

Widespread Voter-Registration Challenges

Miller v. Blackwell (Susan J. Dlott, S.D. Ohio 1:04-cv-735)

One week before the 2004 general election, the Democratic Party filed a federal complaint challenging widespread voter-registration challenges—approximately 22,000—by the Republican Party based on returned mail. The court enjoined administrative hearings on the challenges through the election. After the election, the plaintiffs dropped the case.

Subject: Nullifying registrations. *Topics:* Registration challenges; intervention; class action; enforcing orders.

One week before the 2004 general election, the Ohio Democratic Party and two voters filed a federal class action in the Southern District of Ohio’s Cincinnati courthouse against Ohio’s secretary of state and the election officials of six counties—three in the Southern District and three in the Northern District—challenging extensive challenges by the Republican Party to voter eligibility based on returned mail.¹ With the complaint, the plaintiffs filed a motion for a temporary restraining order.²

On the case’s second day, two persons who signed challenges moved to intervene.³ At 12:31 p.m., Judge Susan J. Dlott held a proceeding in chambers with counsel for the plaintiffs present and counsel for the defendants appearing by telephone.⁴ The defendants confirmed that they had received a total of over 22,000 challenges—from 43 to over 17,000 per county—and that they had challenge hearings scheduled from that day to the following Saturday, depending upon county.⁵ After a recess of a bit over two hours, Judge Dlott reconvened the parties at 3:45 and announced that she would grant the temporary restraining order against acting on the challenges and hold an evidentiary hearing Friday morning on whether to follow up with a preliminary injunction.⁶ A written order followed later that day.⁷ The court of appeals declined to stay the order.⁸

1. Complaint, *Miller v. Blackwell*, No. 1:04-cv-735 (S.D. Ohio Oct. 26, 2004), D.E. 1 (Franklin, Lawrence, and Scioto are in the Southern District; Cuyahoga, Medina, and Trumbull are in the Northern District); see Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 *Geo. Wash. L. Rev.* 1193, 1199 (2005); Scott Hiaasen, *Ohio GOP Challenges 35,000 on Voter Rolls*, *Cleveland Plain Dealer*, Oct. 23, 2004, at A1; Mark Niquette, *GOP Challenges Voters*, *Columbus Dispatch*, Oct. 23, 2004, at 1A. See generally Ari Berman, *Give Us the Ballot* 218–20 (2015).

2. Temporary Restraining Order Motion, *Miller*, No. 1:04-cv-735 (S.D. Ohio Oct. 26, 2004), D.E. 2.

3. Challengers Motion to Intervene, *id.* (Oct. 27, 2004), D.E. 5; Transcript at 4, *id.* (Oct. 27, 2004, filed Oct. 29, 2004), D.E. 18 [hereinafter Oct. 27, 2004, Transcript].

4. Oct. 27, 2004, Transcript, *supra* note 3, at 1–2; see Ann Gerhart, *Up to the Challenge*, *Wash. Post*, Oct. 29, 2004, at C1.

5. Oct. 27, 2004, Transcript, *supra* note 3, at 6–9.

6. *Id.* at 41–63; see Jo Becker, *Judge Rebuffs GOP Effort to Contest Voters in Ohio*, *Wash. Post*, Oct. 28, 2004, at A1; James Dao, *G.O.P. Bid to Contest Registrations Is Blocked*, *N.Y. Times*, Oct. 28, 2004, at A25; Kevin Eigelbach, *Voter Hearings Halted by Ruling*, *Cincinnati*

Judge Dlott certified the individual plaintiffs as representatives of a class of

all persons who have registered to vote in the State of Ohio whose eligibility to vote was challenged by the Ohio Republican Party's voter challenges submitted on October 22, 2004 and whose eligibility their County Board of Elections intended to challenge before the General Election to be held on November 2, 2004.⁹

Judge Dlott determined that the method of challenge combined with the methods of resolution of so many voter registration challenges so close to the election created "grave due process concerns" with respect to the fundamental right to vote.¹⁰ She also granted the challengers' motion to intervene.¹¹ On Thursday, she granted the State of Ohio's motion to intervene.¹²

On Friday, she allowed the plaintiffs to amend their complaint to include all of Ohio's eighty-eight counties, and she extended the temporary restraining order to all of the counties.¹³ There was evidence that one county ignored the temporary restraining order after receiving actual, but not official, notice of it, but the evidence was insufficient to support a finding of contempt.¹⁴

Judge Dlott conducted the preliminary-injunction hearing on Friday¹⁵ and Monday.¹⁶ The temporary restraining order remained in effect through the election.¹⁷ On April 28, 2005, Judge Dlott granted the plaintiffs' motion to dismiss the action on the grounds that their concerns were moot now that the election was over.¹⁸ Ohio's appeal was settled after briefing.¹⁹

Post, Oct. 28, 2004, at A1; Edward B. Foley, *The Future of Bush v. Gore?*, 68 Ohio St. L.J. 925, 991 (2007); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1235–36, 1243–44 (2005).

7. *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004); Temporary Restraining Order, *Miller*, No. 1:04-cv-735 (S.D. Ohio Oct. 27, 2004), D.E. 11; see Mark Niquette, *Voter Challenges Halted*, Columbus Dispatch, Oct. 28, 2004, at 1A; Bill Sloat, *Judge Blocks Voter Eligibility Hearings*, Cleveland Plain Dealer, Oct. 28, 2004, at A1.

8. *Miller v. Blackwell*, 388 F.3d 546 (6th Cir. 2004); see Jo Becker, *Ruling on Ohio Voter Challenges Is Upheld*, Wash. Post, Oct. 30, 2004, at A9; Andrew Welsh-Huggins, *Restart of Voter Hearings Rejected*, Cincinnati Post, Oct. 29, 2004, at A11.

9. *Miller*, 348 F. Supp. 2d at 918 n.1.

10. *Id.* at 921.

11. *Id.* at 917, 922–23.

12. Order, *Miller*, No. 1:04-cv-735 (S.D. Ohio Oct. 28, 2004), D.E. 17.

13. Order, *id.* (Oct. 29, 2004), D.E. 24; see Amended Complaint, *id.* (Oct. 29, 2004), D.E. 25; see also Bill Sloat, *Judge Orders Halt to County Hearings Challenging Voters*, Cleveland Plain Dealer, Oct. 30, 2004, at A1.

14. Order, *Miller*, No. 1:04-cv-735 (S.D. Ohio Nov. 1, 2004), D.E. 33.

15. Transcript, *id.* (Oct. 29, 2004, filed Jan. 14, 2005), D.E. 47.

16. Transcript, *id.* (Nov. 1, 2004, filed Dec. 20, 2004), D.E. 45.

17. Order, *id.* (Apr. 28, 2005), D.E. 51.

18. *Id.*

19. Docket Sheet, *Miller v. Blackwell*, No. 05-3773 (6th Cir. June 23, 2005).