabilities” that “go well beyond” what was discovered in Leon County.

In March 2006 Bruce Funk—a county clerk in Emery County, Utah—allowed independent computer security experts to inspect Diebold’s newest line of touch-screen voting machines. Not surprisingly, the experts found new security vulnerabilities that surpassed what had been found previously. The stunning new vulnerabilities have been described by computer scientists and security experts as “the nuclear bomb for E-voting systems” and “the most serious security breach that’s ever been discovered in a voting system.”

Funk, who held his elected position for 23 years, has been forced out by Diebold and state officials. BlackBoxVoting.org is currently providing funds for legal support as Funk battles to retain his job.

BlackBoxVoting.org described these latest discoveries in Utah as “a major national security risk.” The revelation eventually led Pennsylvania to lock down and sequester all Diebold touch-screen machines just days before the May 2006 primary elections. Caught off guard, voting officials scrambled to find a solution.

The defect is said to be extremely severe, affecting every Diebold touch-screen voting machine in the country. It was unclear at press time if the flaw—which could allow a malicious individual to completely overwrite the software without a password—will ever be remedied. A solution would require a complete reinstallation of all firmware and software on every machine.

Diebold purposefully built this high-security risk “feature” into its voting machines for “easier updates,” but apparently the company never thought it noteworthy to alert officials. Even after the problem was revealed in Utah, it failed to notify the state of Ohio, which was about to use the very same machines just weeks later in 41 counties as part of the 2006 primary elections. Cuyahoga County was eventually plagued with failing Diebold tabulators, the malfunction resulting in some 17,000 absentee ballots having to be counted by hand.

The corrupt, untrustworthy Diebold is now using Heller’s case to send a clear message: Fuck with us; pay the price.

Luckily, election-integrity advocates continue to take a stand. BlackBoxVoting.org and other groups—notably VoteTrustUSA.org, VotersUnite.org and VelvetRevolution.us (all of whom have minimal resources and little more than the truth on their side)—maintain the faint glimmer of hope that democracy might be restored in the United States. For the courageous Stephen Hellers out there, saving America from tyranny is what it’s all about.

The gravest irony in this matter is that if Stephen Heller is convicted of any one of the three pending charges, even if handed a suspended sentence due to his having no prior criminal record, as a felon he would be stripped of his right to vote.

And may God bless America.

For additional information, or to assist the beleaguered whistleblower financially, visit HellerLegalDefenseFund.com. 